



**CODE OF  
CIVIL PROCEDURE  
VOL. II**





# CIVIL PROCEDURE

1908, ACT V.

WITH COMPLETE COMMENTARY

INCLUDING

EXHAUSTIVE CITATIONS AND NOTES OF CASES,  
RULES OF THE HIGH COURTS, ETC

By

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# ORDER XXI.

## EXECUTION OF DECREES AND ORDERS.

### PAYMENT UNDER DECREE.

Modes of paying  
money under decree.

1. (1) All money payable under a decree shall be paid as follows, namely :—

(a) into the Court whose duty it is to execute the decree ; or

(b) out of Court to the decree-holder ; or

(c) otherwise as the Court which made the decree directs. [S. 257.]

(2) Where any payment is made under clause (a) of sub-rule (1) notice of such payment shall be given to the decree-holder. [New.]

### COMMENTARY.

**Scope of Or. XXI.**—The rules under this Order do not apply to insolvency proceedings under the Provincial Insolvency Act 1907. So where in the case of sale by a Receiver, the highest bidder fails to deposit the one-fourth of the purchase-money, the Receiver cannot proceed under Or. XX, r. 71.—*Oheda Lall v. Lachman Prashad*, 39 A. 267 : 15 A. L. J. 253 : 37 I. C. 830. See also *Ramchand v. Mohra*, 30 P. L. R. 320 : 11 L. L. J. 198 : 119 I. C. 427 : A. I. R. 1929 Lah. 622 ; *Shakar Khan v. Sanmukh*, 136 I. C. 267 : 33 P. L. R. 332 : A. I. R. 1932 Lah. 320. The provisions of Or. XXI do not apply to a sale of property under an administration order ; *Benarsi Das v. Nathu Mal*, 40 P. L. R. 1922 : 69 I. C. 718.

**Alterations in this rule.**—Sub-rule (2) is new. It has been inserted for the benefit of both the decree-holder and the judgment-debtor and to relieve the Courts from the difficulty which generally arises with regard to the decree-holder's claim for costs and interests. After service of notice upon the decree-holder, he will not be entitled to claim any costs or interest.

**" Money payable under decree."**—Where a party was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court, held that this rule was not applicable as the order was not a decree.—*Shanks v. Secretary of State*, 12 M. 120.

A decree for mesne profits is a decree for money ; *Lachman Ojha v. Chariter Ojha*, 48 I. C. 183 : (1918) P. 257.

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Payment into Court is  
payment to the decree-  
*Sankaran v. Raman*,

**Payment by stranger.**—Payment by a person who has got a sham sale-deed from the judgment-debtor does not satisfy the decree unless and until the decree-holder consented to receive the amount deposited in satisfaction of the decree.—*Kashuri v. Aruna Chelam*, 34 I. C. 350 : (1916) 1 M. W. N. 195.

**Payment to decree-holder.**—Payment can be made by the judgment-debtor out of Court to the person who has stepped into the shoes of the original decree-holder and is carrying on the execution proceedings. He would obviously require the attaching creditor to deposit in Court the surplus of the amount realised, in case there be any.—*Unao Commercial Bank v. Mohar Gobind*, 129 I. C. 382 : A. I. R. 1930 All. 659 : 28 A. L. J. 945.

Where a decree for payment of annuities was passed creating a charge on certain properties and a Receiver was appointed to realise the amounts and the Receiver absconded after receiving certain amounts from the judgment-debtor for payment to the decree-holder under the decree : *held*, that the charge affirmed by the decree was in no way affected or impaired by the embezzlement of the Receiver. The decree provided in express terms that all the annuitants were entitled to recover their annuities from the properties charged. The decree-holder having received no part of the annuity due to her, is entitled to recover by sale of the properties as the payments to the Receiver were made by the judgment-debtor at his own risk, in the absence of an order of Court authorising the judgment-debtor to pay the sums to the Receiver.—*Brij Indar v. Jai Indar*, 59 I. A. 311 : 7 Luck. 382 (P. C.) : 36 C. W. N. 882 : 56 C. L. J. 48 : 9 O. W. N. 571 : 34 Bom. L. R. 1188 : 137 I. C. 900 : A. I. R. 1932 P. C. 191 (reversing 5 Luck. 80 (F. B.) : 117 I. C. 748 : A. I. R. 1929 Oudh 231).

A judgment-debtor cannot claim to be exonerated from his liability to pay the actual amount due to a joint decree-holder to his share by payment of either the whole or part of the decretal amount to some other of the joint decree-holders. At the same time the judgment-creditor to whom the decree amount has not been paid cannot sue to recover the entire decree amount. In such cases the Court should ascertain the shares of the decree-holder in execution proceedings and permit further execution on that basis.—*Surendra v. Abhay*, 126 I. C. 124 : A. I. R. 1930 Cal. 78.

**Payment into Court.**—A payment to a Receiver appointed by Court is as good and valid as to the Court itself, and falls under Cl. (c) ; *Muthia v. Orr*, 20 M. 224 (231). If the Receiver misappropriates the money, the loss should not fall on the judgment-debtor.—*Jai Indar v. Brij Indar* 5 Luck. 80 (F. B.) : 117 I. C. 748 : A. I. R. 1929 Oudh 231. This last mentioned decision, however, has been reversed on appeal by the Judicial Committee in 7 Luck. 382 (P. C.) noted above upon the ground that though payments had been made by the judgment-debtor to the Receiver there was no order of the Court ordering or authorizing the judgment-debtor to make payments to him.

If money is brought into Court under process of execution, and the party entitled to it or his *vakil* is present to receive it, the Court shall cause it to be paid immediately.—*Muttuvellu v. Samu Pillay*, 5 M. H. C. R. App. 2.

## r. 1.

If under a decree in a pre-emption suit, limiting payment into Court within certain date, only a receipt for payment is put in on the date fixed but confirmed on notice to the judgment-debtor later. *Held* no payment under decree; *Abdul Fattah v. Fattah Ali*, 35 I. C. 363: 73 P. R. 1916.

On the death of the decree-holder, the debtor should either pay the decretal amount into Court or ask for directions under Cl. (c).—*Narendra v. Charu*, 14 C. W. N. 146.

Where a decree is transferred by assignment by the decree-holder but the judgment-debtor having no notice of the assignment pays the decretal amount in full into Court, the payment operates as a satisfaction of the decree and the assignee is not entitled to execute the decree; *Tata Iron & Steel Works v. Baidya Nath*, 2 P. 754: 76 I. C. 55: A. I. R. 1924 Pat. 118.

A payment to one of several joint decree-holders who hold a joint decree is not a discharge of the decree and the certificate given by one cannot bind others in the absence of implied or express authority.—*Thimma Reddi v. Subba Reddiar*, 49 I. C. 141 (1918) M. W. N. 507. *See* notes under Or. XXI, r. 2.

On the date of the payment of the first instalment the Court was closed and a tender was filed when the Court re-opened. *Held*, that there was default in payment, as the defendants who had the option to make the payment direct to the decree-holder or to deposit the amount in Court could not take advantage of the circumstance that the Court was closed on the date of the payment.—*Kunj Bihari v. Bindeshri Prasad*, 51 A. 527: 27 A. L. J. 236: 115 I. C. 796: A. I. R. 1929 All. 207.

**Notice—Its effect.**—The provision contained in Sub-sec (2) is new. Notice must be in writing; *see* S. 142. It is the duty of the Court to give notice to the decree-holder though the judgment-debtor may be bound to pay the process fee. In case no notice is served upon the decree-holder, the Court is bound to inform the decree-holder about the payment when he applies for execution; *Narayan v. Ganpat Rao*, 67 I. C. 242.

When money is paid to a third party without notice of payment to the decree-holder and the decree-holder applies for payment of money to him, the Court cannot refer the decree-holder to a regular suit, but it ought to set aside the *ex parte* order authorising payment to the third party.—*Bithal Das v. Jiwan Ram*, 66 I. C. 744: 20 A. L. J. 353: A. I. R. 1922 All. 190.

But Or. XXI, r. 1 (2) has been held inapplicable to a mortgage-decree.—*Ambi v. Valia Thamburati*, 45 M. L. J. 697: 75 I. C. 566.

Whether interest on the decretal money is payable up to the date of deposit in Court by the judgment-debtor, or up to the date of withdrawal, depends on whether the decree-holder had any notice of the deposit.—*Kalee Dass v. Puran Koomares*, 16 W. R. 304. Where the decree-holder alleged that he had no notice of the deposit till after some time, it was held that the decree-holder was entitled to interest up to the date when he had notice of the deposit, and that the decree-holder was entitled to the costs of the execution which he *bona fide* took out.—*Ranjapur Rayot Bank v. Hesabuddin*, 35 C. W. N. 544.

**Tender must be unconditional.**—A decree-holder is not bound to him in part satisfaction of this decree; and the refusal to receive a part of what is due to him will not deprive him of his right to interest.—*Kunhya Singh v. Tooydun Singh*, 7 W. R. 20.

A judgment-debtor must pay the decretal amount to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money.—*Rajendra Kishore v. Sahib Pershad Sen*, 2 C. L. R. 183.

Payment into Court by the defendant coupled with a request that the money should not be paid until the decision of certain objections made by him is not legal tender.—*Goluckmonee v. Nubungo*, W. R. (special number) F. B. 14; Marsh 45: 1 Hay 76.

For Tender and its effect, see S. 38 of the Contract Act (IX of 1872) and also notes under Or XXIX, rr 1, 2, 3 and 4.

**Limitation.**—There is no limitation for an application to withdraw money which is in deposit in Court as unclaimed deposit.—*Apurba v. Chunder Money*, 10 C. W. N. 354.

**2. (1)** Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

Payment out of  
Court to decree-  
holder

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

[S. 258.]

### COMMENTARY.

**Alterations and their effect.**—This rule corresponds to S 258 of the C. P. Code of 1882, with some important additions, alterations and omissions.

**Sub-rule (1).**—The words "of any kind" have been added "after decree"; the words "or of any payment is made in pursuance of an agreement of the nature mentioned in S. 257-A" have been omitted; and the words "and the Court shall record the same accordingly" have been added.





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Payment into Court by the defendant coupled with a request that the money should not be paid until the decision of certain objections made by him is not legal tender.—*Goluckmonee v. Nubungo*, W. R. (special number) F. B. 14; Marsh 45; 1 Hay 76.

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**Limitation.**—There is no limitation for an application to withdraw money which is in deposit in Court as unclaimed deposit.—*Apurba v. Chunder Money*, 10 C. W. N 354.

**2. (1)** Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree. [S. 258.]

### COMMENTARY.

**Alterations and their effect.**—This rule corresponds to S. 258 of the C. P. Code of 1882, with some important additions, alterations and omissions.

**Sub-rule (1).**—The words "of any kind" have been added after "decree"; the words "or of any payment is made in pursuance of an agreement of the nature mentioned in S. 257-A" have been omitted; and the words "and the Court shall record the same accordingly" have been added.

The substitution of the words "*decree of any kind*" for the words "a decree" is material, as it has got at rest the diversity of judicial opinions which hitherto existed. The expression "*decree of any kind*" includes money decree, mortgage-decrees, and all other decrees under which money is payable. The substitution seems to have been made by adopting the principles laid down in 23 M. 473 (F.B.), 30 A. 218, 7 C. L. J. 591 and 31 C. 863. In all these cases it was held that this section applies to proceedings in execution of a mortgage-decree. It has rendered the cases reported 21 M. 412, 8 C. W. N. 103 and 25 C. 703, obsolete and inoperative.

Section 257-A has been omitted from the Code, see note below.

*Sub-rule (3).*—Some important changes have been introduced, as will appear on a comparison with the provisions of para. 3 of the old section, which ran as follows: "*Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.*" The most important change is the omission of the words "*as a payment or adjustment of the decree*" after the word "*recognized.*" By the above omission it has now become clear that a Court executing a decree cannot recognize a payment or adjustment made out of Court which has not been certified, *for any purpose whatsoever*. The above change seems to have been introduced by adopting the principle laid down in *Mithu Lal v. Khairati Lal*, 12 A. 569; and although that ruling was subsequently overruled by the Full Bench case of *Roshan Singh v. Matadin*, 26 A. 36, the Legislature has adopted the law as laid down in 12 A. 569, where it has been held that a Court executing a decree is not competent to take into consideration payments made out of Court for the purpose of deciding whether or not the application is barred by limitation. By the amendment the rulings of the High Courts in which a contrary view was taken have been superseded. Those rulings are no longer law and have become obsolete. See notes under heading "*Uncertified payments and Limitation*," *post*.

*Scope and application of the rule.*—This rule provides that (1) where any money payable under a decree of any kind is paid out of Court, or (2) where a decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. Under the Code of 1877, (S. 258), it was held in *Daba Mohamed v. Webb*, 6 C. 786; 8 C. L. R. 36, that this rule deals with the adjustment of *any decree* and not merely with the adjustment of a money decree. Under S. 258 of the Code of 1882, which is a *verbatim* copy of the corresponding section of the Code of 1877, it was held in *Sankaran v. Kanara Kurup*, 22 M. 182; 8 M. L. J. 175, that the rule referred only to the execution of decrees under which money was payable, and was not applicable to decrees for possession of immoveable property. Section 258 of the Code of 1882 was further amended in the present Code by the addition of the words "*of any kind*" in order to reconcile the views of the different High Courts. In *Abdul Latif Sahib v. Bathula Bibi*, 23 I. O. 530; (1914) M. W. N. 346, decided under the present Code, it was held by Wallis and Ayling, JJ., that where there was a decree for the delivery of certain immoveable property and for the payment of money, it was not open to the Court to recognize any uncertified adjustment under Or. XX, r. 2, Cl. (3). This

was followed in *Sethurama Sahib v. Ohota Raja Sahib*, 40 I. C. 820 : (1917) M. W. N. 327, where Sadasiva Aiyar, J., held that where the decree provided for payment of money as well as other reliefs, the adjustment of such a decree could not be recognized unless certified to the Court.

In *Vaidhinadasamy v. Somasundram*, 28 M. 473 (F. B.): 15 M. L. J. 126, it was held that this rule applies not only to money decrees but to decrees for the enforcement of a mortgage and other decrees, e.g., a partition decree: *Gharry v. Gowrya*, 46 B. 226: 64 I. C. 490: A. I. R. 1922 Bom. 380; *Rama Krishna v. Bala Krishna*, 43 M. 476: 56 I. C. 289. See also *Kaka Ram v. Haveli Ram*, 126 I. C. 513: A. I. R. 1930 Lah. 814. "The addition of the words 'of any kind' after the word 'decree' in the second line of Or. XXI, r. 2, was intended to set at rest the difference of views between the Calcutta and the Madras High Courts and the conflicting views as regards the meaning of S. 258 of the Code of 1882. By the addition of the words 'of any kind,' it cannot be said that the Legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court. We are clearly of opinion that Or. XXI, r. 2, refers to a decree under which money is payable whether there are other reliefs or not, and if no money is payable under a decree, then r. 2 cannot be held to apply to such a decree. The words 'payable under a decree' do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it."—*Narayanasami v. Rangasami*, 49 M. 716: 50 M. L. J. 547: A. I. R. 1926 Mad. 749: 95 I. C. 731 (per Devadose and Waller, JJ.). This case has been dissented from in *Niamat v. Jakti*, 117 I. C. 833: A. I. R. 1928 Cal. 715, which has held, following 6 C. 786 and 46 B. 226, that the rule is not confined to decrees for money but applies to all kinds of decrees.

A decree provided that the defendants agreed to grant and the plaintiffs agreed to take in lieu of the decree amount a lease of the defendant's lands for 21 years and that in the event of the non-compliance with this clause within one year the decree-holders were entitled to recover the money from the judgment-debtors. Held, that Or. XXI, r. 2 (3) had no application to the case and that the Court had power to adjudicate upon the question whether the judgment-debtors had fulfilled the condition or not.—*Biharilal v. Wali Shaka*, 109 I. C. 386: A. I. R. 1928 Lah. 816. A decree which gives the judgment-debtor an option of paying money in order to secure a reconveyance is not a decree under which money is payable within the meaning of this section.—*Narayanasami v. Rangasami*, 49 M. 716: 95 I. C. 731: A. I. R. 1926 Mad. 749.

This rule does not prevent a Court from trying whether a valid tender by money-order has been made.—*Kishan Prasad v. Beni Ram*, 24 A. 85.

This rule does not apply where the parties agreed that their debts were to be privately adjusted before any decree came into existence; *Contrà Banerji, J.*—*Gauri v. Gajadhar*, 6 A. L. J. 403: 2 I. C. 608.

Before an order absolute has been made in a mortgage decree the Court is bound to consider any allegation of payment by defendant after the decree nisi and before the application for order absolute. But when an adjustment is alleged to have been made after order absolute in answer to an application for sale by the mortgagee, the executing Court determines the question only under this rule.—*Niranmony v. Musa Khan*, 7 I. C. 625 (8 C. W. N. 102).

r. 2.

29 C. 651 *relied on*; 11 C. L. J. 91: 28 M. 473 (F.B.) *folld* ; 12 C. W. N. 485 *distinguished*).

This rule only authorizes the recognition of payment or adjustment. An enquiry into the terms of an alleged compromise and no order so it cannot be made by the executing Court.—*Lodd Govindass v. Ramdoss*, 24 M. L. J. 88: 28 I. C. 376: 17 M. L. T. 222.

This rule requiring certifying of payment applies only to money payable under a decree, and is not applicable where the decree is for the delivery of rice.—*Kristna v. Padmanabha*, 21 I. C. 177: 25 M. L. J. 442.

This rule has no application to a compromise arrived at between the judgment-debtor and decree-holder in a proceeding to set aside an execution sale under Or. XXI, rr. 89 or 90.—*Gobind v. Narsingh*, 118 I. C. 908: A. I. R. 1929 Lah. 886. See also *Bhawani v. Jitendra*, A. I. R. 1929 Pat. 400; *Seth Nanhelal v. Umarao*, 58 I. A. 50: 35 C. W. N. 381: 53 C. L. J. 187: 130 I. C. 686: A. I. R. 1931 P. C. 33: 33 Bom. L. R. 450: 29 A. L. J. 257: 27 N. L. R. 95: 60 M. L. J. 423 (P. C.); *Sita Nand v. Jhangi Ram*, 136 I. C. 735: 33 P. L. R. 146: A. I. R. 1932 Lah. 238.

Where a preliminary decree in a mortgage suit directs payment of money into Court, and the money is not paid into Court, the Court is bound to pass a final decree for sale; and in such a case a payment out of Court cannot be recognised either by virtue of Or. XXI, r. 2 or Or. XXIII, r. 3.—*Durga Devi v. Nand Lal*, 136 I. C. 732: 33 P. L. R. 138: A. I. R. 1932 Lah. 231.

**Judgment-debtor.**—The word " judgment-debtor " in this rule should be construed as including those who claim through him or in his right, e.g., an assignee from the judgment-debtor of the equity of redemption after decree —*Panduranga v. Vythilinga*, 30 M. 537: 17 M. L. J. 417. See also *Matharasappa Chettiar v. Muthu Chettiar*, 50 I. C. 931: 9 L. W. 591; and also his surety. So also a surety cannot plead uncertified payment.—*Onkarmal v. Nritya*, 67 I. C. 885: A. I. R. 1923 Cal. 313; *Rajani Kumar v. Mahalukhmi Bank*, 36 C. W. N. 663; *Tambi Reddy v. Davi Reddy*, 49 M. 325: 94 I. C. 522: A. I. R. 1925 Mad. 674.

**Decree-holder.**—Regard being had to the General Clauses Act (X of 1897), the word " decree-holder " in this rule should be read in the plural.—*Taruck v. Divendro*, 9 C. 631: 12 C. L. R. 566. An assignee of a decree is not a decree-holder until he applies for and obtains an order in his favor under Or. XXI, r. 16, and as such applications are made to the Court as a Court which passed the decree, and not as a Court which is executing the decree, a judgment-debtor can in such a proceeding plead that the decree has been already satisfied even though the formalities prescribed by Or. XXI, r. 2 (1) and (2) have not been followed.—*Raghunath v. Ganga Ram*, 47 B. 643: A. I. R. 1923 Bom. 404. It is illegal for a Court to refuse to certify payment made to the transferee of a decree on the ground that the transfer was not recognized by the Court. In execution proceedings by the original decree-holder, the judgment-debtor can plead payment to the transferee; *Bala Krishna v. Mini Reddi*, 14 I. C. 702.

Where there has been an adjustment or certification, as between the judgment-debtor and an assignee who has attained the status of a decree-holder by an order made under Or. XXI, r. 16 of the Code, Or. XXI, r. 2 would be clearly applicable. Order XXI, r. 2 is not restricted by its terms to the original decree-holder, but extends also to an assignee of the decree

who steps into his shoes, as it were, under the assignment; *Brajabashi v. Manik*, 31 C. W. N. 921 : A. I. R. 1927 Cal. 694. Adjustment of a decree by a guardian without leave of the Court cannot be certified under this rule; *Aruna Chellam v. Ramanadhan Chetty*, 29 M. 309.

It is possible to hold that the decree-holder mentioned in Or. XXI, r. 2 must mean all the decree-holders jointly interested for the purpose of the certificate—*Unao Commercial Bank v. Mohar*, 129 I. C. 382 : 28 A. L. J. 945 : A. I. R. 1930 All. 659.

"Record."—There was no provision in the old Code requiring the Court to record the payment or adjustment. The word "recorded" in sub-rules (2) and (3) is new. Sub-rule (3) does not require that the payment must be both certified and recorded. It is clear that the term "certified" in it refers to sub-rule (1) and the term "recorded" to sub-rule (2). The judgment-debtor does not lose the protection of this rule merely because the Court fails to perform its duty, viz., to record the payment or adjustment. It is not necessary that the payment or adjustment should be both recorded and certified—what is necessary is that it should be either recorded or certified.—*Tarak Nath v. Natabar*, 21 C. L. J. 632 : 30 I. C. 45. See also *Thimma Reddi v. Subba Reddiar*, 49 I. C. 141 : (1918) M. W. N. 507; but a casual reference has been held to be insufficient; *Mahomed Khan v. Nenu Mal*, 52 I. C. 901 : 13 S. L. R. 130.

Adjusted.—An "adjustment" is a transaction which extinguishes the decree as such in whole or in part. A transaction agreeing to vary the date and mode of execution is not an adjustment but a transaction varying the terms of the decree, so as to constitute a new executable decree. Such variation is against the policy of the Code—*Lodd Govindoss v. Ramdoss*, 24 M. L. J. 88 : 28 I. C. 376 : 17 M. L. T. 222 (24 M. 1 (P. C.) referred; 15 C. L. J. 45, *dissenting from*); *Bakshi Ram v. Des Raj*, 132 I. C. 670 : 32 P. L. R. 365 : A. I. R. 1931 Lah. 608 (A. I. R. 1928 Cal. 527 referred to); *Azizur Rahman v. Aliraja*, 32 C. W. N. 434 : 113 I. C. 9 : A. I. R. 1918 Cal. 527. An agreement not to execute the decree cannot be taken cognizance of by an executing Court, the remedy of the judgment-debtors in such cases being to institute a separate suit to restrain decree-holders from executing the decree.—*Ibid*. The word "adjustment" does not embrace an agreement to discharge the decree which the parties have still to carry out.—*Muthu Vaithilinga v. Subbaraya*, 123 I. C. 604 : A. I. R. 1930 Mad. 410 : (1930) M. W. N. 137. An arrangement with the decree-holder that if the judgment-debtor make two defaults in the payment of an instalment decree the former should sell only a particular estate, and should be debarred from proceeding with the execution of the balance until further default is an adjustment and must be certified. A mere agreement to give time would be an adjustment.—*Per Cox, J., Sham Lal v. Hazarimal*, 15 C. L. J. 451 : 13 I. C. 326. Where on the decree-holder in a mortgage suit applying for a final decree for sale, the judgment-debtor pleaded that the decree-holder had agreed to allow him an extension of time for payment, held that the alleged agreement would amount to altering the terms of the preliminary decree and that such an agreement could not be considered unless it has been recorded as certified under the provisions of Or. XXI, r. 2.—*Ahmed Rahman v. Chettiar*, C. R. 235 : 110 I. C. 873 : A. I. R. 1923 Rang. 194. An agreement to hold

property jointly where the decree directs division by metes and bounds falls within the purview of this rule which bars recognition only by the executing Court but not by any other Court.—*Sethu Ram Sahib v. Chhota Raja Sahib*, 40 I. C. 820 : (1917) M. W. N. 327 ; *Niamat v. Jalil*, A. I. R. 1928 Cal. 715 : 117 I. C. 833. But an adjustment prior to decree is superseded by the decree and a decree-holder who obtains a decree cannot, when the decree is barred by limitation, fall upon a prior adjustment.—*Hem Raj v. Dost Muhammad*, 57 I. C. 153.

The Civil Procedure Code is not exhaustive and an adjustment of a decree by the surety of the judgment-debtor with the decree holder might be proved unless there is something to bar its proof.—*Thakar v. Ram Singh*, 108 I. C. 376 : A. I. R. 1928 Lah. 61.

The words "adjustment in whole or in part" suggest that the Court is not confined to merely entering the figures supplied by the decree-holder. It has the power to ascertain to what extent the decree has been satisfied when the manner of adjustment has been notified ; *Lodd Govindoss v. Raja of Karvetnagar*, 29 M. L. J. 219.

An oral agreement not to proceed against the judgment-debtor beyond a certain limit is an agreement varying the terms of the decree and is therefore an adjustment which cannot be proved if not certified.—*Rajah of Kalahasti v. Venkatadri*, 50 M. 897 : 105 I. C. 243 : A. I. R. 1927 Mad. 911 : 53 M. L. J. 533.

Purchase by mortgagee holding decree for sale of portion of mortgaged property, subject to mortgage—Petition by mortgagor under this rule claiming that the mortgagee should be called upon to certify satisfaction of his decree. *Quere* : Whether the subject-matter of the petition was an "adjustment" of the decree within the meaning of this rule.—*Erusappa Mudaliar v. Commercial and Land Mortgage Bank*, 23 M. 377. Where on a reference to arbitration during the pendency of execution proceedings, an award is made, it is binding upon the parties as an adjustment of the claim ; *Raj Kumar Lal v. Bulaki Miyan*, 3 P. L. W. 146 : 42 I. C. 467. In order to make it an adjustment, an agreement must be made after the decree : *Chidambaram Chettiar v. Krishna Vathiyar*, 40 M. 233 (F.B.) : 32 M. L. J. 13 : 37 I. C. 836. An adjustment prior to decree cannot be said to be an adjustment within this rule and the executing Court cannot recognise such an adjustment.—*Hem Raj v. Dost Muhammad*, 57 I. C. 153 ; *Doraisami v. Subbalakshmi*, 46 I. C. 880 ; and *Mallayya v. Chinnaiyappa*, (1921) M. W. N. 382 : 14 L. W. 317. A pre-decree arrangement by which a decree is not to be executed cannot be pleaded in bar of the execution of the decree.—*Ganeshlal v. Sardar Mal*, 119 I. C. 704 : A. I. R. 1929 Nag. 339 (following 11 N. L. R. 110, 29 C. 110, 31 C. 179 ; and not following 49 M. 513 and 22 B. 463). A pre-decree arrangement does not come within the terms of Or. XXI, r. 2 and a suit brought on the basis of such an agreement for recovery of money realised in execution of the decree is barred by S. 47.—*Narayanan v. Damodaram*, 130 I. C. 167 : A. I. R. 1931 Mad. 26. Payments made prior to the decree cannot be pleaded in bar of execution.—*Butchiah v. Tayar*, 54 M. 184 : 129 I. C. 818 : (1930) M. W. N. 1152 : A. I. R. 1931 Mad. 399 : 60 M. L. J. 721. An agreement arrived at prior to the decree, in other words an agreement not to execute the decree which would be passed in future cannot

be taken cognizance of by an executing Court, but to avail of it the judgment-debtor will have to institute a separate suit to restrain the decree-holder from executing the decree.—*Azizur Rahman v. Ali Raja*, 32 C. W. N. 434 : 113 I. C. 9; *Moolla v. Chartered Bank*, 5 R. 685 : 107 I. C. 860 : A. I. R. 1928 Rang 36.

**Adjustment need not be in writing.**—A completed compromise is sufficient adjustment.—There is no justification for holding that an adjustment must be in writing or that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder to satisfy the decree. The question really depends upon the intention of the parties at the time when the agreement is entered into, and if they make a final and binding agreement with regard to the decree, then it amounts to an adjustment; *Samer Chand v. Chiranjil Lal*, 102 I. C. 753 : A. I. R. 1927 Lah. 544. The words "otherwise adjusted" are wide enough to cover an oral adjustment of a decree.—*Anandapriya v. Bijoy*, A. I. R. 1926 Cal. 643 : 91 I. C. 705. An inchoate agreement to adjust cannot be pleaded as a bar to execution.—*Matadat v. Ram*, 113 I. C. 238. An oral agreement that the decree is to be paid in instalments coupled with actual payment of at least one instalment at or before the time the application was made to have it certified amounts to an adjustment of the decree, and is capable of proof.—*Hatchand v. Premchand*, 131 I. C. 710 : A. I. R. 1931 Sind 42 : 25 S. L. R. 29 (relying on 50 M. 897). A contract by which the judgment-debtor promises to do something at a future date can be accepted by the decree-holder as a legal and immediate acceptance of his decree and can form the basis of an application for entering satisfaction of the decree under this rule.—*Ramanarasu v. Venkata*, (1932) M. W. N. 840 : 63 M. L. J. 598. See also *Ma Shwe Pee v. Maung San Mye*, 6 R. 573 : A. I. R. 1928 Rang. 316 (dissenting from *Lachman v. Baba Ramnath*, 44 A. 258 : 64 I. C. 990 : A. I. R. 1922 All. 13).

**Adjustment in part.**—Where the decree-holder enters into an agreement with some only of the judgment-debtors by discharging them from liability, it is an adjustment, in part, of the decree and must be certified to the Court under this rule.—*Mahomed Khan v. Mahamed Munawar*, 31 M. 467

Where a judgment-debtor has out of Court partly satisfied his decree-holder, subsequent to the transfer of the decree to another Court for execution, but before actual execution has been applied for, he is entitled, on execution in full being demanded, to an order of the Court, to which the decree is transferred, calling upon the decree-holder to certify the fact of such part-payment.—*Rajendra v. Chunnoomul*, 5 C. 448.

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the decree-holder to take advantage of his own omission.—*Chango v. Kaluram*, 4 B. H. C. R. A. C. 120.

**Effect of certifying satisfaction, though amount not paid.**—If a decree-holder forgives the defendant and certifies satisfaction without receiving payment, a creditor of the decree-holder attaching the satisfied decree cannot prove that it was made fraudulently; *Subbia Pillai v. Alliar*, 2 I. C. 523 : 6 M. L. T. 72.

**Certificate—Where to be filed.**—Under this rule the certificate of payment or adjustment should be filed in the Court whose duty it is to execute the decree. The filing of a compromise petition in the appellate Court cannot be treated as the filing of a certificate of satisfaction in the Court of first instance; *Kelu Nair v. Meenakshi*, 25 M. L. J. 586. But in *Biroo Gorain v. Jaimurah*, 16 C. W. N. 923; 16 C. L. J. 174 it has been held that where the judgment-debtor having appealed against the decree sought to be executed withdrew the appeal upon an adjustment come to with the decree-holder, and the fact of such adjustment was stated before the appellate Court and was recorded in its order, the application by the judgment-debtor to the Court in which execution was subsequently applied for by the decree-holder praying for an investigation as to the fact of the adjustment was in substance one in continuation of the application before the appellate Court and the two applications together constituted a sufficient compliance with the provisions of Or. XXI, r. 2 (1), and the fact of payment should be inquired into by the Court.

Where an agreement of adjustment has been brought to the notice of the appellate Court and the same is not objected to by the decree-holder in these proceedings the same can be pleaded as a defence before the executing Court.—*Azizur Rahman v. Ali Rajah*, 32 C. W. N. 434; 113 I. C. 9; A. I. R. 1928 Cal. 527.

**Application for certificate of adjustment—How to be made and what is.**—It is not prescribed that the certificate of payment shall be made in any particular form or with any particular details. The information may be conveyed by the decree-holder to the Court even incidentally in his application for execution, the details of payment may be furnished even after the original application for execution has been made.—*Daw Ywet v. U Tin*, 8 R. 310; 127 I. C. 600; A. I. R. 1930 Rang. 329.

This rule contemplates a definite proceeding with a petition by the decree-holder and a formal act by the Court. A decree-holder must do it in some well defined speech or writing. Where a decree-holder stated in an unusual place in his petition for execution that the defendant, had paid some money as interest, held this was not a certificate; *Gokul v. Bhika*, 12 A. L. J. 387; 23 I. C. 753 (referred to in *Bhajanlall v. Cheda*, 24 I. C. 215; 12 A. L. J. 825). The mere statement in an application for the execution of a decree that payments towards satisfaction of the decree have been made out of Court, does not amount to an application for certification.—*Dwarika v. Bepin*, 64 I. C. 32; A. I. R. 1929 Cal. 200 (following *Bireswar v. Ambika*, 45 C. 630 and *Bahuballav v. Jogesh*, 23 C. W. N. 320 and not following *Tukaram v. Babaji*, 21 B. 122). But see *Eusuffzeman v. Sanchia*, 43 C. 207; 20 C. W. N. 272; 23 C. L. J. 390; 34 I. C. 606, where it has been held that the decree-holder may either apply to certify payment before execution or may do so on his application for execution, and the notification to the Court of the receipt of the sum paid is all that he has to do to certify payment.

A petition signed and filed in Court by a judgment-creditor, certifying payment of the amount due to him is sufficient.—*Saadollah v. Kalee Churn*, 12 W. R. 358.

Where an application is made by the decree-holder alleging that the decree has been satisfied by payment outside Court, and praying for the execution proceeding to be closed, the Court has no other alternative except



to record full satisfaction. It is not the duty of the Court to satisfy itself if the statements in the petition are true or if the payment has in fact been made. If the decree-holders had been induced to present their application by a fraud of the judgment-debtors, they have a separate cause of action but the Court has no jurisdiction to refuse to record satisfaction where such an application is made or re-open the execution proceedings subsequently.—*Maung Kyaw Min v. Ma Hpaaw*, 134 I. C. 213 : A. I. R. 1931 Rang. 332.

A letter from a decree-holder to his Vakil to put in an acknowledgment into Court is not a settlement out of Court certified to the Court.—*Thakoor Lall v. Kanyo Lall*, 7 W. R. 510.

Endorsement of payment by decree-holder on the back of an office copy of the decree is sufficient, and no separate petition is necessary; *Lakhu Narain v. Felamani*, 20 C. L. J. 131 : 18 C. W. N. 196-n. (referred to in 29 M. L. J. 219).

Effect of certifying by one of several decree-holders.—The question whether one of several decree-holders can enter satisfaction on behalf of all, is one of procedure, and a rule of decision must be looked for in the C. P. Code. Order XXI, r. 15, and Or. XXI, r. 2 appear to have shown that it is not the act of joint-decree-holders, but the act of the Court executing the decree that is intended to operate as a valid discharge.—*Seshan v. Rajagopala*, 13 M. 236.

Satisfaction of the entire decree certified by one only of several decree-holders, is not binding on the others unless he was authorized by the other decree-holders to execute the decree on their behalf and to give a valid discharge to the judgment-debtor in respect of their shares as well; *Karam Singh v. Tailor*, A. I. R. 1929 Lah. 462. See also *Bharatswari v. Bhagwan*, A. I. R. 1928 Cal. 759 : 33 C. W. N. 193; *Moti Ram v. Hanu Prasad*, 26 A. 334. See also *Sultan Moideen v. Savalayammal*, 15 M. 343; *Tarruck Chunder v. Divendro Nath*, 9 C. 831 : 12 C. L. R. 566 and *Dhanraj v. Ujain Singh*, 34 P. R. 1906 : 93 P. L. R. 1906. Nor can one of several partners or even the manager of a joint Hindu family legally certify so as to bind others unless anything on behalf of others is proved. In the absence of any evidence that they hold any special and definite shares each, such certificate, if any, has not the legal effect of satisfying or adjusting the decree even in part, *Mahomed Silar Sahib & Co. v. Nabu Khan Sahib*, 31 M. L. J. 93 : 35 I. C. 157.

One of two joint decree-holders of a mortgage decree cannot alone certify satisfaction of the whole decree, though he may do so in respect of his own interest. The other decree-holder who refuses to recognise the certificate is entitled to obtain an order absolute for sale of the mortgaged property in respect of his own share of the mortgaged-debt.—*Taman Singh v. Lachhmin Kunwari*, 26 A. 318. See also *Budhun v. Hafesah*, 4 C. L. R. 70; *Brojeswari v. Tripoora Soondaree*, 3 C. L. R. 513; *Motiram v. Honnu Prasad*, 26 A. 334 (15 M. 343; 9 C. 331 referred to; 22 W. R. 77 not followed); *Karam Singh v. Tailor*, 119 I. C. 426 : A. I. R. 1929 Lah. 462.

A mortgaged property burdened with the payment of a mortgage by two shareholders :

1. If the mortgage is a joint mortgage, the mortgagee must obtain satisfaction from both shareholders.

the lien of the other on property pledged to both as security for a joint-debt.—*Inderjeet Koonwar v Brij Bilas*, 3 W. R. 130

See also notes to r. 15.

**Effect of payment to one of joint decree-holders.**—See notes to r. 15. Where shares of the decree-holders are not specified in the decree but are not incapable of being determined, payment to one decree-holder gives a valid discharge to the extent of the share of the decree-holder to whom payment is made, and it is open to the judgment-debtor to show that the decree has been adjusted in whole or in part to the satisfaction of the decree-holder — *Kaka Ram v Haveli Ram*, 126 I. C. 513 : A. I. R. 1930 Lah. 814.

**Distinction between sub-rule (1) and sub-rule (2).**—Sub-rule (1) contemplates a certification of payment by the decree-holder to the Court and a record by the Court of the payment; it does not provide for any notice being given to the judgment-debtor; while sub-rule (2) does contemplate an application by the judgment-debtor; further it provides for notice being given to the decree-holder and it affords an opportunity for the decree-holder to appear and it involves a judicial decision by the Court whether the payment should be recorded — *Prakash v. Allahabad Bank*, 56 I. A. 30 : 3 Luck 634 : A. I. R. 1929 P. C. 19 : 56 M. L. J. 233 (P. C.). A certificate by a decree-holder under Or. XXI, r. 2 (1) is not an application and can be made at any time. A mention in Col. 5 of the application for execution is sufficient certification under the law.—*Ram Sarup v. Mohammad*, 124 I. C. 22 : A. I. R. 1930 All. 123

**Application under sub-rule (2)**—An application stating that the judgment-debtor had paid to the decree-holder a certain sum in different instalments and that he out of kindness agreed to have the execution struck off, is not an application under sub-rule (2) as it did not recite the terms of the adjustment ; *Jogendra v. Provath*, 19 C. L. J. 126. A judgment-debtor's counter-petition alleging adjustment may be treated as an application to certify but it must be within ninety days ; *Budrudeen v. Gulam*, 36 M. 357. The written statement under r. 2 (2) alleging adjustment, should be treated as an application ; *U Pe Thaing v. Maung Ba U*, 11 I. C. 780.

The decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally either by himself or by a person representing him ; *Mahabir v. K. E.*, 20 C. W. N. 520. Mere notifying to the Court that the judgment-debtor has done a particular act which he was bound

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the allegation, may

*Ram*, 30 C. L. J. 118 : 53 I. C. 692.

An application by the judgment-debtor praying for an adjustment to be recorded need not be a document separate from the objections filed by him on the ground of such adjustment. It was held that A. I. R. 1924 All. 706 : 46 A. 635 has been overruled by 51 A. 237 (F. B.) : A. I. R. 1928 All. 629 : 112 I. C. 73.—*Ganga v. Ram*, 113 I. C. 760 : A. I. R. 1929 All. 79. See also *Rajendro v. Chunnoomul*, 5 C. 448.

So long as the judgment-debtor applies under Or. XXI, r. 2 (2) within the time allowed for him to do so, he has the right to have his application heard.

Technically the correct procedure would be for the judgment-debtor to make an application to the Court under sub-rule (2) and then to file a separate application in the execution proceedings asking that they may be stayed until his other application is heard. But the judgment-debtor's right should not be defeated merely because he did not follow this correct procedure but applied in the execution proceedings itself to record the adjustment of the decree.—*Maung Tin v. Ma Ma*, 5 R. 833: 110 I. C. 123: A. I. R. 1923 Rang. 62.

Rule 2 (2) has no application where the execution has come to an end. It has application only where there is a pending execution in Court.—*Bhawani v. Jitendra*, A. I. R. 1929 Pat. 400.

... missed for default, the judgment-debtor should be allowed to file an application for the Court might adjudicate on his objection to the execution on the ground that the decree had been adjusted: held that the latter application was in the alternative a fresh application and the Court should have adjudicated on the merits of the application subject to such objection as might be open to the decree-holder.—*Lakhyat v. Bella Mall*, 132 I. C. 206 A. I. R. 1931 Lah. 505.

"Show cause"—It does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege causes and to prove them to the satisfaction of the Court. In such an investigation evidence may be given either orally or by affidavit.—*Rung Lal v. Hem Narain*, 11 C. 166 (referred to in *Shaik Davud v. Paramasami*, 31 M. L. J. 207)

If the decree-holder fails to appear or to show cause on an application by the judgment-debtor for certification of payment, the Court is not bound to record the payment when it is not satisfied that the payment has been made.—*Maung Chir Pe v. Narayan Chettiar*, 6 R. 218: 111 I. C. 371: A. I. R. 1923 Rang. 185. Even where the alleged adjustment is disputed by the decree-holder the Court can enquire into the matter and record the adjustment if it is proved. "Fails to show cause" does not merely mean fails to appear but would include "fails to satisfy the Court."—*Ganga v. Ram*, 113 I. C. 760: A. I. R. 1929 All. 79 (following 44 A. 253). See *Hatchand v. Pramchand*, 25 S. L. R. 29: 131 I. C. 710: A. I. R. 1931 Sind. 42.

The Court has to ascertain in case of dispute whether there was any compromise, whether the compromise amounted to an adjustment of the decree and what is the effect of the adjustment on the decree. There are no other questions for it to decide.—*Baga Mal v. Shib Parsad*, 120 I. C. 686: A. I. R. 1930 Lah. 334.

The Court executing the decree and, in case where the decree has been transferred to another Court for execution, the transferee-Court, is the only Court which has the power to inquire into the truth of the payment or adjustment, when the application is made by the judgment-debtor within the period of limitation.—*Ram Gopal v. Shiv Narayan*, 34 Bom. L. R. 203: A. I. R. 1932 Bom. 202.

Limitation for an application under sub-rule (2).—The judgment-debtor must apply within ninety days from the payment or adjustment, for the

issue of a notice to the decree-holder to show cause why payment or adjustment should not be recorded as certified. See Art. 174, Limitation Act, 1908. An application by the judgment-debtor made after ninety days is not an application under Or. XXI, r. 2 (2) and even if it is, it would be barred by limitation under Art. 174 of the Limitation Act.—*Frank v. Mufassil Bank*, 115 I. C. 139 : A. I. R. 1929 All. 674. See also *Budrudeen v. Gulam*, 36 M. 357. The object of Or. XXI, r. 2 (2) is to prevent execution proceedings from being unduly prolonged by the judgment-debtor setting up old payments. Objection to the

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*Panchanon*, 9 P. 521 : 126 I. C. 159 : 11 P. L. T. 763 : A. I. R. 1930 Pat. 526. If the judgment-debtor is not able, by reason of lapse of time or for some other reason, to obtain an order under Or. XXI, r. 2, the surety of the judgment-debtor is also prevented from obtaining the relief by applying under S. 47.—*Rajani Kumar v. Mahaluksmi Bank*, 36 C. W. N. 663 (following 49 M. 325).

"Uncertified payments shall not be recognised by the Court executing the decree"—Section 47.—Under this rule any payment or adjustment made out of Court and not certified cannot be taken into account in execution proceedings : *Kamini v. Aghore Nath*, 11 C. L. J. 91 : 14 C. W. N. 357 ; *Nustarini v. Kasim*, 12 C. L. J. 65 ; *Monmohan v. Dwarkanath*, 12 C. L. J. 312 ; *Heramoney v. Musa Khan*, 7 I. C. 625 ; *Trilochan v. Bakkeswar*, 15 C. L. J. 423 ; *Janki Prasad v. Thakur Das*, 13 I. C. 31 ; *Prosanna v. Lal Mia*, 55 I. C. 669 ; *Radhakanta Lal v. Parbati Koor*, 63 I. C. 535 : 6 P. L. J. 337 ; *Taj Singh v. Jagan Lal*, 14 A. L. J. 370 ; *Jogendra v. Ashutosh*, 24 O. L. J. 462. It has been further held that the rule is applicable where, in answer to an application for execution, an uncertified adjustment is set up ; the executing Court is not bound to recognise and to acquire under S. 47 notwithstanding fraud on the part of the decree-holder ; *Badrudeen v. Gulam*, 36 M. 357 (*Veerappa v. Punnayya alias Armugam*, 17 M. L. J. 527, *Ganapathy v. Chenga*, 29 M. 312 and *Persatambi v. Vellaya*, 21 M. 403 followed) ; *Ramayyar v. Ramayyar*, 21 M. 356 commented on and disapproved). See also *Biroo Gorain v. Jaimural*, 16 C. W. N. 923 : 16 C. L. J. 174 ; *Shamlal v. Hazarimal*, 15 C. L. J. 451. The provisions of this rule are express and no payment or adjustment which is not certified shall be recognised ; it is no answer under S. 47 to an application for execution of a decree ; in this case the judgment-debtor pleaded that by fraud he was prevented from learning that the adjustment had not been certified by the decree-holder in accordance with his promise ; *Bajrang v. Lachmi*, 15 C. L. J. 89 ; *Sojhra v. Changomal*, 63 I. C. 239 ; *P. Chetty Firm v. G. Lon Pow*, A. I. R. 1923 Rang. 103 : 1 Bur. L. J. 226 ; *Frank v. Mufassil Bank*, 115 I. C. 139 : A. I. R. 1929 All. 674 ; *Azizur Rahman v. Ali Rajah*, 32 C. W. N. 434 : A. I. R. 1923 Cal. 527 : 113 I. C. 9. See, however, *Gadadhar v. Shyam Churn*, 12 C. W. N. 485, which lays down that where the judgment-debtor complained that the decree-holder had by fraud kept them in ignorance till within a month of the application, of the fact that the satisfaction of the decree had not been certified, the matter could be investigated under S. 47. But see *Taj Singh v. Jaganlal*, 38 A. 239 : 35 I. C. 234. Such uncertified payment or adjustment cannot be recognised by the Court even to guard against the end of giving an opportunity

to dishonest decree-holders to commit fraud by denying adjustments which are not certified.—*In re M. D. S. Ela Nidhi Co., Ltd. v. Subramania Pillai*, 40 I. C. 889. Omission on the part of the decree-holder to certify does not amount to fraud and the executing Court can on no account entertain directly or indirectly an objection regarding an uncertified adjustment of a decree; *Imamuddin Khan v. Bindu Bashini Prasad*, 55 I. C. 890: 5 P. L. J. 70, *Gharry v. Gowrya*, 46 B. 226: 23 Bom. L. R. 981; *Mehbunnissa v. Mehmedunnissa*, 49 B. 548 (F. B.): A. I. R. 1925 Bom 309 (overruling 40 B. 333 and 34 B. 575); *Ganesh v. Yeshwant*, 25 Bom L. R. 247: A. I. R. 1923 Bom. 253; *Parna Ram v. Lehna Singh*, (1919) 135 P. R 1919: 53 I. C. 443; *Jagrani v. Moona*, 110 I. C. 244: 5 O. W. N. 452, *Meyappa v. U. Tun Hla*, 9 R. 104: 132 I. C. 713: A. I. R. 1931 Rang. 148 (57 C. 403 (F. B.) approved); *Falimunnissa v. Asghar*, 3 Luck. 170 (F. B.): 108 I. C. 105: A. I. R. 1923 Oudh 195. An agreement to adjust must be certified if it is to be used as a bar in execution; if it is not certified the judgment-debtor has no *locus standi* to oppose a transfer of the decree—*Gnanamma v. Raja Seetharama*, 119 I. C. 480: A. I. R. 1930 Mad. 429. Where the decree-holder admits that payments had been made but states that they were not certified, held that the Court executing the decree is not precluded from inquiring into payments admitted, although there was no direct certification.—*Chinna v. Somasekara*, (1929) M. W. N. 713: 119 I. C. 594: A. I. R. 1929 Mad 783.

The weight of authority is decidedly against the contention that such uncertified payments may be investigated and recognised when the decree-holder is guilty of fraud in suppressing or omitting to certify such payment; but there are some cases in which executing Courts have allowed the judgment-debtor to raise such plea in execution on the principle that decree-holder cannot be permitted to obtain an unjust order from Court by false statements. See the case of *Hansa v. Bhawa*, 40 B. 333: 18 Bom L. R. 22: 33 I. C. 232 (overruled by 49 B. 548 (F. B.)); *Ghasi Ram v. Dale Singh*, 45 I. C. 222, where an execution sale was held to be a nullity as the decree was satisfied and the decree-holder, in failing to certify payment, had committed a fraud on Court. These cases are not good law.

Where by a consent decree the judgment-debtor agrees to pay a certain sum of money not to the plaintiff but to be a third party, such payment to a third party, if uncertified, cannot be recognised by the Court executing the decree.—*Mahadeo v. Hamidan*, 45 A. 304: 71 I. C. 457: A. I. R. 1923 All. 271.

A sum paid under a void agreement cannot be acknowledged or recognised in execution of a decree under this section, unless it has been certified within the proper time.—*Durga Prasad v. Lalit Mohan*, 25 C. 86. See also *Chedumbara Pillai v. Ratna Ammal*, 3 M. 113.

In the course of execution proceedings the parties entered into an agreement which was registered and filed in Court and the decree-holder filed a petition stating that as the judgment-debtor had made over to him a bond he could realize his debt by bringing a suit upon it. On this the execution case was struck off. Afterwards the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him. Held that the decree was not superseded by the agreement, and was, therefore, capable of execution.—*Fateh Muhammad v. Gopal Das*, 7 A. 424.

A *kistibandi* or instalment bond was executed by way of adjustment of a decree, and this was not certified. *Held* that a Court executing the decree was not competent to take cognizance of the *kistibandi* under S. 47 and the decree must be executed notwithstanding the adjustment.—*Ram Doyal v. Ram Hari*, 20 C. 32. But see *Gadadhar v. Shyam Churn*, 12 C. W. N. 485.

Where payments towards a decree for a monthly family allowance were made by the judgment-debtor to the decree-holder after the latter's adjudication as an insolvent, such payments not having been certified to the Court, they cannot be recognised against the receiver by the executing Court.—*Nilakanta v. Ramachandra*, A. I. R. 1932 Mad. 250.

If the adjustment or payment pleaded by a judgment-debtor be admitted by the decree-holder, then the executing Court cannot proceed to execute the decree, though such payment or adjustment be not certified, as the jurisdiction to execute the decree ceases as soon as the Court is informed by the decree-holder that the decree has been adjusted. The intention of this rule is to avoid enquiry into uncertified and disputed adjustments or payments, but there is no time limit for the decree-holder to certify, and if a decree-holder admits satisfaction, the Court should not proceed in execution any further. So it was held that a Court should not confirm sale, if the decree-holder admits satisfaction of decree, as confirmation of sale is a proceeding in execution.—*Nilkanta v. Yeshwant*, 65 I. C. 331.

The Court is not bound to take account of an adjustment out of Court by agreement to receive a smaller sum in satisfaction of the decree unless such adjustment is certified under this section.—*Veerappa v. Punnayya alias Arumugam*, 17 M. L. J. 527; *Rajah of Kalahasti v. Venkatadri*, 50 M. 897; 105 I. C. 248; A. I. R. 1927 Mad. 911; 53 M. L. J. 533.

A decree-holder was opposed by the judgment-debtor on the ground that the decree had been sold by the Deputy Collector in execution of a decree of his Court, and that he (judgment-debtor) had become the purchaser thereof. *Held* that these proceedings amounted to an adjustment out of Court, which could not be recognized by the Court, unless certified by the judgment-creditor himself.—*Bharat Chunder v. Nuzir Ali*, 10 W. R. 354.

A judgment-debtor cannot plead uncertified adjustment in opposition to an application under Or. XXI, r. 16 by the transferee-decree-holder (47 B. 643 not followed; 119 I. C. 480 approved).—*Subramanyam v. Ramaswami*, 137 I. C. 28; (1932) M. W. N. 190; A. I. R. 1932 Mad. 372; 62 M. L. J. 562 (F. B.).

A decree being attached as directed by S. 273, C. P. Code, 1882 (Or. XXI, r. 53) its adjustment subsequent to such attachment cannot be recognized by the Court.—*Gopal Nanashet v. Joharimal*, 16 B. 522.

Agreement between judgment-debtor and proposed assignee of decree before assignment.—Such an agreement can be pleaded in bar of execution without certification, for the assignee had not then attained the status of the decree-holder and so Or. XXI, r. 2, would not apply to the case; *Brajabashi v. Manik*, 31 C. W. N. 921; A. I. R. 1927 Cal. 694; 104 I. C. 694. See also *Rama Ayya v. Sreenivasa*, 19 M. 230; *Ponnuswami v. Latchmanan*, 35 M.

659 : 12 I. C. 657. This rule does not apply where the payment out of Court was made by a third party and not by the judgment-debtor.—*Ibid.*

**Uncertified payments and limitation.**—The omission of the words “as a payment or adjustment of the decree” from the last para. of the old section has made it clear that the Court cannot recognize a payment or adjustment which has not been certified, for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act.

As the section stood before, it provided that an uncertified payment could not be recognized as a payment or adjustment of the decree; so it was formerly held that if a decree-holder sought execution of a decree and was resisted by the judgment-debtor by the plea of limitation, in deciding the question whether it has become time-barred or not it was competent to the Court to take evidence about an uncertified payment made out of Court and to take it into consideration, as every payment gives a fresh starting point for limitation (*Tukaram v. Babaji*, 21 B. 122; *Roshan v. Matadin*, 26 A. 36; 23 A. W. N. 179; *Hurri v. Nasib*, 21 C. 542).

Under the present rule uncertified payments cannot be recognized for the purpose of limitation or for any purpose whatsoever, e.g., extending the limitation; see *Kutabullah v. Durga*, 16 C. W. N. 396; 13 I. C. 424; *Bhajan v. Cheda*, 12 A. L. J. 825; 24 I. C. 215; *Narsoomal v. Trathmal*, 30 I. C. 51; *Amir Singh v. Chhattar*, 13 A. L. J. 666; 29 I. C. 274; *Bireswar v. Ambika Charan*, 45 C. 630; 42 I. C. 472; *Kamini v. Aghore*, 14 C. W. N. 357; 11 C. L. J. 91 (*Ram Dayal v. Ramhari*, 20 C. 32; *Bairagulu v. Bapanna*, 15 M. 302 relied on; *Nistarini v. Kazim Ali*, 12 C. L. J. 65; *Monmohan v. Dwarkanath*, 12 C. L. J. 312; *Golam Majafar v. Goloke*, 25 I. C. 884. Or for deciding whether the application for execution is within time; *Ram Sarup v. Jaggannath*, 15 I. C. 523; 15 O. C. 234. Or for showing that the decree has been satisfied; *Romesh v. Kala Ganji*, 50 I. C. 331.

Even if the decree-holder certifies, the judgment-debtor can show that no such payment was made, or that such payment did not extend the period of limitation.—*Haider Mirza v. Kaitas*, 47 I. C. 177. An application to set aside an *ex parte* order certifying adjustment of a decree is maintainable.—*Ghulam v. Qutbuddin*, 30 P. L. R. 512; 115 I. C. 467.

The omission of the words has rendered the following decisions nugatory:—*Kishan Singh v. Aman Singh*, 17 A. 42; *Bhubaneswari v. Dina Nath*, 2 B. L. R. 320; 11 W. R. 232; *Bishio v. Uma*, 15 W. R. 459; *Fakir v. Madan*, 4 B. L. R. 130 (F. B.); 13 W. R. 40 (F. B.); *Juggut Mohinee v. Madhub*, 15 W. R. 66; *Purmanand v. Vallab*, 11 B. 506; *Tukaram v. Babaji*, 21 B. 122; *Hurri v. Nasib*, 21 C. 542; *Rajeswara v. Hari Babandhu*, 19 M. 162; *Roshan v. Matadin*, 26 A. 36; 23 A. W. N. 179 (12 A. 569 overruled); *Zahir Khan v. Bakhtawar*, 7 A. 327.

**Suit by judgment-debtor based on uncertified payments is barred.**—Where a decree is alleged to be satisfied by an agreement out of Court but satisfaction is not certified, a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied and for an injunction restraining the decree-holder from executing the decree. Section 47 is a bar to such suit; *Denobundhu*

v. *Hari Mati*, 31 C. 480; 8 C. W. N. 395. See also *Azizan v. Matuk Lal*, 21 C. 437; *Bairagulu v. Bapanna*, 15 M. 302; *Palaneappa v. Somasundaram*, 29 I. C. 463. But see *Iswar Chandra v. Haris Chandra*, 25 C. 718; 2 C. W. N. 247; *Mukund v. Hari Das*, 17 B. 23. See also *Asaram v. Yesha-wantrao*, 50 I. C. 956. In Punjab it has been held that a suit lies for a declaration that a decree has been satisfied ... *Diwan v. Amir*, 16 P. R. 1910; 5 I. C. 814 (C); *Mt. Jamna v. Belram*, 190 P. W. R. 1913; *Jan*

No separate suit will lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court, when, in fact, no such adjustment of the decree has been certified in the manner provided by this section.—*Jaikaran Bharti v. Raghunath*, 20 A. 254; *Prasunno v. Kalidas*, 19 C. 633; *Mothura v. Akhoy*, 15 C. 557; *Yellappa v. Ramchandra*, 31 B. 463.

Where an application for recording adjustment out of Court has been rejected, the decision cannot be attacked by a regular suit.—*Abdulla v. Kanhya*, 14 I. C. 751; 92 P. W. R. 1912; 141 P. L. R. 1912.

Suit lies by decree-holder on uncertified adjustment.—In execution of a decree a compromise was effected and the judgment-debtor executed a bond in favour of the decree-holder in satisfaction of the judgment-debt. The compromise was not certified to the Court. Held that the bond was not void, but was binding on the obligor; and a suit upon the bond was therefore, maintainable.—*Ramghulam v. Janki Rai*, 7 A. 124 (5 B. L. R. 223; 20 W. R. 150, 3 C. L. R. 414, 4 B. 295, 3 A. 533 and 538, followed; 6 B. 146, and 8 B. 300, dissented from). See also *Hukum Chand v. Tahar-runnessa*, 16 C. 504; *Sellamayyan v. Muthan*, 12 M. 61; *Hara Gobind v. Issuri Dasi*, 15 C. 187; *Swamirao Narayan v. Kashi Nath Krishna*, 15 B. 419; and *Tukaram v. Anant Bhat*, 25 B. 252. See, however, *Thirumalai v. Sundara*, 11 M. 469; *Abdul Rakiman v. Khoja Khaki*, 11 B. 6 (F. B.), and *Heeranema v. Pestonji*, 22 B. 693 (F. B.) (followed in *Dhanram Ragho v. Ganpat Sadashiv*, 27 B. 96).

The repeal of S. 257-A makes no agreement to pay any sum in excess of the decretal amount void, and such decree-holders who have obtained bonds in adjustment of decrees may enforce them.

Non-certification is no bar to a suit for damages.—The provision in this rule which forbids any Court to recognize a payment under, or an adjustment of, a decree unless certified to the Court executing the decree, does not debar a suit for damages for breach of contract to certify.—*Periatambi Udayan v. Vellaya Goundan*, 21 M. 409; *Hanmant v. Subbabbat*, 23 B. 394; *Krishnasami Ayyangar v. Ranga Ayyangar*, 20 M. 369. See also *Viraraghava v. Subbakka*, 5 M. 397; *Mallamma v. Venkappa*, 8 M. 277; *Kunhi Moidin v. Ramenunni*, 1 M. 203; *Davilata v. Ganesh*, 4 B. 295; *Guni Khan v. Koonjo Behary*, 3 C. L. R. 414; *Chembrakandi Musutti v. Shekharan*, 6 M. 41; *Sitaram v. Mahipal*, 3 A. 533; *Shadi v. Ganga Sahai*, 3 A. 538; *Tegh Singh v. Amin Chand*, 5 A. 269; *Ishan Chunder v. Indro Narain*, 9 C. 788; 12 C. L. R. 390; *Poromanand v. Khepoo*, 10 C. 354; *Medai Kaliani*, In the matter of, 30 M. 545; 3 M. L. T. 15; *Gendo v. Nihal Kunwar*, 30 A. 464 (3 A. 538 and 21 M. 409 followed); *Krishna v. Sacirimuthu*, 42 M. 333; 50 I. C. 584; 36 M. L. J. 376. The remedy of the judgment-debtor lies in a suit for damages or



refund.—*Ganesh v. Jeshwant*, 25 Bom. L. R. 247; *Maung Myo v. Maung Kha*, 70 I. C. 115; A. I. R. 1923 Rang. 88. But see *Patankar v. Devji*, 6 B. 146, and *Hormasji Dorabji v. Burjorji*, 10 B. 155. To pursue this remedy the judgment-debtor need not wait till the decree is executed, because his cause of action arises as soon as the decree-holder files his application for execution.—*Media Kaliani, In the matter of*, 30 M. 545.

A judgment-debtor paid the decretal amount out of Court, but the decree-holder did not certify, and executed the decree again. The judgment-debtor paid the amount over again to save his property from attachment. *Held* that he was entitled to recover the money paid out of Court by a suit.—*Shyama Charan v. Chaitanya*, 11 I. C. 1 (13 W. R. 69 (F. B.)) : 5 B. L. R. 233 *folld.*). see also *Sayyid Mahomed v. Ko Law Pan*, 22 I. C. 963; *A. K. R. etc., Chetty Firm v. Maung Tha Din*, 7 R. 310; 119 I. C. 742; A. I. R. 1929 Rang. 269; *Ma Shwe Pee v. Maung San Myo*, 6 R. 573; A. I. R. 1928 Rang. 316; *Mahbub v. Muhammad*, 50 A. 111; 104 I. C. 419; A. I. R. 1927 All. 710; 25 A. L. J. 823.

If the judgment-debtor has overpaid any sum under the orders of the lower Court, it is open to him to make an application to that Court for its refund.—*Akhil v. Mathuria*, 11 I. C. 200.

**Uncertified adjustment may be recognized by Courts other than the Court executing the decree**—That is to say, such payments may be proved when the cause of action is based on uncertified payments, e. g., the plaintiff had been surety for the defendant on a bond of Rs. 50. The creditor obtained a decree against the plaintiff on this bond, and the plaintiff paid Rs. 38 in full satisfaction. The payment was made out of Court and not certified. The plaintiff now sued the defendant to recover the money so paid by him to the creditor. *Held* that the last clause of this rule did not apply and that the payment to the creditor might be proved.—*Balaji Lakshman v. Dada Joti*, 12 B. 235; *Noor Mahomed v. Dhaniram*, 96 I. C. 234; A. I. R. 1926 Sind 105

A suit will lie to recover money paid or property delivered; *Amir Lal v. Ramji Lal*, 39 I. C. 15; 12 P. L. R. 1917. In a mortgage suit, when the plaintiff applies for a final decree, the Court can take notice of uncertified payments as such proceeding is not an execution proceeding.—*Mangar Sahu v. Bhatoo Singh*, 1 P. L. T. 416; 57 I. C. 472; *Rasan Chettiar v. Rangayan*, 30 L. W. 551; (1929) M. W. N. 867. But see *Piran Bibi v. Jitendra*, 21 C. W. N. 920, where it has been held that uncertified payments made after the preliminary decree in a mortgage-suit cannot be proved to oppose the passing of a decree absolute.

The prohibition to take cognizance of uncertified adjustments and payments in this rule relates only to the Court executing the decree; such adjustment may be recognised by a Civil Court except in execution.—*Kalyan Singh v. Kamta Prasad*, 13 A. 339. See also *Ghansham v. Kashiram*, 16 B. 589; *Azizan v. Matuk Lal*, 21 C. 437; ... B. 204. The prohibition is only for purpose that the executing Court cannot inquire proceeding under S. 476, Cr. P. Code.—132 I. C. 713; A. I. R. 1931 Rang. 149.

Where a decree has been satisfied out of Court, and the payment has not been certified, it is nevertheless open to the *quondam* judgment-debtor, when suing, to have a sale made by the *quondam* decree-holder, after satisfaction of the decree, set aside, to prove the payment of the decretal money otherwise than by a certificate under this rule.—*Pat Dasi v. Sharup Chand*, 14 C. 376. See also *Ramayyar v. Ramayyar*, 21 M. 356; and *Tegh Singh v. Amin Chand*, 5 A. 269. But see *Mothura v. Akhoy*, 15 C. 557.

**Criminal proceedings.**—This rule does not debar a Criminal Court from recognizing an uncertified payment, where the decree-holder is charged with fraudulently executing a satisfied decree.—*Q.-E. v. Pillala*, 9 M. 101; *Q. E. v. Bapuji*, 10 B. 288; *Q. v. Mutturaman*, 4 M. 325; and *Madhub v. Novodeep*, 16 C. 126; *Trimbak v. Hari*, 34 B. 575.

A mere application for execution is not an offence under S. 210, I. P. C. The decree must have been caused to be executed.—*Shama Charan v. Kasi Naik*, 23 C. 971.

**Appeal.**—An order under this rule, allowing or refusing an application to record an adjustment of a decree falls within the terms of S. 47. Being made on a question arising between the parties to the suit such an order falls within the definition of "decree" and is appealable under S. 96.—*Guruvayya v. Vudayappa*, 18 M. 26; *Lingayya v. Narasimha*, 14 M. 99; *Jamna Prasad v. Mathura Prasad*, 16 A. 129; *Rangji v. Bhaji Harjivan*, 11 B. 57; *Raja Kamlessuri Prasad v. Sukhan Singh*, 7 C. W. N. 172; *Biroo Gorain v. Jaimurat*, 16 C. W. N. 923; 16 C. L. J. 174; *Jadunandan v. Sheonandan*, 1 P. 644: (1922) P. 200: 68 I. C. 645: A. I. R. 1922 Pat. 276. An appeal does not lie from an order refusing to restore an application under subrule (2) which has been dismissed for default.—*Lakhpal v. Bella Mall*, 132 I. C. 206: A. I. R. 1931 Lah. 505 (relying on 63 I. C. 855 and 45 A. 148). See also *Qutab Din v. Hazuri Mal*, 105 I. C. 724: A. I. R. 1927 Lah. 809.

**Time within which decree-holder shall certify.**—No time is fixed within which the decree-holder is bound to certify a payment out of Court.—*Tukaram v. Babaji*, 21 B. 122. He can certify part-payments at any time.—*Lakhi Narain v. Falamani*, 20 C. L. J. 131: 18 C. W. N. 196 (notes); *Hridaymohan v. Khagendra*, A. I. R. 1929 Cal. 687; *Gopi Prasad v. Baru Singh*, 132 I. C. 426: A. I. R. 1931 All. 219; *Joti Prasad v. Srichand*, 51 A. 237 (F. B.): 26 A. L. J. 966: 112 I. C. 73: A. I. R. 1928 All. 629; *Daw Ywet v. U Tin*, 8 R. 310: 127 I. C. 600: A. I. R. 1930 Rang. 329; *Jalimchand v. Yusuf Ali*, 54 C. 143: 86 I. C. 1051: A. I. R. 1925 Cal. 1012. But a payment cannot be certified after the decree has become time-barred.—*Bhajan v. Gheda*, 24 I. C. 215.

The decree-holder may certify payment either prior or subsequent to the application for execution by a separate application or he may do so on his application for execution.—*Eusuff Zeman v. Sanchia*, 43 C. 207: 23 C. L. J. 390: 20 C. W. N. 272: 34 I. C. 606; *Madan v. Harulal*, 26 C. W. N. 534; *Bahy Mahammad v. Aijannai*, 26 C. W. N. 529: 35 C. L. J. 71: A. I. R. 1922 Cal. 30; *Masilamani v. Sethuswami*, 41 M. 251; *Pandurang v. Jagya*, 45 B. 91; *Maung Law San v. Maung Po Thein*, 2 R. 393: A. I. R. 1925 Rang. 26; *Chinnaswami v. Periathambi*, 117 I. C. 790: A. I. R. 1929 Mad. 811; *Chotirmal v. Rupchand*, A. I. R. 1931 Sind 23: 129 I. C. 929: 25 S. L. R. 360. The Allahabad High Court took a contrary view and held that

the certification must be a distinct and prior proceeding; that is, it should be made prior to the application for execution; *Bajinath v. Pannalal*, 46 A. 635; A. I. R. 1924 All. 706; *Chattar Singh v. Amir Singh*, 38 A. 204; 32 I. C. 590; 14 A. L. J. 132; *Bhajan v. Chheda*, 12 A. L. J. 825. It has now held in the recent Full Bench case of *Joti Prasad v. Srichand*, 51 A. 237, noted *ante*, that a decree-holder can certify payment in his execution application and can also certify payment after execution application but before objection is taken either by an officer of the Court before issue of notice, or by the judgment-debtor when he appears to contest the application. It has also been held in this case that a certificate of payment given by a decree-holder to the Court is merely an intimation that he has received a sum of money and that the decree to that extent has been satisfied. In the F. B. case *Shafi Mahomed v. Choithram*, 52 I. C. 804; 13 S. L. R. 37, it has been held that there was no period of time within which such payments have to be certified by the decree-holder and that he may certify by mentioning the fact in his petition for execution and that the object of sub-rule (3) is not to provide a sanction for the obligation imposed on the decree-holder. See also *Sheik Elahi Bakhsh v. Nawab Lall*, 50 I. C. 364; 4 P. L. J. 159; (1919) P. 260. But the decree-holder must certify before the decree is barred by limitation and an uncertified payment cannot be taken notice of to save limitation; *Bahu Bulla v. Jogesh Chandra*, 23 C. W. N. 320; 50 I. C. 242. See also *Bireswar v. Ambika*, 45 C. 630; 42 I. C. 472; *Prosonno v. Kulada*, 29 I. C. 472; *Chatter Singh v. Amir Singh*, 38 A. 204; 32 I. C. 590; and *Pandurang Balakrishna v. Jagya Bahu*, 45 B. 91; 59 I. C. 399; 22 Bom. L. R. 1120; *Madan v. Harilal*, 26 C. W. N. 534; 35 C. L. J. 566; 64 I. C. 72; *Bahy Mohamed v. Ayanmai*, 35 C. L. J. 71; 26 C. W. N. 529; A. I. R. 1922 Cal. 30. The alleged payments must be made within three years from the date of the decree and the application to certify must be made within three years from the date of payment; *Jatindra v. Gagan*, 46 C. 22; 45 I. C. 903; *Madan v. Harilal*, noted *ante*; *Amar Singh v. Ram Deo*, 47 A. 873; *Maung Law San v. Maung Po Thein*, 2 R. 393. A. I. R. 1925 Rang. 26. These rulings so far as they held that the application to certify should be made within three years from the date of payment are no longer good law in view of the Privy Council decision in *Prakash v. Allahabad Bank*, 3 Luck. 684 (P. C.). See notes under heading "Limitation and step-in-aid of Execution" below. When a decree-holder has made certification he is entitled to prove the payments even if the payments were made more than 90 days prior to the certification; the certification therefore lets in evidence in proof of the payment.—*Joti Prasad v. Baru Singh*, 132 I. C. 426; A. I. R. 1931 All. 219. (following 51 A. 237 (F. B.)); A. I. R. 1928 All. 629).

Part payment, made within time but certified after time, saves limitation.—*Rajam Aiyar v. Anantharathnam*, 29 M. L. J. 669 (20 C. L. J. 138: referred to).

Jurisdiction of executing Court to order refund of money paid to decree-holder in excess.—When one of several debtors had paid the decretal amount to the decree-holder and got the payment certified under Or. XXI, r. 2, and another judgment-debtor in ignorance of the satisfaction of the decree paid money into Court and it was withdrawn by the decree-holder, and having discovered that the decree had been previously satisfied, the judgment-debtor made an application to the executing Court.

for refund of the money: *Held* that the executing Court had jurisdiction to entertain such an application.—*Gopal v. Rambhajan*, 65 I. C. 307.

**Reversal of decree and refund of uncertified payment.**—If a decree is reversed on appeal the judgment-debtor is entitled to get back what he had paid to the plaintiff under the decree whether certified by the Court or not.—*Vasudeb v. Vishnu*, 11 B. 724.

**Limitation and step-in-aid of execution.**—An application by some of the judgment-debtors, signed by the decree-holders, to have certain payments made out of Court certified under this rule and that time be allowed to pay the balance of the decree, is a "step-in-aid of execution," such as will keep the decree alive within the meaning of Art. 179 of the Limitation Act, 1877.—*Vasi Imam v. Poonit Singh*, 20 C. 696; *Sujan Singh v. Hira Singh*, 12 A. 399 (F. B.); *Muhammad Husain v. Ram Sarup*, 9 A. 9; *Tarini Das v. Bishtoo Lal*, 12 C. 608; *Akbar Jamadar v. Kali Krishna*, 4 C. W. N. clii (152); *Kasumri v. Beni Prasad*, 26 A. 19.

The payment of part of the judgment-debt by the judgment-debtor with the acknowledgment of liability by his pleader, is sufficient under S. 19 of the Limitation Act (XV of 1877), to give a fresh period of limitation.—*Trimbak v. Kashi Nath*, 22 B. 722. See also *Muhamad Said v. Payag Sahu*, 16 A. 228, where the acknowledgment was made in the presence of the Collector and it was held to be a valid acknowledgment for all purposes and sufficient under Ss. 19 and 20 of the Indian Limitation Act to save limitation in respect of the execution of the decree.

**Certification to the Court under Or. XXI, r. 2** by a decree-holder of a payment made to him out of Court, even if made in the form of an application, is not an "application within Art. 181 of the Limitation Act, 1908, so as to be barred unless it takes place within three years of the payment certified; nor is there any article which limits the time.—*Prakash v. Allahabad Bank*, 56 I. A. 30: 3 Luck. 684 (P. C.): A. I. R. 1929 P. C. 19: 56 M. L. J. 233 (P. C.): 33 C. W. N. 297: 27 A. L. J. 33: 114 I. C. 581.

It cannot be laid down as a matter of law that the decree-holder's certification is in itself a step-in-aid of execution and can afford a fresh starting point of limitation. In order to save limitation the payment must fall within the provisions of S. 20 of the Limitation Act. Such a certification is not an application to the Court; *Prakash v. Allahabad Bank*, noted *ante* relied on.—*Amar v. Jagat*, 59 C. 760 (F. B.): 35 C. W. N. 1192: 54 C. L. J. 201: A. I. R. 1931 Cal. 719: 134 I. C. 922; *Maung Tun Hlaing v. U. Aung Gyaw*, 126 I. C. 540: A. I. R. 1930 Rang. 64. It is the payment that keeps the decree alive; and it is a mistake to regard the process of certification as a revival of the decree.—*Chotirmal v. Rupchand*, 25 S. L. R. 360: 129 I. C. 909: A. I. R. 1931 Sind 28. The view expressed in *Peare Mohan v. Raghunath*, 50 A. 259: 107 I. C. 40: A. I. R. 1928 All. 55, that where a payment by the judgment-debtor is relied on to save limitation for an application for execution, an executing Court must compute limitation from the date not of payment but of certification, seems to be no longer good law in view of the Privy Council decision quoted above.

**Omission of S. 257-A from the C. P. Code.**—Section 257-A, which had a place in the Code of 1882, has now been omitted. It ran as follows :—

*"257-A. Every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable. Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly of any sum in excess of the sum due or to accrue due under the decree, shall be void, unless it is made with the like sanction. Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus (if any) shall be recoverable by the judgment-debtor."*

The section was first enacted by Act XII of 1879, with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. It gave rise to conflicting decisions and as interpreted by the majority of the High Courts was found in practice to be of little service to the judgment-debtors. Section 16 of the Indian Contract Act as amended, appeared to the Special Committee to afford adequate protection where it was required.

The reason for the omission will be clearly understood on reading the Full Bench case of *Atma Singh v. Banke Rai*, reported in 61 P. L. R. (1907) : 71 P. W. R. 1907, where all the cases decided by the High Courts under the old section have been referred to, discussed and explained. The Full Bench said :—

*"A contract under undue influence as under fraud, coercion or misrepresentation is only voidable, and it is left to the Courts to decide the question upon evidence aided by certain presumptions in particular cases. But here simply because the debt has been the subject of a decree, a contract between a debtor and his creditor relating to the liquidation of the debt by which any time is given for its payment, or any sum however small, is agreed to be paid in excess of the decree, is by inflexible fiat of the Legislature pronounced as a nullity unless made with the sanction of the Court that passed the decree. The effects of such a rule in the substantive law of Contract is far-reaching indeed."*

*"The first part of S. 257-A is, however, clearly and admittedly an invasion of ordinary Contract Law. Such an agreement without consideration would clearly be void under S. 25 of the Contract Act. But if for any reason, poverty, misfortune, illness, or so on, the judgment-debtor can induce the decree-holder to give him time, and the Court which passed the decree endorses the indulgence, the contract which under substantive law would be void, becomes valid under this special enactment."*

*"Under the ordinary law, Contract Act, S. 25, an agreement for the satisfaction of the decree, which provides for the payment of a sum in excess of the decree, but does not extinguish the decree, is clearly void in the immense majority of cases, as it is absolutely without consideration. The decree remains in force and executable and the judgment-debtor gains nothing whatever. Such an agreement is void without the intervention of S. 257-A."*

The effect of the omission of S. 257-A, from the present Code, is, that now no agreement to give time to the judgment-debtor without any consideration and without the sanction of the Court, or any agreement which provides for the payment of any sum in excess of the sum due or to be due under the decree, would be valid except in so far as such agreements may be affected by the provisions of the Indian Contract Act.

For contracts induced by undue influence, see notes to S. 9

## COURTS EXECUTING DECREES.

**3.** Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure. [New.]

Lands situate in more than one jurisdiction.

## COMMENTARY.

**Object.**—The introduction of this rule settles a point on which decisions were not harmonious. It provides for cases where estates are situate within the jurisdiction of two or more Courts and definitely lays down that any of such Courts may attach and sell the entire estate. The principle was noted upon in various cases and they are noted below.

**Sale of property situate in more than one jurisdiction.**—A suit was instituted, on a mortgage of a single revenue-paying estate, part of which lay in Bakherganj and part in Fareedpore, in the Sub-Judge's Court at Bakherganj under S. 17, and a decree was obtained for sale of the mortgaged property. Held that the Court was competent to order a sale of the whole of mortgaged property, though only a portion of it was situated in the district of Bakherganj.—*Shurroop Chunder v. Ameerunnissa*, 8 C. 703; *Shama Charan v. Kasi Naik*, 23 C. 971. See also *Ram Lal v. Bama Sundari*, 12 C. 307 (11 B. L. R. 56; 19 W. R. 434 followed); *Shib Narain v. Gobind Dos*, 23 W. R. 154; and *Gunga Narain v. Annunda Moyce*, 12 C. L. R. 404. See, however, *Unnocol Chunder v. Hurry Nath*, 2 C. L. R. 334.

**In execution of a mortgage decree in a suit brought under the provisions of S. 17 in the Court of the Sub-Judge of Rajshahye, properties situated in the districts of Rajshahye and Nyadumka were sold by the Rajshahye Court.**—*Maseyk v. Steel & Co.*, 14 C. 661 (referred to in *Gopi Mohun v. Doybaki Nundun*, 19 C. 13). The latter case has been followed in *Tin Couri Debya v. Shib Chandra*, 21 C. 639, and also in *Jagernath Sahai v. Dip Rani Koer*, 22 C. 871. See, however, *Prem Chand v. Mokkoda Debi*, 17 C. 699 (F. B.).

**Change of territorial jurisdiction.**—When during the pendency of execution proceedings, there was a change of territorial jurisdiction of the executing Court, pending proceedings are by operation of law transferred to the Court having jurisdiction and if in spite of such change, property is sold by a Court which initially had jurisdiction, but subsequently had ceased to have jurisdiction owing to such change; held, the sale was invalid.—*Kasi v. Murugappa*, 33 M. L. J. 750; 43 I. C. 79.

**4.** Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[S. 223, PARA. 5.]

## COMMENTARY.

**Alterations.**—This rule corresponds to para. 5 of S. 223 of the C. P. Code, 1882, with some verbal changes only.

**Scope.**—A Small Cause Court executing the decree of another Court has the same powers as it possesses in regard to its own decree; *Gunaputty v. Thakurdye*, 34 C. 823.

**5.** Where the Court to which a decree is to be sent for execution is situate within the same district, as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

[S. 223, PARA. 6.]

## COMMENTARY.

**Transfer within district.**—Direct transfer of decrees within the same district is not illegal; *Kelu v. Vikrisha*, 15 M. 345.

**Direct transfer outside district.**—A decree for money passed by a Munsif in one district was sent for execution to a Munsif in another district directly. *Held* that the latter Court had no jurisdiction to execute it without an express order of the District Judge.—*Debi Dial v. Moharaj Singh*, 22 C. 764.

The Judge of Gaya sent a decree direct to the Sub-Judge of Palamau: another district for execution who dismissed the application. *Held*, that he should have returned the papers to Gaya for retransmission to the proper Court instead of dismissal; *Prakash v. Baldeo*, 22 I. C. 682.

As to the power of the Court to which a decree is transferred for execution to determine the question of limitation, see notes under S. 42.

6. The Court sending a decree for execution shall send—

(a) a copy of the decree ;

Procedure where  
Court desires that  
its own decree  
shall be executed  
by another Court.

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied ; and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect. [S. 224.]

COMMENTARY.

**Applicability.**—The documents required to be transmitted for the purpose of obtaining execution are a copy of the decree and a certificate of any sum remaining due under it, together with a copy of any order for execution that may be passed.—*Venkata Subia v. Sivaramappa*, 4. M. H. C. R. 331.

Where the two Courts were presided over by the same Judge, it was not necessary to transfer the decree to himself with all the necessary documents.—*Ko Sit Kaung v. Periakaruppan*, A. I. R. 1928 Rang. 15.

The words "a copy of any order for the execution of the decree" mean a copy of any subsisting order.—*Hathibhai v. Patel*, 13 B. 371.

The omission to transmit to the Court executing the decree the certificate required by this rule is a mere irregularity, which would not vitiate the sale.—*Abubaker v. Mohidin*, 20 M. 10; *Lokenath v. Mahim*, 35 C. W. N. 308; A. I. R. 1931 Cal. 649; 134 I. C. 944.

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof. [S. 225.]

Court receiving  
copies of decree,  
etc. to file same  
without proof.

COMMENTARY.

**Alteration and effect—Enquiry into jurisdiction.**—The words "or of the jurisdiction of the Court which passed it" which occurred after "copies thereof" have been omitted, on the ground that an executing Court ought not to go into any question as to the jurisdiction of the Court which passed it. The result is that the judgment-debtor cannot now raise any such objection as to jurisdiction in the executing Court.—*Bhagwantappa v. Vishwanath*, 28 B. 378; *Haji Musa v. Purmanand*, 15 B. 216; *Imdad v. Jagan*, 17 A. 478.



The executing Court has no power to question the jurisdiction of the Court which passed the decree under execution; *Hari Govind v. Narsingrao*, 38 B. 194: 16 Bom. L. R. 30: 23 I. C. 123. See also *Kasturshep v. Rama Kanhoji*, 10 B. 65; *Ekram Hussain v. Mt. Umatul Rasul*, 9 P. 829: 129 I. C. 138: A. I. R. 1931 Pat. 27 (where the contention was that the decree was a nullity for want of plaintiff's succession certificate); *Govindan v. Natesa*, 34 L. W. 806: 61 M. L. J. 520 (defendant was a lunatic and unrepresented at the time of the decree and so decree invalid); *S. A. Nathan v. S. R. Samson*, 9 R. 490 (F. B.): A. I. R. 1931 Rang. 252 (which has held that a Court to which a decree has been transferred must take the decree as it stands and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary to pass it, 8 R. 544 overruled); *Shiddappa v. Revappa*, 31 Bom. L. R. 1254; *Pran Nath v. Maha Dyal*, 138 I. C. 376: 33 P. L. R. 725: A. I. R. 1932 Lah. 601. But see *Sheo Jahal v. Binaek*, 29 A. L. J. 653: A. I. R. 1931 All. 699, where Sulaiman, J. expressed a doubt on the point.

The Calcutta High Court has held that the executing Court would be competent to refuse to execute the decree only when on the face of it it would appear that the Court which passed it had no jurisdiction whether pecuniary or territorial or in respect of the judgment-debtor's person, to make it. Within these narrow limits the executing Court is authorised to question the validity of the decree.—*Gorachand v. Prafulla*, 5 C. 166: 43 C. L. J. 1: 948. But if there is a clear statement upon a plaint which gives the Court jurisdiction to entertain a suit and if upon the basis of that jurisdiction the decree is passed by the Court without any challenge by the defendant as regards the territorial jurisdiction of the Court to pass the decree, it is not open to the defendant in the course of execution to question the jurisdiction of the Court.—*Amalabala v. Sarat Kumari*, 54 C. L. J. 593: A. I. R. 1932 Cal. 380.

As to the powers and functions of such Courts, see notes under S. 42, ante.

It has been held that before issuing execution, the jurisdiction of a foreign Court to pass the decree sought to be executed can be questioned; *Veeraraghava v. Muga Sait*, 39 M. 24: 27 M. L. J. 535; *Jivappa v. Jeerji*, 18 Bom. L. R. 486.

Execution of decree or order by Court to which it is sent.

tion.

8. Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.  
[S. 226.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 226, C. P. Code, with some modifications. The words "be transferred for execution to any subordinate Court of competent jurisdiction," have been substituted for the words "by any subordinate Court which it directs to execute the same."

**Scope.**—As to the powers of the Court to which a decree is sent for execution, under this section, see *Manorath Das v. Ambika Kant*

13 C. W. N. 533, and notes to Ss. 38 and 42. The Court to which a decree is sent for execution may not be competent to execute it before a copy of the decree is received, but once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply for rateable distribution under S. 73, C. P. Code, to the Court to which the decree has been ordered to be sent; *Arimulthu Chetty v. Vyapuri Pandaram*, 8 I. C. 852; and it is not necessary for the decree-holder to apply afresh to the Court to which the decree is transferred, for execution, if he had already applied for execution and transfer to the Court which passed the decree; *Dutt v. Taraprasanna*, 2 P. 909: (1923) P. 280: 74 I. C. 753.

See notes under heading "Court of competent jurisdiction" in S. 39, *ante*.

**Executing Court cannot extend time of payment.**—Where a High Court decree is sent to a Munsif for execution, he has no power to extend the time of payment allowed in the decree. The Court which passed the decree can only grant such extension; *Mohideen v. Maria Kani*, 21 M. L. J. 1018.

**9.** Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction. [S. 227.]

Execution by High Court of decree transferred by other Court.

### COMMENTARY.

**Applicability.**—The functions of the High Court in respect of the execution of decrees of other Courts are limited to effecting execution, and to matters arising out of the proceedings in execution.—*Jadu Ray v. Farrell*, 6 B. L. R. Ap. 65.

### APPLICATION FOR EXECUTION.

**10.** Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof. [S. 280, PARA. 1.]

Application for execution

### COMMENTARY.

**Decree-holder.**—A "decree-holder" is the person in whose name the decree was made, or some person whom the Court has by order recognised as the decree-holder from the original plaintiff or his representatives.—*Paupayya v. Narasannah*, 2 M. 216. A decree-holder, includes any person to whom the decree has been transferred.—*Dwar Buksh v. Fatik Jali*, 26 C. 250: 3 C. W. N. 222. See also *Vishnu Sakharam v. Krishnarao*, 11 B. 153 and *Chathoth v. Saidindaride*, 26 M. 258. See, however, *Amar Chundra v. Guru Prosunno*, 27 C. 488 and *Tameshar Prasad v. Thakur Prasad*, 25 A. 443.

But a person who is a stranger and not a party to the suit, cannot apply for execution of the decree merely because he has got certain rights under the decree; he may bring a separate suit; *Dil Afza Begum v. Deputy Commissioner, Bahraich*, 37 I. C. 133.

As to the right of the decree-holders' representatives to execute the decree without a certificate of heirship, see notes under Or. VII, r. 4.

"Court which passed the decree."—See S. 37 and notes.

If the decree has been sent to another Court.—Where the decree of a District Court has been sent to the Court of a Munsif for execution, and has not been returned to the District Court, the proper Court within the meaning of the Limitation Act, 1908, Art. 182 (5), in which to apply for execution of the decree, is the Court of the Munsif; *Maharajah of Bobilli v. Narasaraju*, 43 I. A. 238; 39 M. 640; 31 M. L. J. 300; 18 Bom. L. R. 909; 14 A. L. J. 1129; 36 I. C. 632. See also *Diwan Chand v. Rallia Ram*, L. R. 1931 L. 313; 130 I. C. 521; A. I. R. 1931 Lah. 14.

See notes under rule 7, *ante* and S. 47, *ante*.

Where terms of decree are ambiguous.—See notes to Or. XX, r. 6 under "Construction of Decree."

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court. [S. 256.]

Written application. (2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
  - (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
  - (h) the amount of the costs (if any) awarded;
  - (i) the name of the person against whom execution of the decree is sought; and
  - (j) the mode in which the assistance of the Court is required, whether—
    - (i) by the delivery of any property specifically decreed;
    - (ii) by the attachment and sale, or by the sale without attachment, of any property;
    - (iii) by the arrest and detention in prison of any person;
    - (iv) by the appointment of a receiver;
    - (v) otherwise, as the nature of the relief granted may require. [S. 235.]
- (3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. [New.]

### COMMENTARY.

**Alterations and scope**—The old section has been re-cast, and some material changes have been introduced. The important changes are given below and they should be noted.

**Sub-rule (1).**—The words "*for the payment of money*" have been substituted for "*passed for a sum of money only*"; (2) the words "*and the amount decreed does not exceed the sum of one thousand rupees,*" and the sentences "*issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his moveable property within the same limits*" have been omitted; and (3) the words "*arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court*" have been added.

**Sub-rule (2).**—The words "*save as otherwise provided by sub-rule (1), every*" have been added in the beginning.

But a person who is a stranger and not a party to the suit, cannot apply for execution of the decree merely because he has got certain rights under the decree; he may bring a separate suit; *Dil Afza Begum v. Deputy Commissioner, Bahraich*, 37 I. C. 133.

As to the right of the decree-holders' representatives to execute the decree without a certificate of heirship, see notes under Or. VII, r. 4.

"Court which passed the decree."—See S. 37 and notes.

If the decree has been sent to another Court.—Where the decree of a District Court has been sent to the Court of a Munsif for execution, and has not been returned to the District Court, the proper Court within the meaning of the Limitation Act, 1908, Art. 182 (5), in which to apply for execution of the decree, is the Court of the Munsif; *Maharajah of Bobilli v. Narasaraju*, 43 I. A. 238; 39 M. 640; 31 M. L. J. 300; 18 Bom. L. R. 909; 14 A. L. J. 1129; 36 I. C. 632. See also *Diwan Chand v. Rallia Ram*, L. R. 1931 L. 313; 130 I. C. 521; A. I. R. 1931 Lah. 14.

See notes under rule 7, ante and S. 47, ante.

Where terms of decree are ambiguous.—See notes to Or. XX, r. 6 under "Construction of Decree."

**11.** (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court. [S. 256.]

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
  - (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
  - (h) the amount of the costs (if any) awarded;
  - (i) the name of the person against whom execution of the decree is sought; and
  - (j) the mode in which the assistance of the Court is required, whether—
    - (i) by the delivery of any property specifically decreed;
    - (ii) by the attachment and sale, or by the sale without attachment, of any property;
    - (iii) by the arrest and detention in prison of any person;
    - (iv) by the appointment of a receiver;
    - (v) otherwise, as the nature of the relief granted may require. [S. 235.]
- (3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. [New.]

### COMMENTARY.

**Alterations and omissions.**—The old section has been re-cast, and some material changes have been introduced. The important changes are given below and they should be noted.

**Sub-rule (1).**—The words "*for the payment of money*" have been substituted for "*passed for a sum of money only*"; (2) the words "*and the amount decreed does not exceed the sum of one thousand rupees,*" and the sentence "*issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his moveable property within the same limits*" have been omitted; and (3) the words "*arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court*" have been added.

**Sub-rule (2).**—The words "*save as otherwise provided by sub-rule (1), every*" have been added in the beginning.

*Clause (e).*—In Cl. (e) the words “*payment or other*,” have been added: and the word “*controversy*” has been substituted for the word “*dispute*.”

“The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognize, as this would remove a valuable incentive to state truly what payments have been made (see 10 B. 288).”—See also the *Report of the Special Committee*.

In the case of *Queen-Empress v. Bapuji Dayaram*, 10 B. 288, referred to in the Report of the Special Committee, it has been held that under S. 235, C. P. Code, 1892 (Or. XXI. r. 11), the decree-holder or the party who applies for execution, is bound to state in his application any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. Intentional omission to make such statement amounts to an offence under S. 193 of the Penal Code (XLV of 1860).

*Clause (f)*—In Cl. (f), the words “*dates of such applications*” have been added

Omission to specify all the previous applications with their dates and their results is not a material irregularity such as would render the whole of the execution proceeding illegal—*Saudamini v. Jessore Registered Loan Co. Ltd.*, 96 I C 554: A. I. R. 1926 Cal 1146.

*Clause (g)*—In Cl. (g), the words “*together with particulars of any cross-decree whether passed before or after the date of the decree sought to be executed*” have been added. By the changes this clause has been rendered more general. The change seems to have introduced in adoption of the principle laid down in *Damodar v. Vyanku*, 31 B. 244 (249), where it has been held that a debt or compensation cannot be attached until ascertained.

*Clause (j)*.—Sub-Cl. (i) of Cl. (j) has been substituted for the words “*by the attachment of his property*.”

Sub-Cl. (iii) of Cl. (j) has been substituted for the words “*by the arrest and imprisonment of the person named in the application*.” The omission of the words “*named in the application*” seems material, inasmuch as the decree-holder, under the provisions of the old Code, was bound to name the person to be arrested in his application for execution, and thus giving sufficient opportunity to the person named to evade the process. But under the present Code the decree-holder is not bound to disclose the name of the person to be arrested in his petition for execution. He can give the name of the person to be arrested, at any subsequent stage of the proceedings, when he may find the opportunity for arresting the judgment-debtor. This is for the benefit of the decree-holder.

Sub-Cl. (iv) of Cl. (j) is new. Decrees may be executed by appointment of Receivers in cases where such appointment is just and convenient as for instance in Administration Suits.—*Maung Po Win v. Ma Tin*, 36 I. C. 385. A Receiver may be appointed in execution of money or other decrees. See other cases under Or. XI, r. 1, C. P. Code.

No second appeal lies from an order appointing a Receiver on an application under this rule.—*Vishnu v. Jashakut*, (1928) M. W. N. 390.

Except in the case where the decree itself directs the appointment of a Receiver to work out the relief, no decree-holder has a right to ask for appointment of Receiver only under this sub-clause. It would always be an alternative mode to the relief mentioned in Sub-Cl. (2) of Cl. (j) i.e., attachment and sale.—*Cheria Kumhi v. Valia*, 114 I. C. 839; A. I. R. 1929 Mad. 20.

In Sub-Cl. (v) of Cl. (j) the words "*relief granted*" have been substituted for the words "*relief sought*," which occurred in the old Code. Any method suggested by the decree-holder for the satisfaction of his decree, which method is not actually prohibited by law, falls within the purview of Sub-Cl. (v).—*Ghanaya Lal v. Punjab National Bank*, 111 I. C. 259; A. I. R. 1928 Lah. 7 (relying on A. I. R. 1926 Oudh 616).

*Sub-rule (3).*—This is now. Under the old Code, it was optional with the decree-holder to file a copy of the decree with his application for execution. But under the present Code, it would depend entirely upon the discretion of the Court.

*For the mode of execution of a mortgage-decree and limitation, see notes under Or. XXXIV.*

*Sub-rule (1).*—The Court has a discretion, *see* rr. 21 and 37.

*Form.*—*See* Appendix E, No. 6.

*Date of decree for purposes of execution.*—This must be taken to be the date of the judgment for the purpose of Art. 179, Limitation Act. Time runs therefore not from the date when the decree was actually signed but from the date of judgment; *Rakhal v. Jogendra*, 10 C. L. J. 467; *Afzul v. Umda*, 1 C. W. N. 93; *Golam v. Goljan*, 25 C. 109; *Yamaji v. Antaji*, 23 B. 442. *See* Or. XX, r. 7.

*Verification.*—An application for execution verified by a general attorney of the decree-holder is a proper verification, notwithstanding that his principal may be residing within the jurisdiction of the Court; *Bakar v. Udit Narain*, 26 A. 154 (23 A. 499 distinguished). One of several decree-holders may verify.—*Bhagwat v. Dwarka*, 74 I. C. 174. Verification by a person other than the decree-holder, but who is well acquainted with the facts of the case, is valid. It is not necessary that the verification should be made in open Court or after obtaining permission of the Court.—*Khararia Mejarilla Zemindari Syndicate Ltd. v. Omed Sheikh*, 28 C. W. N. 687; 80 I. C. 313; A. I. R. 1924 Cal. 811.

*As to the mode of verification, see notes to Or. VI, r. 16.*

*Arrest.*—In authorizing immediate execution of a Small Cause Court decree by the issue of a warrant either against the person or the moveable property of a judgment-debtor, the Legislature never intended that the debtor should be protected from arrest until he had a reasonable time for returning home.—*De Penning v. Debendronath*, 9 W. R. 549.

*As to privilege from arrest, see notes under S. 135.*

*Sub-rule (3)—Copy of Decree.*—Formerly applications for execution need not have been accompanied with the copy of decree (*see Gunga v. Makhun*, 9 W. R. 362; *Khetur v. Ishur*, 11 W. R. 271; *Modhoo v. Nobin*, 16 W. R. 25; *Dhanpat v. Lilanand*, 2 L. B. Ap. 18; 11 W. R. 28; *Rajkumar v. Rajlaxhi*, 12 C. 451; *Rajaram v. Banaji*, 23 B. 311. Now under the new



Sub-Cl. (3) the discretion to dispense with the copy of the decree rests with the Court. It is perfectly clear that the Code does not require that a copy of the decree is to be attached to the application; *Raj Gir v. Iswardhari*, 11 C. L. J. 243. As the Code does not require a copy to be attached the decree-holder cannot get the cost of the copy; *Raghubar v. Jadunandan*, 16 C. W. N. 736; 15 C. L. J. 89.

An order for a copy of the decree is wholly needless, when the Court in which the application is made is the very Court which made the decree; so that if any reference to the decree is needed the original could easily be examined, especially in a case where the cost of procuring a copy was prohibitive.—*Mathuranath v. Janakinath*, 57 C. 996; 129 I. C. 780; A. I. R. 1930 Cal. 804.

Before a decree-holder can obtain execution of a decree affirmed by the Privy Council, he must produce, on the application for execution, a certified copy of the order passed by the Council—*Juggernath v. Judoo*, 5 C. 329; 4 C. L. R. 387. See also *Joy Narain v. Goluck Chunder*, 20 W. R. 444.

Where the original order of Her Majesty in Council (given to the successful party) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: held that a copy, though not certified by him, might accompany a petition for execution.—*Hurriah v. Kali Sundari*, 10 I. A. 4; 9 C. 482 (P. C.); 12 C. L. R. 511.

**Lost or destroyed decree.**—A Court has inherent powers to restore its record when it has been lost or destroyed and application for execution may be made before reconstruction of the decree. The contents of the lost record may be proved by secondary evidence under S. 65 (c) of the Evidence Act; *Raj Gir v. Iswardhari*, 11 C. L. J. 243. See also *Narsingh v. Harkhu*, 8 C. L. J. 521.

**Applications for execution not containing the particulars mentioned in sub-rule (2).**—An application for execution not containing the necessary particulars required by this rule, is a mere scrap of paper and does not amount to an execution application.—*Ramdhun Roy v. Abdool Gunnee*, 9 W. R. 390; *Oodoy Chand v. Nobo Coomar*, 10 W. R. 428; and *Gouree Sunkur v. Arman Ali*, 21 W. R. 309; *Bhupendra Narain v. Janeswar*, 90 I. C. 761; 7 P. L. T. 350; A. I. R. 1926 Pat. 533. But every omission in an application for execution is not necessarily a material irregularity, such as would vitiate the execution proceeding. Whether an omission is or is not material, will depend on the particular circumstances of the case; *Saudamini v. Jessore Registered Loan Co. Ltd.*, 96 I. C. 554; A. I. R. 1926 Cal. 1146.

If it does not specify the mode in which the assistance of the Court is sought the application is defective; *Karamchand v. Ghela Bhai*, 19 B. 34; *Protap v. Peary*, 9 C. L. R. 453; 8 C. 174; and should be dismissed without deciding whether the decree is capable of execution; *Satish v. Purna*, 11 I. C. 696.

Where an application for execution omits to give the names of all the parties, even if it shall appear from the other parts of the proceedings who those parties are, the parties named must be understood to be the

parties defendants against whom the execution is sought.—*Abdool Kureem v. Jaun Ali*, 18 W. R. 56.

Where an execution Court hold that the application was not in accordance with law in view of mistakes made in filling up the columns and gave the decree-holder repeated opportunities of either correcting the alleged mistakes or of pointing out to the Court that it was in error and he ignored the Court's order altogether, *held* that the decree-holder was bound by the view the Court intimated to him and which by his silence he must be taken to have accepted.—*Suddeshwari v. Paljhan*, 131 I. C. 33: A. I. R. 1931 All. 722.

It is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree is such a defect as would invalidate execution proceedings. It is in the discretion of the Court to give notice to the other decree-holders or to the judgment-debtor before making an order for execution and it is not for the judgment-debtor to raise an objection that sufficient steps have not been taken to safeguard the interests of the other decree-holders when they themselves have not made any complaint (32 P. L. R. 290 followed).—*Nasruddin v. Dost Mahomed*, 33 P. L. R. 549.

Where an application for execution is not complete in itself, so as to show in what manner execution is to be taken out, still it is capable of being acted upon, if it refers to the former application in which the mortgaged properties were set out, and prays that the decree may be executed by sale of those properties.—*Wajihan alias Alijan v. Bishwanath*, 18 C. 462. See also *Asjar Ali v. Troilokya Nath*, 17 C. 631 (F. B.). An application to amend a petition for execution, though not in the form required by law, but which when read with the original application supplies all the information, should be treated as a first application and allowed to proceed.—*Haridas v. Raj Kumar*, 53 I. C. 111.

Where the decree gives relief of a different character, separate and successive applications in respect of each relief may be made.—*Radha Kishen v. Radha Pershad*, 18 C. 515; *Sadho v. Hawal*, 19 A. 98 (F. B.). See also *Fulchand v. Bai Ichha*, 12 B. 98.

A decree-holder who has attached before judgment, and who is desirous of sharing in the distribution of sale-proceeds under S. 73 must make an application for execution under this rule.—*Pallonji v. Jordan*, 12 B. 400. An application, praying only for rateable distribution, is not sufficient for execution. The C. P. Code does not require rateable distribution as such. A decree-holder to obtain rateable distribution under S. 73 must make an application for execution praying for execution of his decree in one of the ways mentioned in this rule, before the receipt of assets by the Court.—*Balaji v. Gopal*, 25 N. L. R. 94: 116 I. C. 655: A. I. R. 1929 Nag. 148.

As to the right of the decree-holder's representatives to execute the decree without a certificate of heirship, see notes under Or. VII, r. 4.

A decree declared null and void against one of the parties to it, is not susceptible of execution against others.—*Parupati Nath v. Nando Lal*, 30 C. 718 (10 B. 338 and 25 M. 426 referred to).

**Continuance of execution proceedings after death of judgment-debtor.**—Execution proceedings already commenced continues after the death of the judgment-debtor by substitution of the name of the legal representative and no fresh application under this rule is necessary.—*Purushottan v. Rajbai*, 34 B. 142.

**Clause (i)—Execution against Benamdar.**—A decree cannot be executed against any one not a party to it, nor a representative of the judgment-debtor, on the ground that he is a *benamdar*.—*Jadu Nath v. Premmoni*, 14 C. W. N. 774.

**Execution against a transferee.**—The mere fact that the transferee from the judgment-debtor takes up the position of a representative of the judgment-debtor bound by the decree does not entitle the decree-holder to proceed against him in execution. *Semble*: In a suitable case the Court, even apart from the provisions of adding a party for purposes of execution, may have the power to allow execution against a transferee.—*Hem Chandra v. Annapurna*, 36 C. W. N. 93 : A. I. R. 1932 Cal. 423.

Where a transferee of the defendant's interest after decree of the first Court, not made liable under the decree, got himself impleaded in appeal as an appellant and contested in appeal and second appeal and the decree of the first Court was confirmed, *held* that the executing Court had no power to go behind the decree and so the decree could not be executed against the appellant transferee.—*Ishwar v. Ramrao*, 34 Bom. L. R. 948 : A. I. R. 1932 Bom. 462.

**Clause (a).**—The decree-holder is bound to state any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. Intentional omission to make such statement amounts to an offence under S. 193, I. P. Code.—*Queen-Empress v. Bapuji*, 10 B. 288 (2 M. 216 *followed*). See, however, *Shama Charan v. Kasi Naik*, 23 C. 971.

**Clause (g).**—If the decree awards interest and the application for execution specifies the interest from the date of the decree to date of application, execution may be ordered for future interest also up to the date of the sale, even though that is not specifically included in the application.—*Basanta v. Baikuntha*, 36 C. W. N. 404.

**Clause (j).**—Upon an application for execution of a decree for removal of a building the mode in which the assistance of the Court was required was stated to be by giving the decree-holder possession of his wall by pulling down the wall. *Held* that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court in the way provided by S. 260, C. P. Code, 1882 (Or. XXI, r. 32).—*Protap v. Peary*, 8 C. 174 : 9 C. L. R. 453.

**Execution in part.**—See notes to rule 15 under "Execution of Part of Decree."

**Conditional decrees—Mode of execution.**—The Code does not seem to provide for the execution of a conditional judgment. It deals with the  
made, the plaintiff,  
rt, which passed the  
Then, if and when.

such an order is obtained after determination of any objection of the defendant, application may be made in the usual way for execution of the order.—*Sudevi v. Sovaram*, 10 C. W. N. 306.

A conditional decree directed that if the defendant deposited the amount within three months he would be liable to pay interest at 12 per cent. (the claim was at 30 per cent.) and would be exempted from further liability. It was affirmed by the High Court and Privy Council. *Held* that the time for payment must be calculated from the date of the decree of the first Court and not from date of the Privy Council decree.—*Ghanshyam v. Ram Narain*, 31 A. 379.

Who may apply for execution.—A decree was passed in favour of a firm with the name of an agent. The application for execution was made by an agent other than the agent named. Such proceedings, however irregular, were not invalid.—*Lachman Bibi v. Patni Ram*, 1 A. 510.

The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person that he has taken the decree-holder's place.—*Jasoda Deye v. Kirtibash*, 18 C. 639.

What applications are "in accordance with law."—The following applications for execution have been held to be "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act.

By legal representative of a decree-holder without a certificate under Act VII of 1889.—*Balkishan v. Wagarsing*, 20 B. 76. See *Hafizuddin v. Abdool*, 20 C. 755 and *Adhar v. Lal Mohun*, 24 C. 778. So an application without probate.—*Hari Badani v. Gobinda*, 9 C. L. J. 382. By a representative of the decree-holder whose name is not brought on the record.—*Algirisamy v. Venkatachellapathy*, 31 M. 77. By a mere benamdar.—*Balkishan v. Bedmati Koer*, 20 C. 388 (4 B. L. R. Ap. 40; 14 B. L. R. 425-note; 19 W. R. 255, followed). But see *Denonath v. Lallit Coomar*, 9 C. 633; 12 C. L. R. 146, and *Gour v. Hem*, 16 C. 355.

An application for execution, made through mistake, against the minor's mother personally, and not as his guardian.—*Hari v. Narayan*, 12 B. 427.

An application for execution not accompanied by a copy of a decree.—*Ramachandra v. Lazman*, 31 B. 162; 8 Bom. L. R. 892 (28 M. 557 followed).

An application for execution by the party entitled to make it, although by mistake the deceased judgment-debtor is named as the person against whom execution is sought.—*Samia Pillai v. Chockalinga*, 17 M. 76.

An application in which there is non-compliance with certain formalities regarding execution is none the less an application in accordance with law; *Srinivasa v. Tirumalai*, 23 I. C. 99; 15 M. L. T. 337. Where the decree-holders have not expressly asked the Court to execute the decree of the appellate Court, yet they had mentioned that an appeal was preferred by the judgment-debtors and was decided in favour of the decree-holders; *held* that this amounted to an application to execute the appellate decree and not the decree of the first Court.—*Ekrum Hussain v. Mt. Umatul Rasul*, 9 P. 529; 129 I. C. 138; A. I. R. 1931 Pat. 27. Showing the date of the decree wrongly is an immaterial irregularity which does not affect the validity of the application.—*Volkart v. Achrajram*, 134 I. C. 1182; A. I. R. 1931 Sind 160.

An application for execution though not duly signed and verified by the decree-holder, but if it is actually signed and verified by the pleader in the original suit, is in accordance with this rule; *Hassan v. Ramchandra*, 31 Bom. L. R. 355; A. I. R. 1929 Bom. 196; 117 I. C. 526. An application signed and verified by a pleader who was acting as next friend to the minor plaintiff in the original suit and who signed it in the *bona fide* belief that the plaintiff was still a minor and whose act was subsequently ratified by the plaintiff when objection was raised by the judgment-debtor, held that the application is in accordance with law and not liable to dismissal.—*Madho v. Ghanaya*, A. I. R. 1930 Lah. 603.

Applications not "in accordance with law."—By a guardian of a minor who was major at the time of the application.—*Saramma v. Seshayya*, 28 M. 396. But see *Madho v. Ghanaya*, ante.

By the general attorney of a decree-holder at a time when he himself is resident within the jurisdiction of the Court executing the decree.—*Murari v. Umrao*, 23 A. 499. See also *Kasumri v. Beni*, 26 A. 19. But see *Bakar v. Udit*, 26 A. 154, and *Autoo v. Bidhoomookhee*, 4 C. 605.

An application against the judgment-debtor's surety while the judgment-debtor's application for declaration of insolvency was pending.—*Langtu Pande v. Baijnath*, 28 A. 387.

#### Irregularities.

presented execution was: rule not having been { within a week. The am. . . . . but after the expiry of three years, a fresh application was presented in due form with the defective application that was returned for amendment. Held that the execution was barred as the defective application was not made in accordance with law.—*Gopal Sah v. Janki Koer*, 23 C. 217 (explained in *Mathura v. Anurago*, 14 C. W. N. 481). See also *Asgar Ali v. Troilokya Nath*, 17 C. 631 (F. B.) (14 C. 124 overruled), where the application was defective in not complying with the provisions of r. 13. An application not properly verified was held to be a defective application.—*Raghunatha v. Venkatesa*, 26 M. 101. But see *Gopal Chunder v. Gosain Das*, 25 C. 594 (F. B.): 2 C. W. N. 556; *Rama v. Varada*, 16 M. 142; *Ramanadan v. Periatambi*, 6 M. 250; *Mahomed v. Abedoolah*, 12 C. L. R. 279; *Fuzloor Buhman v. Altaf Hossein*, 10 C. 541; *Jibhai Mahipati v. Parbhu Bapu*, 1 B. 59; *Hurry Charan v. Subayda*, 12 C. 161, and *Kalka Dube v. Bisheshar Patak*, 23 A. 162. In these latter cases it has been held that an informal application for execution filed within time, but not amended till after that time is not valid. . . . . the decree alive. An . . . . . is sufficient to save . . . . . The addition of sub-rule (2) in rule 17 has settled the point that where a defective application is amended it shall be deemed to have been presented on the date when it was first presented. A defective application thus amended will save limitation. See *Gnanendra v. Rishendra*, 22 C. W. N. 540; 27 C. L. J. 398; 44 I. C. 553; *Natesa v. Ganapathia*, 40 M. 949; 38 I. C. 136; *Kanji Mal v. Kedar Nath*, 49 I. C. 982. The law casts upon the Court a duty to ascertain if the application for execution is in order; if it is not, then either to reject it or to

allow it to be amended.—*Ganesh v. Fatteh Chand*, 55 I. C. 16; *Bhagwat v. Dwarka*, 74 I. C. 174: 2 P. 809: A. I. R. 1924 Pat. 23: (1923) Pat. 229. See notes to r. 17.

In considering an application for execution or not the substance and form of the application are to be considered. Where the application was not in accordance with the Rules of Practice but it was filed under Or. XXI, r. 11 with the main particulars required by the rule and the Court overlooked the want of form and passed an order granting the relief prayed for: *held* that the application was one in execution, (*per* Devadoss, J., *contra*, Jackson, J.)—*Abdul Salam v. Veerabhadra Raju*, 107 I. C. 298: A. I. R. 1928 Mad. 129 (34 M. 25 *dist.*). Where a tabular statement in accordance with Or. XXI, r. 11 was filed before the Master who issued notice to the other side, *held*, that it amounted to an application to the Court within the meaning of Art. 183 of the Limitation Act read in conjunction with S. 3 of that Act and that limitation was saved thereby.—*Atarmoni Dasi v. Bepin Behari*, 55 C. 1341: 115 I. C. 83: A. I. R. 1929 Cal. 193.

An application for execution to obtain relief not given by the decree is not an application in accordance with law, and does not keep the decree alive.—*Pandarinath v. Lala Chand*, 13 B. 237.

Where the moveable property of the judgment-debtor is outside the jurisdiction of the Court, an application in execution to sell such property is not an application in accordance with law, unless the application was made on a *bonafide* belief that moveable property did exist within the jurisdiction of the Court.—*Volkart v. Achrajram*, 134 I. C. 1182: A. I. R. 1931 Sind 160.

An application for execution, without specifying the proper mode in which the assistance of the Court is required, but asking the assistance of the Court in an improper mode, is not an application in accordance with law, so as to keep the decree in force.—*Muhammad Umar v. Kamila Bibi*, 4 A. 34. Where the application for execution was in form except that it did not describe the mode in which the assistance of the Court was required and it appeared that the object was to realise the decree amount by sale of property: *held*, that the application was valid in law so as to extend limitation.—*Ghanaya Lal v. Punjab National Bank*, 138 I. C. 249: A. I. R. 1932 Lah. 534.

An insufficiently stamped application for execution of a decree may suffice to keep the decree alive.—*Ramasami Ayyan v. Seshayyengar*, 6 M. 181.

An application for execution by attachment of the judgment-debtor's property was dismissed for non-payment of process-fees. *Held* that the application was in accordance with law, and kept the decree alive.—*Kerala Varma v. Shangaram*, 16 M. 452.

This rule is no bar to the maintenance of concurrent execution-Courts. The Court may allow amendment of the application for execution already filed by addition of other properties to the list.—*Ram Sumran v. Ram Bahadur*, 71 I. C. 741: 2 P. 329: 4 P. L. T. 99: (1923) P. 61: A. I. R. 1923 Pat. 224.

Where a decree was by mistake dated 16th February, 1929, instead of 11th February and the decree-holder being misled thereby, applied for execution the 15th February, 1932, *held*, *actus curiae neminem gravabit*, and

that the decree ought to be regarded as having been passed on the 16th February, 1929.—*Nalini Kanta v. Kamareddi*, 56 C. L. J. 185.

Omission to give the date of disposal of a prior application is not fatal, but omission to mention existence of cross-decrees may be fatal.—*Prosanna v. Jotindra*, 71 I. C. 1054.

**Validity of application—Burden of proof.**—The burden of proving that the application for execution is not time-barred and is in accordance with law is on the applicant.—*Volkart v. Achrajram*, 134 I. C. 1182 : A. I. R. 1931 Sind 160.

**12.** Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. [S. 236.]

## COMMENTARY.

**Scope.**—This rule refers to an application for attachment of moveable property belonging to the judgment-debtor, but not in his possession. Rules 43 and 45 prescribe the attachment of moveable property in his possession.

Where the father of a joint Hindu family was sued and a money-decree was passed and he having died his sons were brought on record and the plaintiff sought to attach the moveables belonging to the family in execution; held that in such a case it was not necessary for the decree-holder to put an inventory.—*Gopal Rao v. Hari Lakshman*, 31 Bom. L. R. 1291. See also *Bridichand v. Badesaheb*, 28 Bom. L. R. 1322 : 98 I. C. 941 : A. I. R. 1927 Bom. 52.

"Failure to annex inventory must be delivered into Court along with Yusoof, 7 C. 556, p. 559. See also *Dhonkal v. F* failure to annex an inventory with the application for execution makes it not in accordance with law under Art. 182, Limitation Act; *Abdul Rafi v. Maula Bakhsh*, 37 A. 527. See also 13 A. L. J. 706.

**13.** Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

Application for attachment of immovable property to contain certain particulars.

[S. 237, PARA. 1.]

**Alteration.**—The words, "the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers," have been added in Cl. (a) of this rule.

The amendment expressly lays down that in areas where settlement has been effected the numbers and boundaries in the settlement record shall be given.

**Any immoveable property.**—The decree-holder has the right to choose the property against which he will proceed.—*Raja of Kalahasti v. Venkatappa*, 27 L. W. 544 (F. B.); 109 I. C. 874; A. I. R. 1928 Mad. 713.

**Description of property and specification of interest.**—The intention of this rule is that the description should be sufficient to identify the property; and in the case of an estate paying revenue to Government, that there should be a specification of the revenue.—*Laek Ram v. Mohesh*, 12 W. R. 488.

A judgment-creditor is bound to specify the debtor's share or interest in the property sought to be attached to the best of his belief, or so far as he has been able to ascertain the same.—*Ardesir Nasarvanji v. Muse Natha*, 1 B. 601.

The specification required of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share, or the family property in which the judgment-debtor had an undivided share, which was sought to be attached, and should also specify what that family property was.—*Muhammad Husain v. Dib Chand*, 14 A. 190.

The effect of Or. XXI, rr. 13 and 14 plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien in his application for sale, and on the Court the duty of specifying the same in the proclamation, and in default the purchaser will purchase the property free of the mortgage. *Pratapa v. Subbarao*, 20 N. D. 388. *Manatha v. ...* 412. As *Giriya v. ...* 2. Gross negligence on the part of the decree-holder in describing that the whole field belonged to the judgment-debtor whose interest was only half, will entitle the auction-purchaser to realise by suit half the purchase money from the decree-holder.—*Dayaldas v. Shankar*, 27 N. L. R. 318; 134 I. C. 269; A. I. R. 1931 Nag. 116.

**Failure to give particulars.**—An application which does not contain the particulars required by this rule cannot be treated as "an application in



accordance with law " for the purpose of Art. 182 of the Limitation Act.—*Sakkar Gauda v. Bhimappa*, L. R. 1931 B. 143: 129 I. C. 159: 32 Bom. L. R. 1368: A. I. R. 1931 Bom. 138.

**14.** Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land, or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors. [S. 238.]

Power to require certified extract from Collector's register in certain cases.

### COMMENTARY.

**Alteration.**—Under the old section it was compulsory that the application should be accompanied by a certified extract. This restriction has been removed, and it has been left to the Court to determine whether such an extract should be asked to be produced.

**Certified extract.**—In attaching an estate paying revenue to Government, the attaching creditor must give also the special information required by this rule.—*Ajoodhya v. Sheo Pershun*, 11 W. R. 175. See also *Laek Ram v. Mohesh*, 12 W. R. 488.

It is unnecessary to specify in the sale notification the names of the *mouzas* included in the property sought to be sold. All that is necessary is to specify the estate or shares of estates, and the number they bear in the Collector's Office.—*Amirunessa v. Secretary of State*, 10 C. 63: 13 C. L. R. 131.

The circumstance that a sale-notification contains only the name of one, and not the recorded proprietors of a revenue-paying estate, does not amount to an irregularity.—*Secretary of State v. Rashbehary*, 9 C. 591: 12 C. L. R. 27.

In addition to the information required by Or. XXI, rr. 13 and 14, the area of a revenue-free tenure and the amount of an annual revenue should be stated in the application for attachment.

**15.** (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it,

Application for execution by joint decree-holder.

shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. [S. 281.]

### COMMENTARY.

**Alteration.**—This rule corresponds with S. 281, C. P. Code, with some changes. The words "unless the decree imposes any condition to the contrary," have been added in subrule (1). The addition seems to have been made in accordance with the principle laid down in 6 A. 69, noted below. The words "or his or their representatives" have been omitted, as this will be covered by the general clause (S. 146).

**Scope.**—The Code does not expressly lay down the rules as to the course to be pursued by the Court, if several persons who have rights in a decree all seek to execute it. Rule 15 provides for cases where a decree has been passed jointly in favour of more persons than one; *Arumpha v. Mangarhi*, 17 I. C. 323; 13 M. L. T. 227.

The deposit of pro-emption money in a suit for pre-emption within the time fixed by the Court is neither a proceeding in execution nor a step towards execution. Or. XXI, r. 15 does not apply to a deposit of purchase-money—*per Sulaiman, J.* [*contra* *Boys, J.*].—*Aurup v. Ram Harakh*, 51 A. 903; 1929 A. L. J. 1049; A. I. R. 1929 All. 953.

**Joint-decree.**—This means a decree passed in favour of two or more persons although their share or interest in the decretal amount or property may be different. When a suit is brought by a firm and the partners of the firm have not been disclosed, the decree in favour of the firm cannot be said to be a joint-decree. Consequently payment of the decree amount to a partner of the firm after dissolution of the firm operates as a valid discharge of the decree amount—*Yusuf Mahbub v. Sallah Mahomed*, 105 I. C. 809; A. I. R. 1928 Sind 37. A firm's name is only a method of writing in shorthand the names of all the partners and a decree in the name of the firm must be held to be a decree passed jointly in favour of all the partners. Consequently some of the partners can take out execution for the benefit of the remaining partners also.—*Abdul Hamid v. Dhanpat*, 131 I. C. 376; A. I. R. 1931 Lah. 507.

A joint-decree remains a joint-decree notwithstanding the acts of the decree-holder in realizing his money from one or more of the judgment-debtors separately.—*Wahed Ali v. Mullick Inayet*, 12 B. L. R. 500; 20 W. R. 31; *Sreenath v. Sahib*, 12 B. L. R. 604-n; 12 W. R. 305; *Krishna v. Ram Lochun*, 2 W. R. Mis. 49; *Gopal v. Ramanoogra*, 5 W. R. Mis. 9; and *Boghoonath v. Alladeen*, 8 W. R. 201; *Jugurnath v. Ahmedollah*, 8 W. R. 132; *Oudhbehari v. Broja Mohan*, 4 B. L. R. Ap. 41; 13 W. R. 129; and *Nunkoo v. Dhunesh*, 17 W. R. 497.

In the case of a joint-decree any arrangement made by the decree-holders amongst themselves or to their relative shares in the decree would not alter its character; *Indurjeet v. Mazum*, 6 W. R. Mis. 76; *Brijoo Coomar v. Ram Buksh*, 1 W. R. Mis. 1.

The term "joint-decree" is wide enough to apply to a case where the rights of the several parties have been determined by one and the same decree.—*Brichandra Chur Deo v. Shyam Kumari*, 11 P. 445; A. J. R. 1932 Pat. 251.

Application for execution of the whole decree by one of several joint-decree-holders.—Under ordinary circumstances all the decree-holders must join in the execution. Where some of the joint-decree-holders apply for execution, the application may be refused or granted at the discretion of the Court, which is bound to protect the interests of the absent decree-holder, but whether the Court does so or not, all recoveries in execution so made must be for the benefit of all the decree-holders.—*Shib Chunder v. Ram Chunder*, 16 W. R. 29. See also *Tara Sundari v. Beharilal*, 1 B. L. R. 28, and *A. J. Meik v. The Midnapur Zamindary Co. Ltd.*, 53 I. C. 803; *Arunachala v. Virappa*, 112 I. C. 410; A. I. R. 1928 Mad. 800. It is immaterial whether the judgment-debtors pay the whole or any portion of the amount into Court or outside the Court during the pendency of the execution application in the hands of the executing creditor; and the fact that one of the joint-decree-holders can apply with the permission of the Court for execution for his share does not stand in the way of his claiming by a suit his share of the amount realised by another decree-holder who executes the decree on behalf of all.—*Ibid.* See also *Gauri Shankar v. Kunwar Jang*, 2 Luck. 259; 97 I. C. 896; A. I. R. 1926 Oudh 605. So also a transferee of the interest of some of the joint-decree-holders ought to apply for the execution of the decree for the benefit of himself and others.—*Thima Reddi v. Subba Reddiar*, 49 I. C. 141; (1918) M. W. N. 507. The omission, on the part of an applicant for an execution of a joint-decree, to mention the names of the other joint-decree-holders and the interests which they have in the decree, is not such a defect as would be sufficient for holding that the proceedings are incomplete and therefore invalid. It is not obligatory upon the Court to issue a notice before making an order under this rule on the other joint-decree-holders of each case.—*Nawab Nuzhat-ud-dowla v. Beni Madhab*, 30 C. W. N. 562; 96 I. C. 692; A. I. R. 1926 Cal. 811; *Durga Das v. Dewraj*, 33 C. 306; 10 C. W. N. 297; 3 C. L. J. 112. It is nowhere laid down that the omission on the part of the decree-holder to state in his application the names of all the persons interested in the decree is such a defect as would invalidate the execution proceedings. It is so the discretion of the Court to give or not notice to the other decree-holder or to the judgment-debtor; nor is it for the judgment-debtor to raise any objection that sufficient steps have not been taken to safeguard the interests of the other decree-holders when they themselves have not made any complaint.—*Ghanaya Lal v. Madho*, 32 P. L. R. 290; A. I. R. 1931 Lah. 600; 135 I. C. 207. Although under rule 15 there is no duty cast upon the Court receiving the application for execution to examine the application in so far as the requirements of the rule are concerned and to have the defects remedied, it does not follow that if any requirements of rule 15 are not complied with by inadvertence or otherwise, the Court when its attention is drawn to the defect cannot allow amendment. The Court cannot allow amendment without infringing any rule at later stages even before the Court of appeal.—*Dharamdeo v. Jwala Prasad*, 28 A. L. J. 474; 122 I. C. 179; A. I. R. 1930 All. 188. It is not necessary to state in the execution application that it is being made for the benefit of all. The Court can impose conditions if necessary in the form of security or the Court may give notice to the other decree-holder either to ratify the action of the person applying or to join in the execution of the decree. The application for execution should not be dismissed on the ground

that the name of one of the decree-holders is not mentioned in it.—*Madho v. Ghanaya*, A. I. R 1930 Lah. 603. See also *Rameshwar v. Ram Ratan*, 13 P. L. T. 579. It has a discretion, and the other decree-holders ought to be heard before execution; *Umraht Nauth v. Chunder Kishore*, 21 W. R. 31 and *Ahmed Chowdhry v. Shahzada Khatoon*, 7 C. L. R. 537.

When one of several joint-decree-holders applies for execution on behalf of himself and the other decree-holders, and alone obtains leave to bid for the property and purchases it, the co-decree-holders are in equity entitled to recover their share of the property; *Kesri v. Ganga*, 33 A. 563 (F. B.); 8 A. L. J. 616.

Any one of several joint-decree-holders may, unless the decree imposes a condition to the contrary apply for execution of the whole decree; *Gajadhar v. Bindubashini*, 29 I. C. 181. In case of death of one of several joint-decree-holders, the other decree-holders may apply for execution for their own benefit and for the benefit of the representatives of the deceased joint-decree-holders; if any person claims to be brought on the record as the heir of the deceased, the Court should inquire into the matter and dispose of it according to law; *Bottamma v. Audinarayana*, 43 I. C. 1008; *Ganga v. Banwari Lal*, 34 A. 72.

**Execution against one of joint judgment-debtors.**—A decree-holder is entitled at his pleasure to execute the whole decree against any one of the joint judgment-debtors. A release of one judgment-debtor under a joint decree does not discharge the other judgment-debtors. When there has been a partial payment towards the decree by one debtor, the decree-holder is not entitled to ignore it and claim satisfaction of the whole against the other judgment-debtor. He may proceed for the balance; *Bhawani v. Darsan*, 14 C. L. J 354; 11 I. C. 450.

**Execution must be for the whole decree.**—Though one of several decree-holders may, with the permission of the Court, take out execution of a joint decree, the execution must be for the whole and not for any fractional share and the Court may admit the application after making proper orders for protecting the interest of other decree-holders.—*Thakoor Das v. Luckmeput*, 7 W. R. 10; *Jugjeebun v. Goluck Monee*, 22 W. R. 354; *Indro v. Mohinee*, 15 W. R. 159; *Ausemoonnessa v. Ameeroonnessa*, 22 W. R. 204; *Faez v. Sadut*, 23 W. R. 282; *Abid v. Munnoo*, Agra 183.

Where two out of several decree-holders petitioned the Court to execute their share of the decree, which was for possession and mesne profits, and the other decree-holders though they virtually joined in the application by signifying their consent and the original applicants declined to proceed with the execution of the decree for mesne profits; held that there was no application on the part of all the decree-holders to execute the decree for mesne profits nor any application by some of them for execution of the whole decree.—*Seetaput Roy v. Ali Hossein*, 24 W. R. 11.

**Application by one of several decree-holders for execution in respect of his share of the decree.**—A joint decree cannot be executed by one of the several joint-decree-holders in respect only of his share of the decree.—*Banarsi Das v. Maharani Kuar*, 5 A. 27 (1 A. 231, 4 A. 72, and 3 B. L. R. 114, followed); *Muthusami Ayyar v. Natesa Ayyar*, 18 M. 464; *Collector of*

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*Shahjahanpur v. Surjan*, 4 A. 72; *Dali Chand v. Bai Shivkor*, 15 B. 242; *Meik v. The Midnapur Zemindary Co. Ltd.*, 4 P. L. J. 575: (1919) Pat. 349: 53 I. C. 803. But if the decree specifically determines the extent of the share of each decree-holder, one among the joint-decree-holders may take out execution in respect of his share only.—*Hurriah v. Kali Sundari*, 10 I. A. 4: 9 C. 482 (P. C.): 12 C. L. R. 511 (followed in *Fazal v. Habib*, 7 I. C. 474: 61 P. R. 1910). A decree may sometimes become divisible and executable in part to the extent of such severance when by operation of law or by act of parties, the judgment-debtor has acquired the interest of one of the joint-decree-holders; *Periasami v. Krishna Ayyar*, 25 M. 431 (F. B.): 12 M. L. J. 166. Separate execution may be taken for costs; *Sukha Sindhu v. Jageswar*, 5 I. C. 480.

If all the decree-holders file a petition that they have no objection to executing the decree by one of them, then the decree may be executed at the instance of one only.—*Krishna Kishore v. Sukha Sindhu*, 10 C. W. N. 1000 (1002).

This rule of law which forbids an application for execution of part of a decree does not bar an application for all that remains due upon a decree where the rest has been previously satisfied.—*Tej Narain v. Ram Tunoo*, 12 W. R. 370. A judgment-debtor cannot be harassed by different applications for execution by different decree-holders for their respective shares of the decree amount. But if some of the joint-decree-holders apply to execute the decree in respect of a portion, making the other joint-decree-holders parties to the application, and these do not object to the giving up of the rest of the decree, the application is not liable to be dismissed. The judgment-debtors cannot however be harassed by any subsequent application for execution of the balance of the same decree.—*Gopendra v. Matilal*, 56 C. 12: 117 I. C. 677: A. I. R. 1928 Cal. 559.

When a decree is of a complex nature and grants different kinds of reliefs to be obtained by processes of different kinds, there is no valid objection to separate applications for partial execution of the decree.—*Ram Buksh v. Madat Ali*, 7 N. W. 9. See also *Johnson v. Madras Ry. Co.*, 28 M. 479: 15 M. L. J. 363.

"Unless decree imposes any condition to the contrary."—The provisions of this rule are not applicable to the case of joint-decree-holders whose decree is conditional on their joint performance of a particular act.—*Farzand v. Abdullah*, 6 A. 69.

Effect of payment by judgment-debtor out of Court to one of several decree-holders.—If a payment of a portion of the decretal amount is made by judgment-debtor *bona fide* to one of several joint-decree-holders and duly certified to the Court by the latter for the benefit of all the decree-holders, the other joint creditors cannot execute the decree for more than their share; *Taruck v. Divendro*, 9 C. 831: 12 C. L. R. 566. If such payment to one of several joint-decree-holders is not certified it cannot be regarded as made in satisfaction of the decree except for the purpose of determining what orders should be passed under this rule; *Sultan v. Savalayammal*, 15 M. 343. One of several joint-decree-holders is not competent to grant a full discharge of the decree out of Court, or to certify to the Court complete satisfaction of the decree, without the concurrence of the other decree-holders, though he may

certify satisfaction in respect of his own share therein.—*Lachman v. Chotur-  
bhuj*, 29 A. 252; *Moti Ram v. Honnu*, 26 A. 334. *Tomman Singh v. Lachmin*,  
26 A. 318; *Umrao v. Mukhtar Beg*, 45 A. 401: A. I. R. 1923 All. 494. 74  
I. C. 687: 21 A. L. J. 308; *Pitcholkuttiyo v. Doraiswami*, 47 M. L. J. 498:  
82 I. C. 688: A. I. R. 1925 Mad. 230. Although a payment to one of two joint-  
decree-holders of the whole decree amount does not, even when certified,  
absolve the judgment-debtor from liability to the other decree-holder, such  
decree-holder is not bound to proceed against the judgment-debtor, but he  
may sue the other decree-holder to recover his share.—*Somasundaram v.*  
*Krishnasamy*, 29 M. 183. See also *Arunachalo v. Viroppe*, A. I. R. 1928  
Mad. 800: 112 I. C. 410.

A payment to two out of three partners who are joint-decree-holders  
does not bind the third unless the former are his agents; *Mohomed Silor v.*  
*Nabikhan*, (1916) M. W. N. 471.

"Any one or more of such persons."—This includes persons claiming  
under such persons. A transferee of a decree within the meaning of r. 16  
below, is such a person; *Dwar Buksh v. Fotik*, 26 C. 250. The assignment  
of a personal decree does not require registration.—*A. Krishnayya v.*  
*T. Sriromulu*, 106 I. C. 485: A. I. R. 1929 Mad. 142.

Effect of payment to a joint-creditor.—The sum due upon a mort-  
gage was paid to one of the two mortgagees and he gave an acquittance  
without the knowledge of the other mortgagee, who now sued upon the  
mortgage. Held that the mortgage had been discharged and the plaintiff  
was not entitled to sue.—*Borber Moran v. Ramono*, 20 M. 461: 7 M. L. J.  
269. The payment to one of two joint mortgagees does not necessarily  
operate as a discharge of the debt to the other mortgagees; *Busoinara v.*  
*Rohamonnesso*, 38 C. 342: 13 C. L. J. 3. See also *Sitarom v. Shridhar*, 27  
B. 292 [25 M. 26 (39) referred to]; *Umesh v. Dinabondhu*, 21 C. L. J. 570.

Appeal.—An order under this rule allowing or disallowing one of  
several joint-decree-holders to execute a joint decree is a decree under S. 47  
and is appealable when the contest is between the decree-holder and judgment-  
debtor; *Lokshmi v. Ponnossa*, 17 M. 394. See also *Gooroo Dass v. Ram*  
*Runginee*, 17 W. R. 136; *Odhyo v. Mohadeo*, 17 W. R. 415. But where the  
contest relating to the execution of the decree is between the decree-holders  
themselves (and not between the decree-holders on the one side and the judg-  
ment-debtor on the other), no appeal lies against an order; *Rotonlal v. Bai*  
*Gulob*, 23 B. 623. Where four only, out of eleven joint-decree-holders, applied  
for execution, and no objection was raised by the judgment-debtor in the  
executing Court, which therefore passed no orders under this rule, held that  
he cannot contend in appeal that the executing Court's order allowing execu-  
tion is barred; *Yaramath Khan v. Amir-ul-umra*, 24 L. W. 711: 97 I. C.  
375: A. I. R. 1926 Mad. 1198.

Effect of application by one of several joint decree-holders on  
limitation.—See the amendments in the Limitation Act (IX of 1908) S. 182  
by the amending Act (IX of 1927).

Every application made by one or more out of several decree-holders  
is an application made in the interests of all, and every proceeding,





from being barred by limitation—*Surya Kumar v. Arun Chunder*, 23 C. 465 5 C. W. N. 767 (20 B. 343 and 22 A. 199 followed; 13 M. 236 and 17 M. 189 dissented from). But see *Pettasami v. Krishna Ayyan*, 25 M. 431 (F. B.), where it has been held that S. 7 of the Limitation Act, 1877, only applies where all the joint-decree-holders are under disability at the time when the period of limitation begins to run (29 C. 463 dissented from; 13 M. 236 and 16 M. 436 approved).

**Application for execution against some only of joint-debtors—**  
**Effect of.**—Where there has been a joint-decree against more persons than one an application for execution against some one or his representatives will keep the decree alive against all persons jointly liable under the decree.—*Subramanya v. Alagappa*, 30 M. 269; 2 M. L. T. 189; *Barada v. Nabin*, 11 C. L. J. 83; 14 C. W. N. 465. See also *Jogendra v. Rasik*, 2 C. L. J. 4-n; *Ramanuj v. Hinu*, 3 A. 517; *Krishnaji v. Murarrav*, 12 B. 48. But see *Harendra v. Sham Lal*, 27 C. 210.

Where a decree was passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously. — *Mohesh Chunder v. Mohun Lal*, 8 W. R. 80. See also *Mohesh Chunder v. Taramonee*, 9 W. R. 240; and *Stephenson v. Unnada*, 6 W. R. Mis. 18. But see *Wise v. Rajnarain*, 10 B. L. R. 259 (F. B.); 19 W. R. 30; *Khema Deba v. Kumola Kant*, 10 B. L. R. 259-n.; 10 W. R. 10; and *Hurkoo Singh v. Ram Kishen*, 6 W. R. Mis. 44.

**16.** Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Application for  
execution by  
transferee of  
decree.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. [S. 232.]

## COMMENTARY.

**Alteration and effect.**—The important changes in para. 1 are the addition of the words “or if a decree has been passed jointly in favour of two

or more persons, the interest of any decree-holder in the decree is"; and the omission of the words "if that Court thinks fit" which occurred in the old section. As to their effect, see below.

"Decree"—The word "decree" in para. 1 and proviso 1 of this rule includes a mortgage decree; *Sarju v. Thakur*, 42 A. 544: 58 I. C. 743; *Kudhai v. Sheo Dayal*, 10 A. 570. The second proviso is limited to money decrees only.

Where a decree is subsequently amended it is necessary that fresh notice is taken out under the first proviso to Or. XXI, r. 16. But where the irregularity is of a technical nature and does not affect the merits of the case it is cured by S. 99, C. P. C.—*Mammad v. Mugaseth*, (1930) M. W. N. 106.

"If transferred by assignment in writing or by operation of law."—The only persons competent to apply for execution under this rule are:

(1) The transferee of a decree under assignment in writing. A transferee under an oral assignment is not competent to apply; *Parvata v. Digambar*, 15 B. 307.

(2) The transferee of a decree by operation of law. Such a transferee includes the legal representative of a deceased decree-holder, the Official Assignee in the case of an insolvent decree-holder, or the purchaser of a decree at a Court-sale in execution of a decree against the decree-holder; *Gour Sundar v. Hem*, 16 C. 355. A transfer by operation of law means a transfer on death, or by devolution, or by succession.

(3) A transferee (under an assignment in writing or by operation of law) from any of the transferees mentioned in (1) and (2) above; *Amar v. Guru Prosunno*, 27 C. 488; *Ganga v. Yakub*, 27 C. 670.

This rule is intended primarily for those cases where the name of the applicant for execution does not appear as a decree-holder in the decree. It does not apply to a case where the applicant is one whose name is already in the decree as one of two brothers in whose favour the decree has been passed, and who claims on the death of his brother and the devolution of the brother's interest by survivorship to execute the decree as the sole surviving decree-holder.—*Rameshwar v. Ram Ratan*, 13 P. L. T. 579.

This rule does not recognise an equitable assignment of a decree. See *Mathurapore Zemindary Co. v. Bhasaram*, 51 C. 703: 28 C. W. N. 626: 39 C. L. J. 373: 80 I. C. 881: A. I. R. 1924 Cal. 661; *Malik Fazlul Rahman v. Must. Kokila*, 5 P. 511: 96 I. C. 446: A. I. R. 1926 Pat. 320.

Execution by transferee a matter of right.—The omission of the words "if that Court thinks fit" from the rule has an important effect. Formerly it was held that the Court had an absolute discretion to allow or refuse execution at the instance of the transferee (see *Shama v. Nobin*, 16 W. R. 283; *Krishna Mohini v. Kedarnath*, 15 C. 446; *Balkishen v. Belmati*, 20 C. 388; *Parvata v. Digambar*, 15 B. 307; *Chhagan v. Lakshman*, 31 B. 462; *Javermal v. Umaji*, 9 B. 179). The omission now makes it clear that the transferee can proceed with execution as a matter of right. It does not depend upon the discretion of the Court; *Asad Ali v. Haidar Ali*, 38 C. 13 at p. 21. A transferee of a decree must prove his right before he can be

allowed to execute; *Mohamed Bener v. Pichan*, 4 L. W. 534. The assignment of the decree is not affected by a subsequent order for attachment.—*Lakshminarayan v. Fair Chand*, 26 S. L. R. 158.

“The transferee may apply for execution of the decree”—Part transferee —“Transferee” does not mean only a transferee of the whole decree. It includes a transferee of a portion of the decree, and also where the decree is a joint one, the transferee of the interest of any one of the joint-decree-holders; *Kishore v. Goshwami & Co*, 17 C. 341; *Endeori v. Venkatachinnulu*, 33 M. 80; *Muthiah v. Gorindass*, 44 M. 919; 69 I. C. 337; *Muthunarayana v. Balakrishna*, 19 M. 306; *Jaswant v. Lajwanti*, 107 I. C. 603; A. I. R. 1928 Lah. 70; *Raja of Kalahasti v. Venkatasappa*, 27 L. W. 544 (P. B.); 103 I. C. 872 A. I. R. 1928 Mad. 713. This rule applies to the assignment of even a fractional interest in a decree; *Ram Sahai v. Madan Lal*, 48 A. 432; 24 A. L. J. 430; 98 I. C. 376; A. I. R. 1926 All. 346. But see *Mazhar Husain v. Amtul Riba*, 66 I. C. 679; A. I. R. 1922 All. 101, where it has been held that unless the whole interest be exhausted there is no transfer within the meaning of this rule. The words “transfer by assignment in writing or by operation of law” do not include the transfer of rights in a decree by means of a mortgage.—*Ibid*.

But a decree for payment of money and costs is one and indivisible, and the transfer of the right to realize costs only does not give any right of execution to the transferee; *Ram Chandra v. Abul*, 35 A. 264; 19 I. C. 301; *Ahmad Shah v. Faujdar*, 2 L. L. J. 1; 55 I. C. 983.

“Transferee” within the meaning of this rule does not mean a person to whom a party to a suit agrees to transfer any decree that may be passed in the suit, *Basroovittil v. Rama Chundra*, 17 M. L. J. 391.

The transfer of a decree under attachment is valid and the transferee is entitled to be substituted in place of the transferor and to apply under this rule for execution.—*Hazariram v. Kedar Nath*, 7 P. 726; 113 I. C. 673; A. I. R. 1929 Pat. 1.

An application for execution of the decree by an assignee, pending suit, of the rights of the plaintiff in whose favour a decree is subsequently passed, is not one made in accordance with law. The necessity for an assignment prior to an application for execution is one which the law, as embodied in this rule, requires, as a condition precedent; *Genaram v. Hanmantram*, 28 Bom. L. R. 761; A. I. R. 1926 Bom. 406; 96 I. C. 833.

Transfer of a decree by a decree-holder after insolvency cannot have any effect and the transferee cannot execute the decree.—*Periathambi v. Gundhunada*, 109 I. C. 832; A. I. R. 1928 Mnd. 360.

The assignee of a decree for arrears of rent (under the Bengal Tenancy Act) is not entitled to apply for execution of that decree even as a simple decree for money under the O. P. Code. The application is barred by S. 148, Cl. (c) of the Bengal Tenancy Act.—*Rahimuddin v. Jogendra*, 64 C. L. J. 596.

The assignee before decree of a certain property with a right to all arrears of rent is not entitled to apply under this rule for execution of the decree for rent subsequently passed (*Mathurapore Zemindary Co. v. Rhasaram*,

51 C. 703 followed).—*Prabashinee v. Rasiklal*, 59 C. 297 : A. I. R. 1932 Cal. 439. See the cases noted under heading "Assignment of Rent-decree," post.

**Sale of property does not give right of execution.**—If a decree-holder holding a decree for possession of immoveable property sells a portion of such property, the sale does not, without express provision to that effect, give the purchaser any right to execute the decree himself.—*Hansraj Pal v. Mukhrari Kunwar*, 30 A. 28 : 27 A. W. N. 280 (7 A. 107 referred to) ; *Vithal v. Mahadev*, 80 I. C. 249 : 26 Bom. L. R. 333 : A. I. R. 1924 Bom. 426 ; *Perumal v. Marukrithammal*, A. I. R. 1927 Mad. 240 : 98 I. C. 856 ; *Genaram v. Hanmantram*, 28 Bom. L. R. 761 : 96 I. C. 833 : A. I. R. 1926 Bom. 406.

The sale of a mortgaged property by the mortgagor does not entitle the purchaser to execute a redemption decree obtained by the mortgagor before the sale unless the sale-deed expressly includes the decree.—*Ahmed Shah v. Faujdar*, 55 I. C. 983. But when, in execution of a mortgage decree, the mortgaged properties were sold together with "all arrears of rent," the purchaser was held to be entitled to execute all decrees for rent obtained against the tenants of the mortgaged properties by the mortgagor ; *Ananda Mohan v. Promotha Nath*, 57 I. C. 874 : 25 C. W. N. 863. A purchaser of a portion of a mortgaged property, who subsequently purchased the mortgage-decree, was held entitled to execute the decree against the judgment-debtors personally as well as against the portion of their property in their hands.—*Nafer Chunder v. Baikanto Nath*, 4 C. L. R. 156.

**Pledge of decree**—This rule seems to recognise the validity of a pledge of a decree as security no less than the validity of its sale ; *Subbaraya v. Kuppusamy*, 1 I. C. 535 : 5 M. L. T. 278

Where a mortgagee mortgages his mortgage decree with specific provisions that the subsequent mortgagee should be competent to realise the sum of his mortgage by being made a party to the execution proceedings and should have full powers to withdraw the deposit made by the mortgagor-judgment-debtor and that if the original mortgagee failed to pay the money due within a certain period, the subsequent mortgagee would be competent to realize the sum due by bringing a suit against his borrower or by the execution of the mortgaged mortgage decree, the subsequent mortgagee has the decree assigned to him within the meaning of Or. XXI, r. 16.—*Nagendra v. Ambica*, 33 C. W. N. 958 : 50 C. L. J. 12 : A. I. R. 1929 Cal. 676.

**Transfer when takes effect and when complete.**—When a decree is transferred by an instrument in writing, such transfer takes effect from the date of the instrument, and not from . . . . . Court ; *Sadagopa v. Raghunatha*, 33 M. 62 : Nil . . . . . C. 54 : A. I. R. 1928 Sind 71. The transfer is complete when the assignment is in writing. It does not depend on the sanction of the Court ; *Subba Naicker v. Saminatha*, 5 M. L. T. 260 : 1 I. C. 353.

**Registration of assignment.**—Assignment of a personal decree against one defendant does not require registration, though in the same decree there is also a mortgage-decree against another defendant.—*Krishnayya v. Sriramulu*, A. I. R. 1928 Mad. 142. An assignment of a decree does not require registration when it has been incorporated in a decree and the assignment of a decree though it is one for possession of immoveable property is.

not equivalent to a transfer of property (23 C. 459; 35 A. 524, and 94 P. R. 1952 followed).—*Jawant v. Lajvanth*, A. I. R. 1928 Lah. 70; 107 I. C. 603.

**General rights and liabilities of transferee of a decree.**—This rule should be read with S. 49, which lays down the respective rights and liabilities of transferees and judgment-debtors. See notes *ante*.

A transferee cannot apply for a mere recognition of his right to execute the decree without asking for execution; *Alagappa v. Ramaswami*, 14 M. L. T. 513.

The assignment of a decree is one approved by law as contained in this rule and the transferee of a decree gains by the transfer the rights of the transferor.—*Fishnu Saktharam v. Krishnarao*, 11 B. 153.

The transferee of a decree for costs is entitled to realize the amount in execution of the decree and not by a separate suit.—*Ram Bakhsh v. Panna Lal*, 7 A. 457.

There is no provision of law to the effect that the assignment of a decree has no legal force until the assignee is brought on the record under the provision of rule 16.—*Co-operative Town Bank v. Raman*, 5 R. 595; 6 Bur. L. J. 221; A. I. R. 1928 Rang. 25; 106 I. C. 853.

**Assignment must be in writing.**—An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree; *Parvata v. Digambar*, 15 B. 307; *Ramanathan v. Sokkanatha*, 2 M. W. N. 559; *Ramanathan v. Ragavendra*, 16 I. C. 807.

As writing is essential in a transfer of a decree, a mere agreement to transfer, does not entitle the intended transferee to apply for execution.—*Jatindra Nath v. Peyerdeye Debi*, 43 I. A. 109; 43 C. 990 (P. C.); 24 C. L. J. 67; 20 C. W. N. 866; 34 I. C. 69; 18 Bom. L. R. 509; 14 A. L. J. 527; 31 M. L. J. 248.

If a liquidator has transferred a decree before the company is dissolved he may execute a written assignment for the purpose of this rule after dissolution and after he has ceased to be liquidator.—*Krishnaswami v. Andi Chetti*, 51 M. 691; 109 I. C. 563; A. I. R. 1928 Mad. 478.

As a transfer of a decree must be in writing a transferee under an oral assignment has no right to execute the decree. A person to whom a decree is agreed to be transferred is not a transferee. A transfer of property during the pendency of a suit, does not entitle the transferee to execute the decree unless he has taken steps to get himself substituted in the suit in place of his vendor, nor can an assignee of a property with all its future and back rent, execute a decree for rent subsequently obtained by the landlord when the decree itself has not been transferred.—*Mathurapore Zemindary Co. Ltd. v. Bhasaram*, 51 C. 703; 28 C. W. N. 626; 39 C. L. J. 373; 80 I. C. 881; A. I. R. 1924 Cal. 661.

A transfer of a decree by an unrecognised transferee is seldom objected to in practice and is recognized by the Courts as passing a good title.—*Mian Sahib Levtai v. Gopalai*, 33 I. C. 553. But if the transferee is not recognised by Court, the decree-holder on record can execute the decree in spite of the transfer; *Ari Chetty v. Theerthamalai Chetty*, 34 I. C. 791.

**Rights of transferee by operation of law.**—As to right of the representative of a decree-holder to execute the decree without a certificate of heirship, see notes under Or VII, r. 4, under the heading "Right to Execute Decree Without Certificate."

The words "by operation of law" cannot be invoked so as to make an assignment operative to transfer the decree and the right under it, which would upon the true construction of its terms, otherwise be inoperative in that regard. Where a person assigns all his property it may be taken that there is a valid assignment of a decree in his favour.—*Abdul Kader v. Daw Yin*, 128 I. C. 584; A. I. R. 1930 Rang. 308.

The succession of a son to the estate of his deceased father is succession or transfer by operation of law.—*Umasoondury v. Brojonath*, 16 C. 347. See also *Raghunatha v. Venkatesa*, 26 M. 101.

The right to execute a decree obtained by a Hindu widow, would not pass to her heirs or assignee, but would revert to her reversionary heirs.—*Hriday Kant v. Behari Lal*, 11 C. W. N. 239.

The representatives of the original decree-holders are transferees of the decree by operation of law.—*Purmanandas v. Vallab Das*, 11 B. 506; but a person, by being a decree-holder of the decree-holder, does not become a transferee of the decree-holder by operation of law; *Fazlul Rahman v. Musst. Kokila*, 5 P. 511; 96 I. C. 446; A. I. R. 1926 Pat. 820.

The holder of a certificate of administration under S. 7 of Reg. VIII of 1827 is a transferee by operation of law of a decree obtained by the deceased.—*Khandarav v. Ganesh*, 11 B. 368.

Where the estate of an insolvent is assigned to his surety, the surety is an assignee by operation of law.—*A. B. Miller v. Abinash Chunder*, 4 C. W. N. 785.

A person attaching a decree under Or. XXI, r. 53 is a representative of the decree-holder within the meaning of that term as used in S. 47, and in every case is entitled to enforce execution of the decree which he has attached.—*Peary Mohun v. Romesh Chunder*, 15 C. 371; and *Rangasami Chetti v. Periasami Mudali*, 17 M. 58. See also *Adhar Chandra v. Lal Mohun*, 24 C. 778.

A mortgage suit, even after an order absolute, is a pending suit up to the time of sale. An application for substitution, by legal representatives of the decree-holder, after order absolute for sale, but before actual sale, is governed by Or. XXII, r. 10, and not by Or. XXI, r. 16.—*Bhugwan v. Nilkanta*, 9 C. W. N. 171.

Certain persons sought to enforce a decree on the ground that they were transferees thereof by operation of law. The transfer was disputed and the matter was *sub-judice* in another suit. Held that the Court has discretion both under Ss. 232 and 234, C. P. Code, 1882, either to stay execution or dismiss the petition.—*Vakulabharana v. Rangaiayan Chetty*, 29 M. 357.

Application by transferee for execution must be to "the Court which passed the decree."—As to definition of "Court which passed the decree," see notes to S. 37.

It includes the Court, which by reason of a transfer of jurisdiction, has jurisdiction in respect of the subject-matter of the suit.—*Udit Narain v. Mathura*, 35 C. 974: 12 C. W. N. 859. But where after a decree was transferred to another Court for execution and the interests of the judgment-creditor vested in another person by operation of law he can apply for execution to the Court to which the decree was transferred and obtain afterwards a certificate from the Court which passed the decree; *Manorath v. Ambika*, 13 C. W. N. 533: 9 C. L. J. 443.

An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred for execution has no jurisdiction to entertain it.—*Amar Chundra v. Guru Prasunno*, 27 C. 498. See also *Manorath v. Ambika*, 13 C. W. N. 533: 9 C. L. J. 443 (14 W. R. 65, 5 Bom. L. R. 497, 9 B. 46, and 2 A. 293, referred to), *Sucha Singh, President v. Saran Das*, 132 I. C. 183: A. I. R. 1931 Lah. 499; *Prithvi Chand v. Satya Kinkar*, 11 P. 91: A. I. R. 1932 Pat. 168.

The Court to which a decree is transferred for execution has no power to entertain the transferee's application for rateable distribution under S. 73. Such application can be entertained by the Court which passed the decree.—*Tameshar Prasad v. Thakur Prasad*, 25 A. 443 (27 C. 488 and 16 A. 483 referred to) But see *Chathoth v. Saidindavide*, 26 M. 259.

Where an order of the Privy Council was transmitted by the High Court to the District Court as the Court which passed the first decree, the latter has jurisdiction to entertain an application made by an assignee and to allow him to execute the decree; *Krishna v. Raja of Vizianagaram*, 38 M. 832.

Proviso (1)—Notice of application shall be given to judgment-debtor and transferor.—The notice required by the first proviso to this rule is not notice of the assignment but notice of the application for execution of the decree; *Musst. Bhagwanta v. Dewan Zamir*, 3 P. 596: 78 I. C. 766: A. I. R. 1924 Pat. 576. The provision as to notice is imperative and no execution by the assignee can proceed unless notice has been served both upon the judgment-debtor and the transferor. Notice upon the judgment-debtor alone is not enough; *Sreenath v. Achutananda*, 11 C. L. J. 354: 6 I. C. 262. If execution is issued without notice, the proceedings in execution are void; *Gulzarilal v. Daya Ram*, 9 A. 46; *Musst. Gulab v. Syed*, 6 P. L. J. 358; *Notan Das v. Lachhman*, 2 L. 230: 63 I. C. 884; and all subsequent proceedings dependent upon them; *Abdul Samad v. Kamaruddin*, 131 I. C. 171: (1930) M. W. N. 1187: A. I. R. 1931 Mad. 192; *Umamoyee v. Jatan Bewa*, 54 C. 624: 105 I. C. 193: A. I. R. 1927 Cal. 781. The object of the notice is to enable the transferor and the judgment-debtor to raise such objections regarding the assignment as may be available to them; *Sheo Prasad v. P. E. Lall*, 4 P. 120: 86 I. C. 564: A. I. R. 1925 Pat. 449. See also *Brajabashi v. Manik*, 31 C. W. N. 921: 104 I. C. 4: A. I. R. 1927 Cal. 694; *Kussum Goolum v. Dayabhai*, 36 B. 58 and *Partap Singh v. Gurdutta Mal*, 39 I. C. 952. A notice under S. 158, B. T. Act, will not dispense with the necessity of a notice under this rule.—*Maharaja Sir Rameshwar Singh v. Harihar Jha*, 57 I. C. 250. But if no objection be taken in prior execution proceedings, the judgment-debtor cannot plead want of notice under this rule when a subsequent execution is proceeding.—*Brajlat Martwari v. E. M. Atkinson*, 5 P. L. J. 639: 57 I. C. 707. Notice or



application for execution and not of transfer is to be given. So where during the pendency of an execution proceeding, the assignee applies for continuance of the execution, he does not apply for fresh execution and no notice is necessary.—*Golab Kuer v. Mohammad Zaffar Hassan*, 62 I. C. 30. The provisions of this rule are mandatory and non-compliance with them renders the proceedings void.—*Notan Das v. Lachhman* noted above and *Ramdeo v. Frank Combs*, 117 I. C. 614: A. I. R. 1929 All. 437. In the latter case it was held that where the first mortgagee sued the mortgagor and the second mortgagee and got a decree for sale, the second mortgagee was a judgment-debtor within the meaning of r. 16 and so a failure to serve notice on him would make the whole execution proceedings void. On appeal however it was held that the omission to issue notice to the subsequent mortgagee is not sufficient for holding the auction-sale invalid as against the mortgagor. The result of the omission is that the auction purchaser only acquires the right of the mortgagor.—*Ram Deo v. Frank Combs*, 129 I. C. 445: A. I. R. 1930 All. 627: 28 A. L. J. 1265.

The notice required by this rule need not be in writing; *Musst. Bhagwanta v. Dewan Zamir*, noted *ante*. The Official Receiver represents an insolvent decree-holder. So he is entitled to notice under this rule and he is also entitled to object to the execution on the ground that he never had any notice of the transferee-decree holder.—*Periathambi v. Gundhunada*, 109 I. C. 832: A. I. R. 1928 Mad. 360.

A notice under this rule can be issued only by the Court which passed the decree. An application for transmission of the decree for execution can be treated as an application for execution.—*Nando Lal v. Chutterput*, 29 C. 235.

Where on an application by the transferee of a decree to have his name substituted, an objection is taken by the judgment-debtor, the judgment-debtor will be precluded from transferring, on an application by the transferee for execution of the decree; *Taj Singh v. Jagan Lal*, 38 A. 289; *Dwarka Das v. Muhammad*, 47 A. 86: 80 I. C. 722: A. I. R. 1925 All. 117.

Where the judgment-debtor is dead, no such notice can be sent until his representatives are brought on record.—*Mahalinga v. Kuppanachariar*, 30 M. 541: 17 M. L. J. 485. Notice of the transfer may be served on the legal representatives of the deceased judgment-debtor.—*Khushrobbhai v. Hormazsha*, 11 B. 727.

A decree is not a "debt" within the meaning of that word as used in S. 131, Transfer of Property Act (IV of 1881), so as to make a transfer thereof void without express notice. When a decree is assigned, a notice under this rule is sufficient.—*Dagdu v. Vanji*, 24 B. 502. See also *Afzal v. Ram Kumar*, 12 C. 610.

Proviso (1)—"Objections" to be heard before attachment.—Upon an application by a judgment-debtor's obj. ed before hearing the judgment-debtor's obj. illegal and should be set aside.—*Rasum v. ...*, 12 A. 913.

The fact that when notice under Or. XXI, r. 16 was given to the judgment-debtor of the application for execution, he failed to file any

objections as to its executability before the decree was transferred for execution, does not prevent him from raising an objection to the right of the transferee of the decree to execute the decree before the Court to which the decree has been transferred for execution, *Ram Sural v. Satruhan*, 101 I. C. 616; 8 P. L. T. 167; A. I. R. 1927 Pat. 170 (12 C. L. J. 312 distinguished).

The judgment-debtor cannot plead an uncertified adjustment in opposition to an application under this rule by the transferee-decree-holder.—*Subramanyam v. Ramaswami*, 137 I. C. 28 (F. B.); (1932) M. W. N. 190; A. I. R. 1932 Mad. 372 62 M. L. J. 562.

**Benamdar**—Where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer, and that the transferee named therein was a mere benamdar for him, can apply for execution of the decree under the terms of Or. XXI, r. 16, *Gurdial v. Gurbakhsh*, 8 L. 35; 100 I. C. 515; A. I. R. 1927 Lah. 110; *Palaniappa v. Subramania*, 48 M. 553; A. I. R. 1925 Mad. 701; 48 I. C. 409 (dissenting from 21 M. 388 and 5 C. L. R. 253); *Official Receiver v. Lalchand*, 119 I. C. 542; A. I. R. 1930 Sind 1; *Chellam Chetti v. Seeni Chetti*, 43 I. C. 801; (1918) M. W. N. 226; 7 L. W. 201. But it has been held also to the contrary that a true owner can execute a decree obtained in the name of his benamdar.—*Nil Kanta v. Ram Chand*, A. I. R. 1928 Cal. 835; 114 I. C. 495 (dissenting from 48 M. 553 and following 5 C. L. R. 253). See in this connection *Bada Kristam v. Duvvada*, 105 I. C. 405; 53 M. L. J. 668; A. I. R. 1927 Mad. 903. If the transferee is a benamdar for one of the judgment-debtors, he cannot execute; *Ramanaya v. Krishnamurthy*, 19 M. L. T. 124; *Mohamad Rowther v. Pichai Rowther*, 35 I. C. 624; *Gian Chand v. Sunder Das*, A. I. R. 1926 Lah. 666.

But the absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his right to execute the decree provided the assignment is not a sham transaction; *Thimma Reddi v. Subba Reddiar*, 49 I. C. 141; *Rami Reddi v. Venkatanarasimhulu*, 109 I. C. 617; A. I. R. 1928 Mad. 458; *Venkataramanujamma v. Chinna Venkata*, (1932) M. W. N. 326; A. I. R. 1932 Mad. 327.

It is permissible for the Court to enquire, if a transferee is a benamdar for the judgment-debtor. If the transferee is found to be a benamdar for a judgment-debtor, the Court is bound to refuse execution in his favour; *Gurditta Mal v. Partab Singh*, 54 I. C. 944; *Gurdial v. Gurbakhsh*, 8 L. 35; 100 I. C. 545; A. I. R. 1927 Lah. 110; *Surjan v. Tegh Bahadur*, 131 I. C. 229; A. I. R. 1931 Lah. 545.

But a purchase by a pleader of the judgment-debtor, in the name of his wife, does not satisfy the decree and release the judgment-debtor from liability, although the pleader holds the decree assigned to him in trust for his clients and if called upon by his clients to do so, is bound to assign the decree to them, on equitable terms; *Nagendra Bala v. Debendra Nath*, 22 C. W. N. 491; 27 C. L. J. 388. A benamdar may otherwise be permitted to execute the decree; *Lall Dwarka Das v. Burma Railways Co.*, 62 I. C. 299.

**Award.**—A transferee of an award filed in Court under the provisions of the Arbitration Act, 1899, is entitled to apply for execution under this rule; *Gladstone Wyllie & Co. v. Joosub*, 27 C. W. N. 666: 77 I. C. 863: A. I. R. 1924 Cal. 117.

**Proviso (2)**—"Decree for the payment of money."—The second proviso applies only to decrees for money personally due by two or more persons, and it does not apply to mortgage decrees.—*Lalla Bhagun v. Holloway*, 11 C. 393. See also *Laldhari v. Manager, Court of Wards*, 14 C. L. J. 639: 16 C. W. N. 132: 12 I. C. 70; *Jagabandhu v. Haladhar*, 27 C. L. J. 110; *Chidambara v. Subbarayar*, 49 M. 508: 93 I. C. 58: A. I. R. 1926 Mad. 623. The phrase "a decree for payment of money" means a personal decree for the payment of money by two or more defendants jointly. The proviso does not extend to a decree against the estate of a deceased person, where the personal liability of the representatives is to be determined by the Court.—*Panachand v. Sundarabai*, 31 B. 308: 9 Bom. L. R. 409.

**Proviso (2)**—Effect of transfer of money-decree against two or more persons to one of them.—The proviso does not make an assignment of a decree in favour of one of several judgment-debtors invalid in law. It only provides that the transferee is not entitled to enforce his rights by execution.—*Arumugha v. Yagamba*, 17 I. C. 323: 13 M. L. T. 227. See also *Annabattula v. Annabattula*, 28 I. C. 906. The proviso is one of procedure only and does not create either rights or liabilities.—*Abdul Kader v. Daw Yin*, 128 I. C. 594: A. I. R. 1930 Rang. 308. The proviso does not mean that a judgment-debtor purchasing a decree will have no relief against his fellow judgment-debtors. It provides that he shall not execute the decree against the others. The proper procedure would be to bring a suit for contribution, for if execution was allowed, a purchasing judgment-debtor might execute the whole decree against one of his fellows who might then purchase it and execute the whole against another and so on; *Ram Lal v. Khiroda*, 18 C. W. N. 113; *Anant Vinayak v. Nagappa*, 32 B. 195, p. 197. See also *Kalyan v. Damber*, 6 A. L. J. 564: 2 I. C. 626. There is a distinction between purchase of the whole decree and purchase of a *partial* interest. When one of several joint judgment-debtors, acquires the position of a decree-holder in respect of the whole judgment-debt, by operation of law or by transfer, the effect is to extinguish *pro tanto* the liability of other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has acquired.—*Banarsi Das v. Maharani Kuar*, 5 A. 27 (7 W. R. 136: 25 W. R. 343: 9 W. R. 230: 6 N. W. P. H. C. R. 1, referred to). See also *Kudhai v. Sheo Dayal*, 10 A. 570 (followed in *Fazal v. Habib*, 61 P. R. 1910: 7 I. C. 474), and *Pogose v. Fukurooddeen*, 25 W. R. 343.

**Rule 16** prohibits the execution of a decree by one judgment-debtor against another, but where by an agreement between the decree-holder and some of the judgment-debtors it was settled that the decree-holder should pay the amount to amount in advance

**Substitution of name of assignee In execution proceedings not**  
**in the Code which renders necessary the**  
**of an assignee or legal representatives for**  
**proceedings; all that this rule provides is that**  
**an assignee should apply for execution of the decree and that his name should**  
**be brought on the record; Monmotho v. Rakhal, 10 C. L. J. 396. See also**  
*Jogendra v. Shyam*, 36 C. 543; *Syud Nadir v. Pearoo*, 19 W. R. 255; *Shama v.*  
*Nobin*, 15 W. R. 283; *Javermal v. Umaji*, 9 B. 179; *Sailendra v. Surendra*,  
 57 C. 1137; 34 C. W. N. 437; 129 I. G. 572; A. I. R. 1930 Cal. 614.

**Record decree-holder entitled to proceed.**—The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it is shown that another person has taken his place as assignee; *Jasoda v. Kirtibash*, 18 C. 639; *Khettur v. Ishur*, 11 W. R. 271; *Monmotho v. Rakhal*, noted above; *Gopi Chand v. Mehr Chand*, 134 I. C. 194; 31 P. L. R. 961; A. I. R. 1931 Lah. 116.

**Fresh attachment not necessary.**—If at the date of the assignment of a decree the judgment-debtor's property is already under attachment in execution of the decree, a fresh attachment by the assignee is not necessary; *Hafiz Suleman v. Abdullah*, 16 A. 133 (12 B. L. R. 411 referred to).

**Fresh application not necessary.**—It is not necessary for an assignee of a decree to present a fresh application if the execution initiated by the transferor is pending at the time of transfer; *Monmotho v. Rakhal*, 10 C. L. J. 396, p. 400.

**Decree-holder dying pending execution—Legal representatives must apply for execution afresh.**—There is no rule of law which enables the legal representatives of a deceased decree-holder to apply for mere substitution of names. He must apply, whenever he does apply for fresh execution, in the usual form of ten columns, when his predecessor's application is pending; *Akhoy v. Surendra*, 30 C. W. N. 735; 96 I. C. 378; A. I. R. 1926 Cal. 957; *Day Nath v. Ram Bharos*, 49 A. 509 (F. B.); 104 I. C. 116; A. I. R. 1927 All. 165; *Mirza Mahammad v. Sajjad Mirza*, 3 Luck. 126; A. I. R. 1928 Oudh 30; 105 I. C. 611. An application made by one of them takes effect in favour of all—*Ibid.* An application for substitution of names in place of the original decree-holder and for continuance of the execution proceedings is a step-in-aid of execution.—*Mohan Singh v. Jagat Singh*, 50 A. 621. 109 I. C. 412; A. I. R. 1928 All. 299; 26 A. L. J. 417.

Where after the decree is transferred, the decree-holder dies, the legal representatives may apply to the executing Court for carrying on the proceedings and may subsequently produce from the Court which passed the decree the necessary order under this rule. But the failure or omission of the legal representatives to produce such an order from the Court which passed the decree at the moment of his application to the executing Court does not entirely vitiate his application to that Court. Where the executing Court ordered substitution in spite of the objections raised by the judgment-debtor, but no appeal was preferred as against the order; held, that the validity of the order for substitution could not be raised in a subsequent application for execution.—*Sailendra v. Surendra*, 57 C. 1137; 34 C. W. N. 437; 123 I. C. 572; A. I. R. 1930 Cal. 614. See also *Kacharabhai v. Kacharabhai Vadilal*, 134 I. C. 720; 33 Bom. L. R. 818; A. I. R. 1931 Bom. 423. But a Full Bench of the Madras High Court has held that the legal representative of a decree-holder who died during the pendency of an execution petition filed by him, can be substituted in his place and be allowed to continue (50 M. 1 overruled; 60 M. L. J. 628 approved).—*Venkatachalam v. Ramaswami*, (1931) M. W. N. 1209 (F. B.); 34 L. W. 866.

**Right of assignee to sue for refund of price or for declaration of right.**—A suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. Section 47 is no bar.—*Bomanapati v. Chintakunta*, 26 M. 264 (14 M. 478 referred to).

An assignee of a decree who was refused execution is entitled to sue his assignor to recover the amount paid by him for his assignment; *Ramasami v. Basavarappa*, 16 M. 325. The assignee is also entitled to sue for the cancellation of the order refusing execution and for a declaration of his right to execution. Such a suit is not barred by S. 47.—*Raman v. Muppil*, 14 M. 478. Where an application by the transferee was dismissed on the ground that his purchase was *bona fide* for some of the judgment-debtors, he was entitled to bring a separate suit for a declaration of his right to execute the decree.—*Haloikar v. Harasoband*, 12 C. 105. See also *Shoray v. Aminuddin*, 20 A. 539, and *Ram Bahadur v. Panna Lal*, 7 A. 457. But no suit will lie to establish a right to execute a decree when an order dismissing an application under this rule has been allowed to become final.—*Imanatullah Khan v. Sardha Prasad*, 29 A. 613; 3 A. L. J. 429; (1906) A. W. N. 133 (20 A. 533 distinguished). See also *Kunhammad v. Ariad*, 16 M. L. J. 27.

A transferred a decree to B, who recovered part of the amount due under it, and was prevented from recovering the balance by an attachment in execution of a decree against A. Held that A was liable to pay compensation to B.—*Puthandi v. Acalil Meidin*, 20 M. 157.

A suit brought for a declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same in his own name had been really purchased by the plaintiff for his own benefit is not barred by S. 47.—*Gour Mohan v. Dino Nath*, 2 C. W. N. 76. See also *Sethurayar v. Shanmugam Pillai*, 21 M. 353.

**Appeal.**—A transferee of a decree is a representative of the decree-holder; hence an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment-debtor is a decree and appealable as such; *Subbuthayammal v. Chidambaram*, 25 M. 383; *Ganga Das v. Yakub*, 27 C. 670; *Harditta v. Nigahais*, 4 L. L. J. 259; A. I. R. 1922 Lah. 396; *Badri Narain v. Jai Kishen*, 16 A. 483; *Tameshar v. Thakur*, 25 A. 443.

**Step-in-aid of execution.**—The mere issue of a notice under this rule does not operate as a step-in-aid of execution within the meaning of Arts. 182 and 183 of the Limitation Act.—*Monohar Das v. Fulleh Chand*, 30 C. 979. But see *Mohan Singh v. Jagat Singh*, 50 A. 621; 109 I. C. 412; A. I. R. 1923 All. 299; *Pitam Singh v. Jota Singh*, 29 A. 301; *Mahalinga v. Kuppanachariar*, 30 M. 541; *Annamalai v. Ramaier*, 18 M. L. J. 24.

**17.** (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application

in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. [S. 245.]

### COMMENTARY.

**Alteration.**—This rule corresponds to S. 245, C. P. Code, 1882, with some changes.

**Sub-rule (1).**—The words "*may allow the defect to be remedied*" have been substituted for the words "*may allow it (application) to be remedied.*" The last sentence of the old section, viz., "*If the application be not so amended, it shall be rejected,*" has been omitted. Sub-rule (1) states the procedure that a Court should adopt on receiving an application for execution and empowers the Court to reject the application if not properly drawn up or to allow the defect to be remedied. Where an application is not signed, it should not be rejected but should be allowed to be amended; *Chowdhuri v. Monmohini*, 1 P. 149 : 69 I. C. 200 : A. I. R. 1922 Pat. 409; *Ganesh Das v. Fattah Chand*, 2 L. L. J. 104 : 55 I. C. 16. The Court has an option under Or. XXI, r. 17 either to reject the application or to allow the defect to be remedied within a time to be fixed by it. If it rejects the application, the order is not illegal; *Sankaran Nair v. Ambu*, 49 M. L. J. 699 : A. I. R. 1926 Mad. 260 : 92 I. C. 109. It was held in *Pitchayya v. Ankineedu*, A. I. R. 1924 Mad. 367 : 76 I. C. 750 : 45 M. L. J. 651, that where an application for amendment is filed after the expiration of 12 years provided by S. 48, the Court may accept it or reject it.

**Order XXI, r. 17** does not contain anything to prevent the amendment of an application for execution after it is filed, by correcting a statement therein to the effect that the transferee had become entitled by succession and substituting the statement that he had become entitled by survivorship, with the object of making a succession certificate unnecessary (17 C. 631 (F. B.) distd.).—*Nauranglal v. Charubala*, 36 C. W. N. 618.

The Court is competent at any time before the execution proceedings terminate and before the decree becomes barred by limitation, to allow the decree-holder whose application for execution is pending, to amend his application by addition of the name of the other executor also where originally he named only one of two executors as his judgment-debtors by a *bona fide* mistake (2 P. 328 fold).—*Brajasunder v. Radha Prasad*, 11 P. 508.





preclude questions of validity being raised at subsequent stages.—*Abdul Kharim v. Lakshmanaswami*, 27 L. W. 475; 112 I. C. 36; A. I. R. 1928 Mad. 440. See also *Pitambar v. Damodar*, 53 C. 664; 30 C. W. N. 918; 98 I. C. 166; A. I. R. 1926 Cal. 1077.

A decree-holder applied for execution of a decree, and the Judge ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was passed. Subsequently the applicant prayed for leave to make the amendment, which prayer was granted. Held that the order of the Judge granting leave to amend was not *ultra vires* under this rule.—*Kaminy Mohun v. Gopal*, 8 C. 479 : 10 C. L. R. 519. Where an application is returned by the Court for amendment and is re-presented long after the time allowed for that purpose, the case does not fall within Or. XXI, r. 17 (2) (26 M. 101 : 12 M. L. J. 435 followed).—*Sangiliya v. Muthu*, 34 L. W. 546 : 61 M. L. J. 516. An execution application, which is neither signed nor verified by the decree-holder, but which is signed by his *vakil*, who however, does not profess to be acquainted with the facts of the case, is not in accordance with law within the meaning of Art. 182 of the Limitation Act, and consequently does not save limitation.—*Ibid.*

A decree-holder made several applications for execution giving a wrong date of the decree in each. On the third application the judgment-debtor objected that the application was barred. The application was allowed to be amended, but the amendment took place after the expiry of the period of limitation. Held that the amendment would relate back to the preceding applications, and the execution of the decree was not barred.—*Jivat Dube v. Kali Charan*, 20 A. 478; *Gnanendra v. Rishendra*, 22 C. W. N. 540; 27 C. L. J. 398; *Maheswaran v. Velappa*, A. I. R. 1928 Mad. 24; 107 I. C. 303; 54 M. L. J. 154; 27 L. W. 796.

has been registered, no amendment is to file a fresh list of properties against is not an amendment of the execution petition; *Chaurasi v. Bhagan*, 2 P. 787 : 74 I. C. 144. The Court can, so long as the decree is alive, allow an amendment of an execution petition which is still pending by the addition of other properties to the list of properties sought to be attached.—*Ram Sumran v. Ram Bahadur*, 2 P. 328 : (1923) P. 61 : A. I. R. 1923 Pat. 224 : 71 I. C. 741. The principle upon which amendments of pending execution petitions are allowed is based upon the fact that if the amendment had been entered before the execution could have been entertained or if the amendment was filed; an application for amendment of the execution made after the decree sought to be executed had become barred by limitation cannot be entertained.—*Jagannath v. Chamu*, 8 P. 462 : 119 I. C. 411 : A. I. R. 1929 Pat. 407. But the Madras High Court has held that rule 17 does not take away the power of the Court to allow amendment of execution petition at any time before final disposal and that an amended application must be deemed to have been in accordance with law when it was presented, though the amendment was made after the period of limitation; *Pitchayya v. Ankrneedu*, A. I. R. 1924 Mad. 367 : 45 M. L. J. 651 : 76 I. C. 750.

An order for amendment may be made when the defect in the execution application is brought to the notice of the Court. It is not as if the amendment can be ordered by the Court only when the application is presented

and not at any subsequent date (22 C. W. N. 510 *folld.*)—*Sheojobind v. Kishunbasi*, 13 P. L. T. 318 Where an application for execution of a decree was presented against the judgment-debtor who, it was subsequently ascertained, was dead at that time, and with the permission of the Court the application was amended by substituting the name of the legal representative and at the time of the substitution more than three years had elapsed from the date of the decree: *held*, that the effect of the amendment was to treat the application as presented on the date when it was presented and the application was not barred by limitation.—*Ibid.*

**Value of property attached shall correspond with decretal amount.**—Under this rule the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been passed; *Saadatmand v. Phul Kuar*, 25 I. A. 146; 20 A. 412 (P. O.); 2 C. W. N. 550. See also *Madarsah v. Palaniappa*, 23 M. 629; *Sirasami v. Ratnasami*, 23 M. 569, *Sunderabai v. Bapuna*, 116 I. C. 65; A. I. R. 1929 Nag. 305

See notes to Or. XXI, r. 66

If the order for attachment is wrong and excessive the attachment actually put is not null and void or without jurisdiction; *Sorabji v. Govind*, 16 B. 91 (114).

**Execution of declaratory decrees.**—Execution cannot be obtained on a merely declaratory decree.—*Muniyan v. Periya*, 1 M. H. C. R. 184; *Jeora v. Thakore*, 2 N. W. P. 303; *Tata Chariar v. Singara Chariar*, 4 M. 219. See, however, *Kishore Bun v. Dwarkanath*, 21 I. A. 89; 21 C. 784 (P. C.).

A decree, so far as it is a mere declaratory decree, cannot be enforced in execution.—*Janakiram v. Thiruvet Kodu*, 2 M. L. T. 94 (5 B. 80; 3 M. I. A. 359; 23 M. 299, and 18 C. 448 (P. C.), *referred to*).

A declaratory decree cannot be executed in a Revenue Court; *Anupa Kuar v. Achhaibar*, 37 A. 97; 26 I. C. 697.

**Execution of rent decrees.**—A landlord who has obtained a decree for arrears of rent of an under-tenure is at liberty to execute the decree in the ordinary manner against the person or other property, whether moveable or immovable, of his judgment-debtor. He is not restricted by the provisions of the Bengal Tenancy Act to executing such decree in the first instance by sale of the under-tenure.—*Fotick v. Foley*, 15 C. 492 (14 C. 14 *explained*); *Tariniprosad v. Narayan*, 17 C. 301; *Bhabani v. Pratap*, 8 C. W. N. 575; *Sourendra v. Surnomoyi*, 26 C. 103; 3 C. W. N. 38 (*folld.* in *Aosub v. Bisseshuri*, 8 C. L. J. 554).

**Execution of maintenance decrees.**—If in a maintenance decree property is charged with payment of the allowance, to make a fresh suit unnecessary in case of default in payment of the instalments, a Receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance to take possession of the estate and sell the same, and out of the sale-proceeds to pay the allowance for maintenance.—*Hemanginee v. Kumode*, 26 C. 441. See also the following cases: 2 B. 494; 9 B. 108; 9 A. 33; 19 C. 139 (F. B.); 10 M. 283 (F. B.); 16 A. 179; 22 C. 903; 2 C. W. N. 33; 12 B. 65 and 416; and 12 M. 183.

A decree for maintenance can be executed after the death of the person against whom it was passed, and also against other members of the joint family, where the decree created a charge on the joint family property.—*Subbanna Bhatta v. Subbanna*, 30 M. 324: 17 M. L. J. 180.

**Execution of satisfied decree.**—This rule has nothing to do with the invalidity of a sale made to a stranger, who purchased without notice of the fact that the amount realised by the previous sale of other plots of the property attached was more than sufficient to satisfy the decree in execution.—*Surendra v. Bola Ram*, 45 I. C. 699.

**Mortgage-decree.**—*See the cases under Or. XXXIV.*

**Appeal.**—An order under this rule is not appealable as a decree; *Pattah Verran v. Veethil Appu*, 9 I. C. 760: 9 M. L. T. 347. An order allowing the decree-holder to withdraw execution is not appealable; *Kenaram v. Kailas*, 18 C. L. J. 53.

**18.** (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Execution in case of cross-decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.[S. 246.]

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to

a decree passed against him singly in favour of one or more of such persons. [NEW.]

*Illustrations.*

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint-decree as a cross-decree under this rule.

COMMENTARY.

**Alterations and effect.**—This rule corresponds with S. 216 of the C. P. Code of 1832, with some modifications. The meaning of the rule has been made more clear by use of appropriate words.

**Sub-rule (1).**—The words "*where applications are made to a Court for the execution of cross-decrees*," and the words "*in separate suits*," have been added after "*cross-decrees*," in order to indicate that this rule is applicable to cross-decrees obtained in separate suits and not cross-claims under one decree; for which provision is made in rule 19. The addition seems to have been made in adoption of the principle laid down in *Kalka Prasad v. Ram Din*, 5 A. 272.

**Sub-rule (4).**—This is new; it has been added in accordance with the principles laid down in *Ram Sukh Das v. Tota Ram*, 14 A. 339 and *Hury Doyal v. Din Doyal*, 9 C. 479; 13 C. L. R. 93. The illustration (d), which has been newly added, clearly explains the meaning of sub-rule (4).

**Applicability.**—The words "*where applications are made to a Court for the execution of cross-decrees in separate suits*" clearly indicate that this rule contemplates applications by both persons for execution of both decrees passed in separate suits, viz., *A* against *B* and *B* against *A*, *A* being the decree-holder against *B* in one suit, and *B* the decree-holder against *A* in another. That is, both the decrees sought to be set off must be before the same Court and under execution at the same time. If one decree-holder only applies for execution and the other has not applied, set-off cannot be allowed and execution must proceed for the full amount; *Chajmal v. Lal Dharam*, 24 A. 431 [13 I. A. 106 (110) *refd. to*], followed in *Ponnusamy v. Doraisamy*, 32 M. 336 : 1 I. C. 247.

The words "*separate suits*" signify that for the purposes of set-off a counter-claim is not an independent action. For all purposes except those

of execution a claim and a counter-claim are two independent actions; *per* Lord Esher in *Strumor v. Campbell & Co.*, (1892) 1 Q. B. 317.

This rule is applicable to cross-decrees and not to cross-claims under one decree.—*Kalka Prasad v. Ram Din*, 5 A. 272. As to cross-claims, see r. 19.

The provisions as to set-off contained in this rule are exhaustive and no set-off on grounds other than those mentioned in r. 8 is permissible. Nor can S. 51 be invoked for such purpose.—*Shankar v. Anrit Lal*, 138 I. C. 285; 33 P. L. R. 671; A. I. R. 1932 Lah. 537.

**Requisites for right of set-off of cross-decrees.**—In order that this rule may apply the following elements must be present: (1) The cross-decrees must be passed in *separate suits*; (2) The cross-decrees must be for payment of *two sums of money* passed between the *same parties*; (3) The cross-decrees must be in the *same Court* for execution at the *same time*, i.e., both decree-holders must apply for execution; (4) They must be *capable of execution*; (5) The sums due under the decrees must be *definite*; (6) The decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party *fills the same character in both suits*. The existence of one without the other does not justify the application of the rule. They will be considered under separate heads:—

(1) **Cross-decrees in separate suits**—Rule 18 applies even though one decree is in a suit and the other is in a proceeding under S. 144. Where *A* attached, in execution of a decree against *B*, a decree for mesne profits obtained by *B* under S. 144 of the C. P. Code against *C*, though the case may not strictly fall under Or. XXI, r. 18, the Court has inherent power to allow *C* to set off as against *A* executing the decree for mesne-profits against him (as *B*'s assignee) to a decree for a larger sum which he holds as against *B*; *Adwaita v. Chittagong Co.*, 28 C. W. N. 988; 84 I. C. 747; A. I. R. 1925 Cal. 102.

(2) **"Two sums of money"**—**Mortgage-decrees.**—A decree in a mortgage suit directing the plaintiff to recover the amount by *sale of properties* but not directing payment by the defendant, is essentially a decree for money. The provisions as to set-off, in this rule will apply to such decrees.—*Krishnan v. Venkatapathi*, 29 M. 318 (28 M. 476 followed). See also rule 20 of this Order which seems to have been framed in adoption of the principle of this ruling. But see *Burma Oil Company v. Ma Tin*, 7 R. 505, which held that a mortgage-decree is not a decree "for the payment of sums of money" within the meaning of rule 18 and consequently the decree-holder cannot set-off the claim thereunder as against a personal decree against him. Rule 20 of Or. XXI merely applies the provisions of rule 18 to a decree for sale in enforcement of a mortgage and where the latter rule is not applicable the former cannot be invoked.

**"Between the same parties."**—In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.—*Rechawoodden v. Fuzloonissa*, 5 W. R. Mis 12.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable.

in the same Court, it is competent to the holder of the joint decree to plead such decree in answer to an application for execution of the decree against him singly.—*Ram Sukh v. Tota Ram*, 14 A. 339. See also *Hury Doyal v. Din Doyal*, 9 C. 479; 13 C. L. R. 93. See, however, *Murli Dhar v. Parsotam*, 2 A 91.

(3) In the same Court and under execution at the same time.—See notes under "applicability," above. Before a cross-decree can be set-off, the one against the other, it is necessary that both the decrees should be in the same Court for execution: For instance, A obtaining a decree against N in the Court of S, in execution prays that another decree obtained by N against A in the Court of B should be set-off against A's decree. This cannot be allowed as the two decrees were not in course of execution in the same Court; *Afsalunnissa v. Nurul*, 11 A. L. J. 763; 21 I. C. 32. See also *E. I. Ry. Co. v. Hall*, 3 N. W. P. 104; *D' Silva v. Ameer Shaha*, 16 W. R. 303; *Salig Ram v. Ishar Das*, 126 I. C. 516; A. J. R 1930 Lah. 509. They must be under execution at the same time.—*Judoonath v. Ram Buksh*, 7 W. R. 535. See also *Chajmal v. Lal Dharam*, 24 A. 481 (followed in *Ponnusamy v. Doraisamy*, 32 M. 336; 1 I. C. 247; *Rukmani v. Seethamul*, 22 I. C. 73).

A in execution of his decree against B secured the attachment of a decree obtained by B against A, B then applied for execution of his decree against A. Held, as there were applications for execution of both the decrees, this rule applied and the Court could set-off smaller amount due from B against the larger amount due to him from A, although A had already secured attachment of B's decree against himself.—*Firm Soba Ram v. Tarachand*, 117 I. C. 103; A I. R. 1929 All. 502.

But when the Court directed that a decree for rent should not be executed until the amount of mesne profits due under a decree against the rent decree-holder has been ascertained, evidently the intention was that the decrees should be set-off against each other and set-off was allowed though the judgment-debtor did not apply for execution of his decree; *Hira Lal v. Ramjiram*, 52 I. C. 746; (1919) P. 372.

The provisions of this rule apply only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which had found their way for execution to the same Court.—*Ram Coomar v. Gobindnath*, 7 W. R. 480 (reversing on review 6 W. R. 21). See also *Hadoo Sirdar v. Jadoo Monee*, 17 W. R. 46. Where on application for execution of a decree in the Court of a Sub-Judge, it was sought to set-off a decree obtained in the Judge's Court which has not been sent to the Sub-Judge for execution: Held that this rule was inapplicable.—*Girish v. Fakir*, B. L. R. Sop. Vol. 503: 6 W. R. Mis. 72.

(4) Decrees capable of execution.—A decree which is incapable of being enforced cannot be set-off against a decree which is alive.—*Huro Pershad v. Fool Kishoree*, 16 W. R. 308.

A set-off is not admissible, except upon a cross-decree which the decree-holder is seeking to execute, and not upon a cross-decree incapable of execution by lapse of time. A cross-decree must be kept alive by action of the party entitled under it.—*Anund Mohun v. Huro Chunder*, 5 W. R. Mis. 16; *Prosunno Coomar v. Sham Lal*, 5 W. R. Mis. 8; *Himraj v. Asoodun*,

5 W. R. Mis. 43. But where in one suit judgment is given in part for the plaintiff, and in part for the defendant, the decree for the smaller sum becomes absorbed in the one for the larger and no question of limitation can therefore arise in respect to the execution of the decree for the smaller sum which became incapable of execution as soon as the decree for the larger sum was passed.—*Nubo Lall v. Maharanee of Burdwan*, 9 W. R. 590.

(5) The sums must be definite.—The principle of setting off cross-decrees between the same parties and ordering execution only for the surplus that may be found due to one of them cannot be applied where the defendant has only got a preliminary-decree for sale in a mortgage suit against the plaintiff, because until the accounts are taken, the amount cannot be said to be ascertained.—*Galstain v. Radhakissen*, 57 C. 855 : 129 I. C. 420 : A. I. R. 1931 Cal. 23.

(6) Each party fills the same character in both suits.—For the meaning of these words, see illustration (c) of this rule and illustrations (a) and (b) of Or. VIII, r. 6. See also *Abdul Hasan v. Zohrajan*, 5 A. 299, where it has been held that in a suit by the creditor of a deceased debtor to recover his debt, an amount due as manager cannot be set-off, against a personal liability. For instance A obtains a decree against B as executor to the estate of C, and B obtains a decree against A personally; the two decrees cannot be set-off, as A and B do not fill the same character in the two suits.

In the case of ordinary money decrees, even when the parties are not identical, but the decree is joint and several against the decree-holder of the other decree, set-off may be allowed; *Ram Chander v. Mahabar*, 39 I. C. 560. But the matter is different when the decree is a mortgage decree particularly when there is no personal liability; *ibid.* See also *Sheo Shankar v. Chunn Lal*, 33 A. 669 : 36 I. C. 948.

Decree for sale on mortgage against puisne encumbrancer—Personal decree in favour of puisne encumbrancer against mortgagee—Different capacities; *Sheo Shankar v. Chunn Lal*, noted above.

A decree against a firm can be set-off against a decree in favour of a partner, for a firm's name is only a description of the individual partners.—*Administrator-General v. Sultanalli*, 29 Bom. L. R. 396 : 104 I. C. 319 : A. I. R. 1927 Bom. 255.

When two sums are unequal,—execution should be issued for the difference. The smaller decree being absorbed in the larger, it cannot be executed separately; see *Sinnu v. Santhoji*, 26 M. 428. See also *Haro Sanker v. Tarak*, 3 B. L. R. A. C. 114.

Where property sold in execution of valid decree, under the order of a competent Court, was purchased *bona fide* and for fair value. Held that mere existence of a cross-decree for a higher amount in favour of the judgment-debtor without any question of fraud would not support a suit by the latter against the purchaser to set aside the sale.—*Rewa Mahton v. Ram Kishen*, 13 I. A. 106 : 14 C. 18 (P. C.) (followed in *Mothura v. Akhoy Kumar*, 15 C. 557; and in *Yellappa v. Ram Chandra*, 21 B. 463). See also *Sinnu v. Santhoji*, 26 M. 428 (13 I. A. 106 : 14 C. 18 (P. C.)), explained.

Where there are essentially cross-decrees, the decree for the smaller amount becomes absorbed in the one for the larger, and the order of

attachment under Or. XXI, r. 46, can have no operation or affect the legality of the set-off.—*Bujhavan Lal v. Sukhraj Ras*, 2 A. 866.

When the two sums are unequal, execution may be taken only by the holder of the decree for the larger sum. See notes to r. 19.

Though the holder of the decree for the smaller amount cannot apply for execution, his right and priorities should be decided as if the decree for the larger amount was attached at his instance as soon as application for execution is made; *Armugha v. Yagamba*, 17 I. C. 323.

**Rights of assignee of decree to set-off.**—*A* and *B* had obtained a decree against *K* and *J*. After partial satisfaction *A* and *B* assigned it to *D*. Prior to the date of assignment, *K* and *J* had instituted a suit against *A*, *B* and *D*, and ultimately obtained a decree against them. Held that *K* and *J* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D*.—*Kristo Ramani v. Kedar Nath*, 16 C. 619.

Attaching decree-holders are assignees within the meaning of sub-rule (2) of this rule. *X*, who has obtained a decree against *Y*, attaches in execution of his decree a decree held by *Y* against *Z*; *X* is an assignee of *Y*'s decree within the meaning of sub-rule (2); *Adwaita v. Chittagong Co.*, 28 C. W. N. 938; 84 I. C. 747; A. I. R. 1925 Cal. 102.

*A*, by deed or *zuri-peshgi*, let certain land to *B* to secure a sum advanced by him to her. *B* covenanted to pay certain dues annually to *A*. On failure of *B*, *A* obtained a decree against him for the amount. In execution of a decree against *B*, *C* purchased his interest in the sum secured by the *zuri-peshgi* deed, and sued *A* to recover the sum. Held that *A* was entitled in such suit to set-off the amount of the decree obtained by her against *B*.—*Bhagawani Kunwar v. Lala Baijnath*, 2 B. L. R. A. C. 84; 10 W. R. 380.

The purchaser of a decree held by *A* against whom *B* holds a cross-decree takes it subject to a set-off on account of *B*'s decrees.—*Kasim Ali v. Lakhikant*, 1 B. L. R. 23 (F. B.); 10 W. R. 32 (F. B.); *Nundo Coomar v. Koonjo Kishore*, 6 W. R. Mis 73; *Doorga Churn v. Debnath*, 18 W. R. 442; *Oopendro Mohun v. Poorno Chunder*, 19 W. R. 85; and *Ram Chunder v. Mohendro Nath*, 21 W. R. 141.

**Cross-decree for mesne-profits.**—Where there are cross-decrees for possession and mesne-profits in respect to the same land, the earlier decree comprehending only a part of the land embraced in the latter, each party may take execution and be entitled to receive mesne-profits separately.—*Anund Mohun v. Shibo Soonduree*, 16 W. R. 256. See also *Ram Coomar v. Gobind Nath*, 12 W. R. 391.

When both the decrees are for mesne-profits, the amounts of which have not been ascertained, the right of set-off does not arise until the amounts due under the decree are definitely ascertained and after ascertainment of the amounts due, the provisions of this rule can be applied.—*Matadin v. Chandi Din*, 10 A. 188.

**Appeal.**—An appeal lies against an order under this rule as under S. 47; *Kristo Ramani v. Kedar Nath*, 16 C. 619.



**19.** Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case  
of cross-claims under  
same decree.

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

[S. 247.]

### COMMENTARY.

**Scope—Applicability.**—This rule is applicable to cross-claims under one decree only and not cross-decrees in separate suits.

The object of this rule is to prevent each side executing a decree in respect of sums due whether for costs or otherwise under the same decree.—*Bhagwan v. Ratan*, 16 A. 395; *Venkatanarayana v. Puvvada*, 44 M. L. J. 590; A. I. R. 1923 Mad. 638; 72 I. C. 865. There is nothing in the rule to prevent a plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs which in the aggregate exceed the amount due to the plaintiff), from taking out execution against one defendant alone for the balance due to him by both defendants until the other defendant applies for execution against the plaintiff. Thus *A* gets a joint decree against *B* and *C* for Rs. 1,200, *B* gets Rs. 400 as costs against *A*, and *C* gets Rs. 1,000 as costs against *A*. *A* can execute against *B* for Rs. 800; *Rangiah v. Narasayya*, 3 L. W. 267; 34 I. C. 389.

The words "a decree under which two parties are entitled" suggest the simultaneous birth of two sets of rights under the decree. A judgment-debtor objected to the attachment of certain property, and his objection having succeeded obtained a decree for costs against the decree-holder. When the judgment-debtor sought to execute his decree for costs, the decree-holder asked for a set-off for the decree for costs against the amount due to him under his decree in the suit; held, that r. 19 would not apply as the two claims were not under one decree.—*Bisheshwar v. Narmadeshwar*, 127 I. C. 525; A. I. R. 1930 All. 726.

To make this rule applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case.—*Kalka Prasad v. Ram Din*, 5 A. 272. But this view is no longer maintained and it has now been held that rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature or where the parties fill the same character. Thus, where one party

was entitled to recover certain costs by means of the sale of hypothe-  
cated property, and the other party under the same decree was entitl-  
ed to recover a smaller sum as costs from his opponent personally,  
*held* that this rule was applicable.—*Bhagwron Singh v. Ratnan*, 16 A.  
335 (5 A. 272 *dissented from*, *approved* in *Sankara Menon v. Gopala*  
*Pattar*, 23 M 121, *referred to* in *Mirza Sadik v. Hashin*, 24 I. C. 376).

"Two parties"—mean the two parties or sets of parties who are  
parties not only to the suit in which the decree was passed but also referred  
to in the opening sentence of the rule; *Ranjiah v. Narasayya*, 3 L. W. 267;  
34 I. C. 388.

"Execution may be taken only by the party entitled to the larger  
sum."—It follows from this provision that the party who under a decree is  
entitled only to the smaller sum has no right to apply for execution. The  
rule contemplates that the decree should be regarded as a single indivisible  
order, enforceable only for the difference between the two sums awarded.  
When two unequal sums are awarded, the smaller sum must be taken to have  
been entered as satisfied under the provision "satisfaction for the smaller sum  
shall be entered on the decree." Thus if *A* is awarded Rs. 50 against *B*,  
and *B* is awarded Rs. 100 against *A* as costs, and *A* applies to execute the  
decree against *B*, he cannot do so even if *B*'s claim against him is barred by  
limitation; *Madappa v. Jaki Ghosal*, 40 B. 60: 17 Bom. L. R. 689; *see notes*  
*to r. 18*. If in violation of this rule, a decree-holder takes out execution  
without setting-off the dues of the judgment-debtor, the Court can under its  
inherent power compel a refund of the sum taken in excess.—*Annanda*  
*Mohan v. Atul Chandra*, 24 C. W. N. 465: 56 I. C. 753.

Set-off in cross-claims under same decree.—Where two parties have  
to recover sums from each other under the same decree, the party entitled  
to the lesser sum cannot be allowed to take out execution against the party  
entitled to the larger sum, and the Court is bound to direct a set-off, or to  
enter satisfaction of the smaller sum upon the decree.—*Jugo Mohun v.*  
*Soorendronath*, 13 W. R. 106. *See also* *Ram Lal v. Asutosh*, 44 I. C. 445.

Under this rule all that the decree-holder is entitled to enforce exe-  
cution of is the difference between the amount found recoverable by him and  
the amount which the judgment-debtor is entitled to recover against him.—  
*Giribala Debia v. Rani Mina Kumari*, 5 C. W. N. 497. *See* *Amjud Ali v.*  
*Fazul Hossein*, 19 W. R. 187; *Issur Chunder v. Mun Mohun*, 12 W. R. 308.

A decree in a pre-emption suit directed that the plaintiff should obtain  
possession and recover costs from the defendant on payment of the purchase-  
money within a fixed time. *Held*, applying the equitable doctrine of set-off,  
that the plaintiff was entitled, when depositing the purchase-money under  
the decree, to deduct therefrom the sum which the decree awarded to him  
as costs.—*Ishri v. Gopal Saran*, 6 A. 351. *See also* *Kapurja Mal v. Wali*  
*Muhammad*, 2 L. 294; *Hemendra Nath v. Tulshi*, 126 I. C. 831: A. I. R.  
1930 All. 413, in which the costs and mesne profits till the date of delivery of  
possession were allowed to be set-off against the deposit of purchase-money.

20. The provisions contained in rules 18 and 19 shall

Cross-decrees apply to decrees for sale in enforcement of a  
and cross-claims mortgage or charge. [New.]  
in mortgage suits

## COMMENTARY.

**Object—Mortgage-decrees.**—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage-decrees. The rule also makes it clear that the expressions "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge.—*Report of the Select Committee.*

This rule seems to have been framed in accordance with the principle laid down in *Krishnan v. Venkatapathi*, 29 M. 318, where it has been held that a decree directing the plaintiff to recover the decreed amount by sale of properties but not directing payment by the defendant is essentially a decree for money and the provisions as to set-off in S. 246, C. P. Code, 1882. (Or. XXI, r. 18), will apply to such decrees (following *Vaidhinadasamy v. Somasundaram*, 28 M. 473 (F. B.) which overruled 24 M. 412).

The mortgage decree must be a decree for sale in enforcement of a mortgage, otherwise rule 18 will not apply.—*Burma Oil Company v. Ma Tin*, 7 R. 505, noted under rule 18 *ante*. Rule 20 will not apply where only a preliminary decree for sale has been made in a mortgage suit.—*Galstaun v. Radhakisen*, 57 C. 855; 129 I. C. 420; A. I. R. 1931 Cal. 23, noted *ante* under rule 18.

It has been held that a simple decree for recovery of money can be set-off against a decree for recovery of money by enforcement of a mortgage or charge; *Nagar v. Ram Chand*, 33 A. 240; 7 A. L. J. 1179; *Venkata Reddi v. Dorasami*, (1932) M. W. N. 1187; 36 L. W. 644; 63 M. L. J. 722 (even if under this mortgage decree the mortgagor is personally liable for the deficiency).

The costs awarded to a judgment-debtor can be set-off against the money recoverable under a mortgage-decree; *Mirza Sadik v. Hashim*, 24 I. C. 376.

**21.** The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor. [S. 230, PARA. 2.]

Simultaneous  
execution.

## COMMENTARY.

**Simultaneous execution against person and property.**—This rule should be read with r. 30, which says that a decree may be executed both by attachment of person and property.

Though the Court has discretion to refuse execution against the person and the property simultaneously, it has no power to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor; *Hargobind v. Hakim Singh*, 6 L. 548; 93 I. C. 54; A. I. R. 1926 Lah. 110; *Hiralal v. Lalchand*, A. I. R. 1929 Lah. 86; 110 I. C. 185.

**Appeal.**—An order under this rule, refusing execution of a decree simultaneously against the person and property of judgment-debtor, is appealable as a decree—*Chena Pemaji v. Ghelabhai*, 7 B. 301.

**22.** (1) Where an application for execution is made—

Notice to show  
cause against exe-  
cution in certain  
cases.

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him. [S. 248.]

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. [New.]

### COMMENTARY.

**Principle—Scire facias.**—"Writs of execution must be sued out within a year and a day after the judgment is entered otherwise the Court concludes *prima facie* that the judgment is satisfied and extinct; yet, however, it will grant a writ of *scire facias*, for the defendant to show cause why the judgment should not be revived and execution had against him."—(Stephen's Commentaries on Blackstone, p. 421, Vol. 3, 15th Ed.). The provisions of this rule have been borrowed from the English procedure for a writ of *scire facias*; *Jogendra v. Shyam Das*, 35 C. 543 : 9 C. L. J. 271; *Livinia v. Madhabmoni*, 11 C. L. J. 489, 498 : 14 C. W. N. 560. A *scire facias* is a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment.

**Alterations—Effect.**—This rule corresponds to S. 248, C. P. Code, 1882, with several alterations and additions. The old section has been re-arranged and the language re-cast in order to make the meaning more clear and intelligible.

Sub-rule (2) is new. It has given full discretion to the Court to issue process in execution before issuing a notice under this rule, if for any reason the Court is satisfied that the issue of such notice would cause unreasonable

delay or would defeat the ends of justice. But before doing so, it shall record its reasons. The addition is no doubt an improvement and it has done away with the stringent rule which hitherto existed that omission to issue a notice rendered the execution proceedings null and void; see 20 C. 370; 21 B. 424 (F. B.); 21 C. 19; 6 C. 103; 3 A. 424. See notes, *post* under "Effect of omission to issue notice to the judgment-debtor."

The explanation attached to the old section has been omitted as unnecessary in view of S. 37 in which the expression "*Court which passed a decree*" has been clearly defined.

"The Committee have omitted the reference to a decree passed in appeal, for that is ordinarily the decree to be executed (*Kristo Kinkur Roy v. Rajah Burrodacount Roy*, 14 M. I. A. 465 and *Muhammad Sulaiman Khan v. Muhammadyar Khan*, 11 A. 267 (F. B.))."—*Report of the Special Committee*.

Rule 22 does not apply in the case of the summary procedure contained in S. 111, Madras Estates Land Act.—*Subba Reddi v. Marga*, 118 I. C. 818; A. I. R. 1929 Mad. 517.

**Object of notice**—is to prevent undue surprise to a judgment-debtor, when more than one year has elapsed between the date of the decree and the application for execution, or when the decree is sought to be enforced against the legal representative of the party against whom the decree was originally made—*Jogendra Chandra v. Shyam Das*, 9 C. L. J. 271; 36 C. 543.

A notice under r. 22 is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor.—*Prish Chandra v. Rahatannessa*, 58 C. 825; 133 I. C. 670; 35 C. W. N. 220; 53 C. L. J. 46; A. I. R. 1931 Cal. 555.

The object is not merely to give an opportunity to show cause why the decree should not be executed because, for instance, it is time-barred or has been adjusted, but also to give him an opportunity to satisfy before issue of execution; *Erava v. Sidram Appa*, 21 B. 424 (F. B.); *Ajyun v. Gunendra* 20 C. L. J. 341; *Livinia v. Madhabmoni*, 11 C. L. J. 489, 497; 14 C. W. N. 560; *Lakshmi v. Sris*, 13 C. L. J. 162; *Tara Prasanna v. Jnanendra*, 83 I. C. 1039; A. I. R. 1926 Cal. 86; *Gurudas v. Bhowanipore Zemindary Co.*, 25 C. W. N. 972.

**Proper notice.**—An insolvent's estate vested in the Official Assignee and a notice was served upon him to show cause why he should not be substituted for the judgment-debtor. *Held* that this was not a proper notice under this rule and a notice to show cause why the decree should not be executed against him ought to have been issued: *Raghunath v. Sunder*, 41 I. A. 251; 42 C. 72 (P. C.); 18 C. W. N. 1058; 20 C. L. J. 555. 24 I. C. 304; 27 M. L. J. 150; 13 A. L. J. 154; 16 Bom. L. R. 814. See also *Smith v. Kailash*, 11 P. 24; 138 I. C. 99; A. I. R. 1932 Pat. 199.

An application for transmission of a decree is not an application for execution, and no notice under this rule can be issued upon it; *Chutterpat v. Saita*, 20 C. W. N. 889 (F. B.); 23 C. L. J. 645. The Registrar of the High Court cannot order execution to issue, as an order for execution to issue is a judicial act which cannot be delegated to the Registrar under S. 637 of the old Code; *Ibid*.

In case of instalment decrees, notice under this rule is necessary if execution is sought for one year after the decree, though the date of default is within one year of the execution of the petition. The *terminus a quo* is the date of decree and not the date of default; *Keralal v. Punjab National Bank Ltd.*, 5 L. L. J. 67.

Where one of several judgment-debtors has ceased to have an interest in the property, a failure to serve him with notice does not vitiate the execution proceedings in view of a definite provision to that effect in Art. 182 of the Limitation Act: *Tara Prasanna v. Jnanendra*, A. I. R. 1926 Cal. 86; 89 I. C. 1039.

On the application of a decree-holder the executing Court directed simultaneous issue of three things: (1) notice under rule 22; (2) notice to show cause why the judgment-debtor should not be arrested; and (3) a warrant for the arrest of the judgment-debtor. The Court-peon was prevented from arresting the judgment-debtor. A prosecution under S. 353, I. P. O. having been launched, *held*, that the order for arrest was not illegal and that the accused were liable to be convicted for the offence.—*Rajani Kanta v. Emperor*, 58 C. 940 35 C. W. N. 228; 32 Cr. L. J. 886; 1931 Or. C. 595; 132 I. C. 214 A. I. R. 1931 Cal. 443.

**Proof of notice.**—A notice under this rule stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice when required by law to do so.—*Dimola Soonduree v. Kalea Kishen*, 22 W. R. 5.

**Court's duty to issue notice.**—It is the Court's duty to issue notice upon the judgment-debtor when the decree is more than one year old even though the decree-holder may not formally ask and it is not obligatory upon him to do so; *Stevens v. Kamta*, 10 C. L. J. 19; 2 I. C. 941 (29 C. 580 *refd. to*).

Order XXI, r. 22 is not confined to those cases in which the execution is taken out against the representative of the judgment-debtor in the first instance. It applies as well to a case where execution has been taken against a judgment-debtor, and on the death of the judgment-debtor it is sought to be taken against the legal representatives, (42 C. 72 (P. C.) *folld.*; A. I. R. 1929 Mad. 275, not *folld.*).—*Smith v. Kailash*, 11 P. 241; A. I. R. 1932 Pat. 199; 138 I. C. 99.

**Effect of omission to issue notice to the judgment-debtor.**—The question arises whether a sale without notice to the judgment-debtor is null and void by itself or voidable? It was held in *Gopal v. Gunamoni*, 20 C. 370, that the issue of notice is a condition precedent to the issue of execution in order that the Court should obtain jurisdiction to sell the property by way of execution, and omission to issue such notice renders the sale null and void. The decision was approved by the Privy Council in *Raghunath v. Sunder Das*, 41 I. A. 251; 42 C. 72 (P. C.); 24 I. C. 304; 27 M. L. J. 160; 16 Bom. L. R. 814; 13 A. L. J. 154; *Shyam Mandal v. Salinath*, 44 C. 954; 38 I. C. 493; 21 C. W. N. 776; 24 C. L. J. 523; *Ram Kinkar v. Shiti Ram*, 27 C. L. J. 528; *Fani Bhusan v. Surendra*, 35 C. L. J. 9; 64 I. C. 25; *Rajagopala v. Ramanuja Chariar*, 47 M. 288 (P. B.); 80 I. C. 92; A. I. R.

1924 Mad. 431; *Sarada v. Krishna Dome*, 91 I. C. 711; A. I. R. 1926 Cal. 539. The sale is a nullity whether it is purchased by the decree-holder (*Ramessuri v. Doorgadass*, 6 C. 103; *Gurudas v. Bhowanipore Zemindary Co., Ltd.*, 25 C. W. N. 972); or by a third party (*Imamunnissa v. Liakat Husain*, 3 A. 424; *Sahdeo v. Ghasiram*, 21 C. 19; *Parashram v. Balmukund*, 32 B. 572. In a case which went to the Privy Council, a decree was sought to be executed against the estate of a deceased judgment-debtor and a person described in the application as the legal representative was served with notice under this rule, who objected that he was not the legal representative. The executing Court ruled that he was the legal representative. The execution went on and the property of the judgment-debtor was sold. It turned out afterwards that the person served with the notice was not the real representative. It was held by the Privy Council that the Court having determined for the purpose of execution proceedings that the person served was the legal representative, it had *jurisdiction* to sell although the decision as to who was the legal representative was erroneous. The omission to serve notice on the right person was a serious irregularity and the sale was *voidable* under Or. XXI, r. 90 or by an independent suit brought within a year as provided by Art. 12, Cl. (a) of the Limitation Act. But the sale was a reality and was valid so long as proper action under the law was not taken and it was not set aside—*Malkarjun v. Narahari*, 27 I. A. 216; 25 B. 337 (P. C.): 5 C. W. N. 10; 2 Bom. L. R. 927; 10 M. L. J. 363. The point was raised in *Lavinia v. Madhabmoni*, 11 C. L. J. 489; 14 C. W. N. 560, where all the cases were discussed and the principle enunciated above in the Privy Council case was affirmed, and it was held that omission to serve notice is a grave irregularity sufficient by itself to justify the reversal of the sale if a proper proceeding is taken in that behalf. It was said there that 25 B. 337 (P. C.) is an authority for the proposition that a sale held without issue of notice under this rule is *not a nullity* and cannot be ignored by the party whose property has been sold as if the sale had never taken place: but such omission is a *serious irregularity*. This principle was applied in *Lakshmi v. Sris*, 13 C. L. J. 162; *Kumed Bewa v. Prasanna*, 40 C. 45. *Sham Sundar v. Jhumak*, 20 C. L. J. 337; 11 I. C. 893. See also *Arjun v. Gunendra*, 20 C. L. J. 341; 18 C. W. N. 1266.

In accordance with the principle laid down in the cases cited above, it has been held in *Kumad Bewa v. Prasanna*, 40 C. 45 (21 C. 19 *not followed*), that omission to serve notice is *not by itself* sufficient to render a sale subsequently held, void. In order to justify the setting aside of such a sale it must be proved that the omission resulted in substantial injury; see also *Lakshmi v. Sris*, 13 C. L. J. 162, 164.

The Privy Council case of *Raghunath v. Sundar*, 41 I. A. 251; 42 C. 72 (P. C.): 18 C. W. N. 1058; 24 I. C. 304; 27 M. L. J. 150; 13 A. L. J. 154; 16 Bom. L. R. 814, seems to have changed the situation. There it has been laid down (approving *Gopal Chunder v. Gunamani*, 20 C. 370) that a notice under this rule is *necessary* to confer on the executing Court jurisdiction to sell property and the Privy Council decision in *Malkarjun v. Narahari*, 27 I. A. 216; 25 B. 337 (P. C.): 5 C. W. N. 10; 10 M. L. J. 363, was distinguished as one where notice was actually served on a person whom the Court decided to be the legal representative. If there is no *jurisdiction* to sell without service of notice, it must follow that the subsequent sale without notice is not merely an irregularity but a

nullity. The Calcutta High Court followed *Raghunath v. Sundar*, 41 I. A. 251, in *Moharaj Bahadur v. Surendra*, 19 C. W. N. 162, and held that non-service of notice vitiates the sale. In *Shyam Mandal v. Satinath*, 44 C. 954: 24 C. L. J. 523: 21 C. W. N. 776: 38 I. C. 493, also, it has been held that omission to give notice is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction. See also *Ram Kinkar v. Sthiti Ram*, 27 C. L. J. 628. *Das Narayan v. Mir Muhammad*, 6 P. L. J. 319: 61 I. C. 823. See also *Rajagopala v. Ramanujachariar*, 47 M. 288 (F. B.): 80 I. C. 92: A. I. R. 1924 Mad. 431: 46 M. L. J. 101, where 42 C. 72 (P. C.) has been followed and 45 M. 875 overruled and 25 B. 337 (P. C.) and 14 C. 18 (P. C.) distinguished. See also *Manmatha v. Lachmi*, 55 C. 96: 46 C. L. J. 679: 105 I. C. 65: A. I. R. 1928 Cal. 60; *Smith v. Kailash*, 11 P. 241: 138 I. C. 99: A. I. R. 1932 Pat. 199; *Chandi v. Jamna*, 49 A. 830: 102 I. C. 239: A. I. R. 1928 All. 74; *Ramdas v. Kannamal*, 7 R. 110: 117 I. C. 245: A. I. R. 1929 Rang. 161. The mandatory character of the provision as it stands only applies when the application is being first taken out.—*Ramanathan v. Ramanathan*, 30 L. W. 995: 117 I. C. 705: A. I. R. 1929 Mad. 275. But see *Smith v. Kailash*, 11 P. 241: A. I. R. 1932 Pat. 199 noted ante. It has been held by a Special Bench of the Patna High Court that the rule applies to every application for execution and not merely to the first application, and that in every case where an application for execution is made more than a year after the last order made against the judgment-debtor in any previous application a fresh notice must be issued (overruling *Mahadeo Singh v. Dhobi Singh*, 2 P. 916).—*Aditya Prasad v. Ram Narayan*, 5 P. 1 (S. B.): 87 I. C. 531: A. I. R. 1925 Pat. 474: (1925) P. 121.

**Service of notice.**—A mere issue of notice is not sufficient, service of such notice is essential, otherwise the order for execution is without jurisdiction and the sale void; *Gurudas Biswas v. Bhowanipore Zemindary Co., Ltd.*, 25 C. W. N. 972. Where notice was served on an undivided brother and on his refusal to accept it, it was affixed to the outer door of the catchery ghar in the outer apartment, held, that it was proper service.—*Sarat v. Joy Sankar*, 134 I. C. 80: 35 C. W. N. 332: A. I. R. 1931 Cal. 546. Where the notice was issued but was suppressed and the sale was set aside and a re-sale was held to the knowledge of the judgment-debtor, it was held that the re-sale was not rendered invalid on the ground that a fresh notice under Or. XXI, r. 22 was not issued.—*Fakhrul Islam v. Rani Bhubaneswari*, 7 P. 790: 117 I. C. 648: A. I. R. 1929 Pat. 79. Where the notice was not served but the judgment-debtor appeared before the executing Court and showed cause against execution, it was held that the objection regarding the non-issue of notice could not be given effect to.—*Chandra Nath v. Nabadwip*, 35 C. W. N. 9: 53 C. L. J. 329: 131 I. C. 702: A. I. R. 1931 Cal. 476.

A notice, in order to be valid must give sufficient time to enable the judgment-debtor to come and oppose the application (2 B. 449 followed).—*Lakshmanan v. Palaniappa*, A. I. R. 1928 Mad. 1052.

But the rule is sufficiently complied with if notice is given to the adult co-tenants in a case where they and the minor co-tenants live in the same house and the minors have no guardian ad-litem on record; *Fani Bhusan v. Surendranath*, 35 C. L. J. 9: 64 I. C. 25.



**Proviso.**—Where the proceedings are in fact proceedings in continuation of the prior execution cases no notice is necessary to the judgment-debtor under the provisions of this rule.—*Sultan Hasan v. Nanki Bibi*, A. I. R. 1923 Cal. 241. The expression "last order against the party" includes not merely a subsisting order but also an order which has been vacated.—*Bibi Wakilan v. Bibi Kasiman*, 9 P. 499; 125 I. C. 793; 11 P. L. J. 859; A. I. R. 1930 Pat. 536. An application by the decree-holder to continue the execution proceedings against the legal representatives of the deceased judgment-debtor, need not necessarily be made by a fresh application for execution, but it may be made by an application in the pending execution against the judgment-debtor. Such an application, if made, is not a fresh application within the meaning of S. 48.—*Shankar Balchand v. Hiralal*, 134 I. C. 730; 33 Bom. L. R. 853; A. I. R. 1931 Bom. 425.

Where the last order passed against a judgment-debtor within one year of the subsequent application for execution is passed behind his back, the case does not come under the proviso, and notice must issue.—*Satish v. Pabna Dhana Bhandar*, A. I. R. 1930 Cal. 349; 51 C. L. J. 197; 125 I. C. 655.

**Judgment-debtor dying during execution—Person already on record sufficiently representing the estate—Fresh notice under this rule not necessary.**—The initial notice under this rule must be issued at the time of the application for execution, to the judgment-debtor if he is alive, if the application is beyond one year from the date of the decree, or to his legal representatives in all cases if he is dead before the application is put in; and the omission to do so is an illegality which renders the sale void unless sub-rule (2) of this rule applies. When such a notice has been initially issued, no fresh notice is required by law to be issued on the death of the judgment-debtor during the pendency of the proceedings, if some one who can represent and is representing the estate is already on the record, even if he be a wrong legal representative or a legal representative brought on by the wrong procedure. Where an adult legal representative is already on the record and initial notice has gone to him under this rule, it is not necessary that notice should also go to others, *Ramanathan v. Ramanathan*, A. I. R. 1929 Mad. 275; 30 L. W. 995; 117 I. C. 703. During the suit the son was represented by the father as guardian. At the time of execution the son became a major but that was not brought to the notice of the Court. Notice under r. 22 was served on the father but not on the son. Held that the son, having waived notice, cannot be heard to say that its absence is an illegality so as to vitiate the sale.—*Ibid.* See also *Kunhammad v. Kuthi*, 12 M. 90; *Azizannessa v. Dwarika*, A. I. R. 1925 Cal. 1227; 86 I. C. 745.

**Remedy when property has been sold by judgment-debtor.**—See notes under this rule. It has been held that the fact that the property has been sold by the judgment-debtor does not prevent the decree-holder from proceeding under this rule. *S. 47* as the question arises in execution proceedings, it may be raised in a separate suit; *Lakshmi v. Prayanna*, 40 C. 45; *Lacina v. Madhavmoni*, 11 C. L. J. 489; 14 C. W. N. 550; *Parashram v. Balmukund*, 33 B. 572; *Rajagopala v. Ramanuja Chariar*, 47 M. 238 (F. B.); 80 I. C. 92; A. I. R. 1924 Mad. 431; 46 M. L. J. 104. But in *Surja Kanta v. Jogendra*, 54 C. L. J. 591; A. I. R. 1932 Cal. 381; 137 I. C.

378, it has been held that an application to set aside sale under Or. XXI, r. 90 on the ground of non-service of the notice as provided for by Or. XXI, r. 22 should be made within 30 days from the date of the sale; if it is an application under S. 47, it must be made within 3 years from the date of the sale; but the time may be extended by the Court in appropriate cases under S. 18 of the Limitation Act.

**Rule applies to moveable property or to strangers.**—It makes no difference in the application of this rule, if the property sold without notice is moveable property or if the auction-purchaser is a stranger and not the decree-holder; *Sahdeo v. Ghasiram*, 21 C. 19; *Shyam Mandal v. Satinath*, 44 C. 954; 24 C. L. J. 523; 21 C. W. N. 776; 38 I. C. 493.

**Where the judgment-debtor had no knowledge of notice or does not object.**—Where notice was not personally served on the judgment-debtor and he came to know of the execution proceedings only when his property was attached, he is entitled to prefer objection against execution at that stage; *Mochas v. Meseruddin*, 13 C. L. J. 26 (the principle enunciated in *Mungul v. Grija*, 8 C 51 (P. C.) explained).

Although a judgment-debtor does not contest a notice under this rule, he can put in objections when his property is attached; *Chatterput v. Daya Chand*, 23 C. L. J. 641.

**Irregular service of notice.**—Irregularity in the service of notice as distinguished from non-service is a material irregularity within the meaning of Or. XXI, r. 90; *Das Narain v. Mir Muhammad*, 6 P. L. J. 319; 61 I. O. 823. In such a case a sale can only be avoided. In order to affect the jurisdiction of the Court to execute the decree, it must be shown that the notice was either not issued or not served and in such a case the execution sale is null and void and need not be avoided.—*Moinuddeen v. Mohamad*, 119 I. C. 891; A. I. R. 1930 Pat. 153.

**Appeal.**—An order refusing to set aside a sale without notice is an order unconditionally appealable; *Kumed Bewa v. Prasanna*, 33 B. 572. An objection as to non-service of notice can be taken in appeal although not taken in the first Court; *Lakshmi v. Sri*, 13 C. L. J. 162.

**Effect of issue of notice of execution on limitation.**—The issuing of a notice under this rule gives a fresh starting point for limitation under Art. 182 of the Limitation Act, 1909, whether such notice is issued on a valid or invalid application for execution.

Where notice under this rule is issued, the time provided by Art. 182 of the Limitation Act, runs from the date of the order directing issue of notice; actual service of the notice is not necessary.—*Damodar v. Sonaji*, 27 B. 622 and *Govind v. Dada*, 23 B. 416. See also *Hari v. Yamunabai*, 23 B. 35 and *Jumai v. Abdul Karim*, 30 A. 566. In *Mohamad v. Moinuddeen*, 119 I. C. 891, 656, it has been held that it means the date when it is actually served. See also *Ratan Chand Cheruvath v. Nerath*, 30 M. 30; 16 M. L. J. 548. In *Koonj v. Girdharee*, 22 W. R. 484, and in *Sheo Sahoy v. Birj Beharee*, 23 W. R. 195, it has been held that time should be reckoned from the date of actual service of notice upon the judgment-debtor.

But the filing of an affidavit to prove service of notice under this rule has been held to be an application to take a stop-in-aid of execution; *Pran Krishna v. Pratap*, 21 C. W. N. 423 : 38 I. C. 536.

An order for execution of a decree, made after notice to the judgment-debtor under this rule, has the effect of such a revivor of decree as prevents the execution of the decree from being barred by Art. 180 of the Limitation Act, 1877.—*Ashootash v. Doorga*, 6 C. 504 : 8 C. L. R. 23 ; *Jogendra v. Sham*, 9 C. L. J. 271 : 36 C. 543 (followed in *Kamini v. Aghore*, 11 C. L. J. 91 ; *Futteh v. Chundrabati*, 20 C. 551 ; *Suja Hossein v. Monohur Das*, 24 C. 224 (reversing on review, 22 C. 921), and *Umrao v. Lachmi*, 26 A. 361). See also *Desoo Venkatesa v. Ranga Row*, 33 M. 187. See, however, *Monohar Das v. Futteh Chand*, 30 C. 979 : 7 C. W. N. 793.

**Revival of decree by notice to one judgment-debtor.**—Revival of decree of the Original Side of the High Court on notice to one only of two judgment-debtors does not keep the decree alive against the other judgment-debtors; *McLaren v. Veeriah*, 38 M. 1102. Where there are more than one legal representative to a deceased judgment-debtor and a notice under Or. XXI, r. 22 is not issued to one of them, the sale is not void in its entirety; it is invalid only as against the person to whom notice was not given.—*Srish Chandra v. Rahatannessa*, 58 C. 825 : 133 I. C. 670 : 35 C. W. N. 220 : 53 C. L. J. 46 : A. I. R. 1931 Cal. 555.

**Reasons for dispensing with notice to be recorded.**—The omission to record the reasons for dispensing with the notice as required by sub-rule (2) is a mere irregularity; *Rajagopala v. Ramanujachariar*, 47 M. 288 (F. B.) : 80 I. C. 92 : A. I. R. 1924 Mad. 431. Where the decree-holder expressly requested the Court to exercise its powers under sub-rule (2), alleging the ground therefor and the Court granted the request but failed to record the reasons for its order; held that the failure to record the reason under the circumstances was a mere irregularity and the order was not vitiated on that ground.—*Somu Ayyar v. Chelliah*, 30 L. W. 230 : 119 I. C. 43 : A. I. R. 1929 Mad. 718. The mere fact that the Judge has omitted to record reasons cannot make the act entirely invalid.—*Rajani Kanta v. Emperor*, 58 C. 940 : 35 C. W. N. 228 : 132 I. C. 244 : A. I. R. 1931 Cal. 443. Sub-rule (2) is not mandatory (approving 45 M. 875).—*Shaikh Yakub v. Mahadev*, 34 Bom. L. R. 987. But it has been held in *Randas v. Kannamal*, 7 R. 110 : 117 I. C. 245 : A. I. R. 1929 Rang. 161, that where a Judge records no reasons for issuing an order of arrest of the judgment-debtor in an execution case instituted after one year from the date of the decree, the failure was not a mere irregularity but a defect which went to the very root of the proceedings and rendered them void for want of jurisdiction; where however no objection was raised to the committal to jail and the question of legality was not then raised, held that the order could not be subject-matter of an appeal, but the High Court could interfere and set aside the order in revision.

- 23.** (1) Where the person to whom notice is issued under the last preceding rule, does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

Procedure after  
issue of notice.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. [S. 249.]

### COMMENTARY.

**Court shall consider objection.**—When objection is filed under this rule, the Judge is bound to take it into consideration, and pass order notwithstanding the absence of the judgment-debtor and his pleader, for the decree might be *prima facie* unexceptionable.—*Rajballab v. Ramsaday*, 5 B. L. R. Ap. 65: 14 W. R. 115. An objection need not be verified; *Sunt Gopal v. Jugut*, 8 W. R. 200.

When, after issue of notice, the legal representative of the judgment-debtor neglected to appear and raise objection to the execution, and certain property belonging to him was sold without opposition, and the sale was duly confirmed and the purchaser was put into possession he cannot afterwards come and ask to have the sale set aside as a nullity.—*In the matter of the petition of Samuel Cochrane*, 15 B. L. R. 330: 23 W. R. 310.

**Appeal.**—An order by a Munsif refusing to execute a decree transferred for execution, or an objection raised by the judgment-debtor under this rule, is appealable.—*Perumal v. Venkatarama*, 11 M. 130. Where an order was virtually under this rule and by a clerical mistake r. 25 was quoted, it was held appealable; *Angne Lal v. Jaydish*, 9 I. C. 431.

### PROCESS FOR EXECUTION.

**24. (1)** When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree. [S. 250.]

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed. [S. 251.]

### COMMENTARY.

**Alterations.**—Sub-rule (1) corresponds to S. 250 with the omission of the words "subject to the provisions of S. 245-A and S. 245-B" (S. 56 and r. 37 of this Order) as unnecessary. In sub-rule (2) process has been substituted for warrant, as the former word is more comprehensive. The latter portion of S. 251 has been omitted and reproduced in rule 25.

"Shall issue process."—It is not open to the Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired.—*Ishan Chunder v. Ashanoollah*, 10 C. 817.

"Shall bear date—Execution of time-expired warrants."—This rule requires the Court to specify in a warrant for execution of a decree, the day on or before which the warrant must be executed. It cannot be executed after expiration of the date. A person resisting a time-expired warrant is not guilty of any offence.—*Abinash v. Ananda*, 31 C. 424; *Anand Lall v. Empress*, 10 C. 18; *Shekh Nasur v. Emperor*, 37 C. 122; 14 C. W. N. 282. But a warrant may be executed till the date it bears although the *nazir* who makes it over to the peon fixes an earlier date for execution and return; *Subed. v. Emperor*, 40 C. 849.

If a warrant is extended, the date must appear on the warrant; *Sheikh Nasur v. Emperor*, 37 C. 122.

Where a warrant bears no date upon which or before which it was to be executed it was bad and resistance to execution was no offence; *Mohini v. K. Emperor*, 36 I. C. 871. 1 P. L. J. 550.

"Shall be signed by the Judge or such other officer as the Court may appoint."—A warrant for arrest may be signed by the Judge himself or by the sheristadar who must be duly authorized.—*The Deputy Legal Remembrancer v. Mir Sarwar*, 6 C. W. N. 845. See also *Q. E. v. Janki Prasad*, 8 A. 293. But the word "signed" does not include initials.—*Abdul Gafur v. Queen-Empress*, 23 C. 896 and *Ram Dayal v. Mahtab Singh*, 7 A. 506. If the warrant of attachment was not signed by the Judge and did not bear the seal of the Court, held that the attachment was bad and resistance to such attachment was not an offence.—*Khidir Bux v. Emperor*, 49 I. C. 171; 3 P. L. J. 636.

An execution sale was set aside on the ground that the warrant had not been signed by the Judge, but by a *Munsarim* of the Court.—*Ram Dayal v. Mahtab Singh*, 7 A. 506.

"Shall be sealed"—The provisions of this rule are mandatory, and omission to affix the Court's seal on the warrant renders the attachment illegal; *Khidir Bux v. K. Emperor*, 3 P. L. J. 636; 49 I. C. 171; *Badri Gope v. Emperor*, 5 P. 216; 7 P. L. T. 30; 93 I. C. 146; A. I. R. 1926. Pat. 237.

Delegation of authority to execute.—The officer to whom a process is delivered for execution may delegate it to another officer for execution; *Abdul Karim v. Bullen*, 6 A. 385; *Dharam Chand v. Q. E.*, 22 C. 596 (distd. in *Subed v. Emperor*, 40 C. 849); *Sheo Prakash v. Bhoop Narain*, 22 C. 759; *Jagannath v. Emperor*, 30 A. L. J. 179; A. I. R. 1932 All. 227; 140 I. C. 118.

A warrant under 8. 45 of the *Chaukidari Act* cannot be delegated; *Sheikh Nasur v. Emperor*, 37 C. 122.

See notes to r. 25.

Arrest or attachment without warrant.—The arrest of a judgment-debtor in execution of a decree without the officer making the apprehension.

having the warrant in his possession is illegal.—*Empress v. Amar Nath*, 5 A. 318. The judgment-debtor is entitled to see the warrant; *Sheikh Nasur v. Emperor*, 37 C. 122 (126).

When a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful.—*Emperor v. Ganeshi Lal*, 27 A. 258.

**25.** (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

[S. 343, including latter part of S. 251.]

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[S. 343.]

### COMMENTARY.

"Officer entrusted with execution"—means the person who actually conducts execution, i.e., seizes property. Such a person is known in English law as "Bailiff." In mofussil Courts such work is done by persons called "Peons."

The words "*officer entrusted with execution*" clearly indicate that such officer is the *peon* and not the *nazir*; *Subed Ali v. Emperor*, 40 C. 849.

**Endorsement on process—Delegation.**—The Code does not prohibit a *nazir* from delegating a subordinate to execute a warrant for him, and his endorsement is *prima facie* evidence of the authority of the person to whom the warrant is delivered for execution.—*Abdul Karim v. Bullen*, 6 A. 385. See also *Dharam Chand v. Q. E.*, 22 C. 596; and *Sheo Prakash v. Bhoop Narain*, 22 C. 759. In *Subed Ali v. Emperor*, 40 C. 849, it has been held that the fact that processes are actually addressed to "bailiffs" shows that the *peon* executing derives his authority from the Court and not from the *nazir* who endorses it. It is the *nazir's* duty to distribute the process among the *peons* and this does not amount in any way to delegation. See notes to r. 24.

**Proof of execution of process.**—A return by the *nazir* to the effect that the *peon* swears that a process has been served is insufficient in law to prove the service without the deposition on oath of the *peon* taken before a competent authority.—*Raj Kishore v. Bydonath*, 12 W. R. 365. The *nazir's* return is no legal evidence of the service of process.—*In the matter of Nil Kant*, W. R. (1864), Mis. 9; *Okhoy v. Erskine*, 3 W. R. Mis. 11; *Srenath v. Watson*, 4 W. R. Mis. 4; *Ram Soondur v. Kalee Komul*, 6 W. R., Act X. 92; *Koondun v. Noor Ali*, 10 W. R. 3; *Meeh Khan v. Narain*, 18 W. R. 197; and *Megh Lall v. Shib Pershad*, 7 C. 34, p. 38. See also *Subed v. Emperor*, 40 C. 849.

## STAY OF EXECUTION.

**26.** (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application. [S. 239.]

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit. [S. 240.]

## COMMENTARY.

**Scope.**—The stay of execution contemplated by this rule, if allowed, will only be for such a period as is necessary for applying to the Court which passed the decree or to the appellate Court for any order relating to the execution of the decree.

**Stay of execution.**—Where, in the opinion of the Court, sufficient cause has been shown against the execution of a decree transferred for execution, the Court should follow the procedure prescribed by this rule. But it is beyond its jurisdiction to question the correctness or propriety of the order under which the decree has been transferred to it for execution.—*Beerchunder v. Maymana*, 5 C. 736. See also *Mulla Abdul v. Sakhinaboo*, 21 B. 456; *Ram Chunder v. Mohendro*, 21 W. R. 141; *Dhuresh v. Oolfut*, 21 W. R. 219; *Ram Lal v. Radhey*, 7 A. 330.

Under this rule a Court to which a decree has been transferred may refer the objector to the Court which passed the decree.—*Jassoda Koor v. Land Mortgage Bank of India*, 8 C. 916; 11 C. L. R. 348.

A Court is competent to stay execution of decree of the High Court for a sufficient time to enable the judgment-debtor to apply to the High Court for a new trial, on the ground that the decree had been obtained *ex parte* without his knowledge.—*Mirtoonjoy v. Cochran*, 8 W. R. 202.

An order for stay under r. 26 cannot be made on the application of a decree-holder.—*Allah Bakhsh v. Karam Chand*, 133 I. C. 643; A. I. R. 1931 Lah. 690.

**Costs.**—Where the defendants applied to the appellate Court for stay of execution of the decree pending the appeal they must pay the costs of the application.—*Chuni Lal v. Anantram*, 25 C. 893.

As to the jurisdiction of the Court to which a decree is sent for execution to try the question of limitation, see notes under S. 42.

As to the extent of liability of a surety and the mode of enforcing a surety bond, see notes under S. 145, and Or. XXI, rr. 5 and 6.

**Appeal.**—Formerly, under the old Code, an order relating to stay of execution was held to be appealable as a decree under S. 47; see *Steel v. Ichchamoyi*, 13 C. 111; *Kristomohini v. Bama Churn*, 7 C. 733; *Ghazidin v. Fakir*, 7 A. 73; *Lingum v. Kandula*, 20 M. 366; *Ishwargar v. Chudasama*, 12 B. 30; *Udayadeta v. Gregson*, 12 C. 624; *Luchmeeput v. Sita Nath*, 8 C. 477. The omission of the words "or to the stay of execution thereof" from Cl. (1), S. 47 of the present Code, does not bring an order relating to stay of execution, within S. 47. Even in a decision under the old Code it was held that an order relating to stay of execution does not come under S. 47 and is not appealable (see *Nihal Chand v. Rameshvari*, 9 C. 214). It has been held that an order for security to stay execution is neither an order under S. 47 nor a "decree" within S. 2 (2) and is not appealable; *Saraswati v. Golap Das*, 41 C. 160 (*Deoki Nandan v. Bansi*, 14 C. L. J. 35; *Srinibash v. Kesho Prasad*, 38 C. 754 referred to).

**27.** No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution. [S. 241.]

Liability of judgment-debtor discharged.

## COMMENTARY.

**Scope**—This is an exception to the ordinary rule. Cf. S. 53 (2).

A judgment-debtor, once arrested and imprisoned in execution of a decree, cannot, under the Code, be again arrested under a fresh writ of attachment on the same decree; *Secretary of State v. Judah*, 12 C. 652 (followed in *In the matter of Bolye Chund Dutt*, 20 C. 874; distinguished in *Rajendro v. Chunder*, 23 C. 128). But see *Shamji v. Poonja*, 26 B. 652, where it has been held that re-arrest is not forbidden (20 C. 874 dissented from; 12 C. 652 distinguished).

**28.** Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution. [S. 242.]

Order of Court which passed decree or of appellate Court to be binding upon Court applied to



## COMMENTARY.

**Principle.**—The transfer of a decree to another Court for execution amounts to a *qualified delegation* of the powers possessed by the Court that passed the decree in discharging its functions relating to the execution of that decree. Such delegation, however, is not complete, nor does it entirely divest the Court which transfers the decree, of its powers and functions in relation to the execution of such decree; *Ghazidin v. Fakir Bakhsh*, 7 A. 73 (76).

Where a Sub-Judge's Court in one district executes a decree of a Sub-Judge's Court in another district, it is bound to comply with a requisition from the latter Court to transmit to it the record of the case.—*Indur Chunder v. Gopal Chand*, 11 W. R. 230.

For the powers and functions of the Court to which a decree is transferred for execution, see notes to S. 42.

**29.** Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. [S. 243.]

## COMMENTARY.

**Alteration**—The words "*either absolutely*" in the old section have been omitted.

**Scope**—There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of this rule have no reference to a case in which execution has already been carried out, and the decree-holder has been placed in possession of the property decreed to him.—*Ghazidin v. Fakir Bakhsh*, 7 A. 73.

**Rule 29** refers only to the Court and not to the personality of the Judge presiding over the Court, and not to the personality of the person pending before the Court. There is no indication in the rule that the order should only be passed by the Court before whom the execution proceedings are pending.—*Narsidas v. Manhar-sing*, 132 I. C. 507; 33 Bom. L. R. 370; A. I. R. 1931 Bom. 247.

The Court has ample power to stay execution under S. 151, in cases not provided for by this rule; *Bhagwan v. Harnam*, 82 P. R. 1910. As for instance, when the *ex parte* decree is obtained by fraud; *Fitzholmes v. Waryam Singh*, 75 I. C. 419; A. I. R. 1923 Lah. 514.

**"Such Court"**—The words "*such Court*" do not limit the exercise of the powers only to decrees passed by the Court in which the suit is pending, but that Court is empowered to stay execution of decrees transferred to it

for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.—*Knsa Mnl v. Gopi*, 10 A. 389. *A* obtained a decree against *B* which was transferred to another Court for execution. In the latter Court *B* filed a declaratory suit for injunction to be issued against *A* restraining him from taking out sale proceedings. It was urged that that application should be treated as if it had been made under rule 29. Held that rule 29 did not apply to the facts of the case as *A* was not the decree-holder of a decree of the Court to which the suit was pending and to which the application was made. Rule 29 was only applicable to the holder of a decree of "such Court."—*Inayat Beg v. Umrno Beg*, 123 I. C. 182; A. I. R. 1930 All. 121. But see *Cooke v. Hiseebn Beebe*, 6 N. W. P. 181.

"Until the pending suit has been decided."—These words mean after all rights of appeal have been exhausted and not merely until a decree has been passed by the Court. The word 'decided' means finally decided.—*Mahesh Chandra v. Jogendra*, 55 C. 512; 32 C. W. N. 181; 107 I. C. 79; A. I. R. 1929 Cal. 222. This case has been dissented from in *Rndha Ballav v. Pyarilal*, 59 C. 1113; 134 I. C. 939; 35 C. W. N. 540; A. I. R. 1932 Cal. 19, where it has been held that if an order of stay is made with express reference to Or. XXI, r. 29, the order does not operate to stay execution until the claim in the suit has been disposed of after exhaustion of all rights of appeal; the order can have reference only to the actual proceeding referred to in the order.

Whether provisions relating to execution of decrees apply to awards.—An award filed in Court under S. 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree and execution of such award cannot be stayed under this rule; *Tribhuwandas v. Jivan Chand*, 35 B. 196. See also *Gajjar v. Dharam Chand*, 12 Bom. L. R. 860. It has been held by the High Courts of Calcutta and Allahabad that an award filed in Court under S. 11 of the Arbitration Act being enforceable under S. 15 of that Act, as if it were a decree, the provisions of the Code applicable to the execution of decrees apply to an award so filed; *Gladstone Wyllie & Co. v. Joosub*, 37 C. W. N. 666; 77 I. C. 868; A. I. R. 1924 Cal. 117; *Sital Prasad v. Clement Robson & Co*, 43 A. 394; 61 I. C. 401.

Appeal.—See notes to r. 26.

Revision.—Amount of security.—Security for the full amount of the decree under rule 29 being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used.—*Jiwandas v. Khem Chand*, 116 I. C. 101; A. I. R. 1929 Sind 110. The phraseology of the rule indicates that it is not necessary that the Court should pass an order for security for the whole amount. The Court has ample discretion in regard to the terms on which the execution of the decree could be stayed.—*Narsidas v. Manharsing*, 132 I. C. 507; 33 Bom. L. R. 370; A. I. R. 1931 Bom. 247.

Limitation.—Where the execution of a decree is stayed under this rule an application for execution of such decree, after disposal of the suit is governed by Art. 178 and not by Art. 179 of the Limitation Act.—*Rungiah Gounden v. Nanjappa Row*, 26 M. 780.

## MODE OF EXECUTION.

**30.** Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both. [S. 254.]

## COMMENTARY.

**Alteration and scope.**—The language of the old section has been recast and made more explicit. The word *order* has been omitted, as S. 36 says that provisions relating to execution of decrees shall apply to execution of orders.

See r. 21 which lays down that Court may refuse simultaneous execution against person and property.

This rule does not constitute a limitation upon the general right conferred by S. 51, *Lahani v. Harakchand*, 31 I. C. 235 : 11 N. L. R. 113.

**Alternative to some other relief.**—See Or. XX, r. 10. An order made under the Land Acquisition Act, directing a party, to whom a sum of money was awarded as compensation, to refund the money, may be enforced under this rule.—*Nobin Kali v. Banalata*, 32 C. 921 : 2 C. L. J. 595.

Where a decree is for the delivery of moveable property, and states the amount to be paid as an alternative the goods must be delivered if capable of delivery, but if not capable of delivery, then assessed damages should be paid.—*Kashee Nath v. Debkisto*, 16 W. R. 240.

**Option as to mode of execution.**—Under this rule a judgment-creditor has the option of enforcing his decree against the person or property of the judgment-debtor, and the fact that such decree is an *ex parte* one makes no difference.—*Raj Chunder v. Shama Soondari*, 4 C. 583.

It is for the decree-holder to decide whether he should execute the decree for payment of money by the arrest of the judgment-debtor, or by the attachment and sale of his property, or by both. While the Court has discretion to refuse execution against the person and property simultaneously under Or. XXI, r. 21, it has no authority to refuse an order of commitment to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor; *Hargobind Kishan Chand v. Hakim Singh*, 6 L. 548 : 93 I. C. 54 : A. I. R. 1926 Lah. 110. Where a decree-holder wants to execute his decree by arrest and detention of the judgment-debtor, the executing Court cannot deprive him of his right and compel him to accept payment in instalments instead.—*Bhagwan v. Girdhari*, 125 I. C. 61 : 30 P. L. R. 736 : A. I. R. 1930 Lah. 220.

In a suit for damages for *ex parte* order of arrest applied under Or. XXI, r. 30, it was held that the requirements of the law were satisfied by the plaintiff showing that it was the invariable practice of the Court only to make an order of that kind when special circumstances are alleged and that the defendant had alleged maliciously such a circumstance, viz., that the

plaintiff was about to leave the jurisdiction of the Court, without reasonable or probable cause. It is not necessary for the plaintiff to show that the order was wholly wrong or without jurisdiction, or that the proceedings terminated in his favour.—*Sudhangshu v. Hari Charan*, 36 C. W. N. 809.

“Decree for payment of money.”—The words “decree for payment of money” include all sorts of decree for payment of money, except mortgage-decree. See notes under rule 20.

A suit on mortgage-bond was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. Held that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.—*Janki Prasad v. Baldeo Narain*, 3 A. 216. See, however, *Debi Charan v. Pirbhu Din*, 3 A. 388, and *Jagannath v. Debi Pursad*, 2 P. 768: 73 I. C. 598, where it has been held that no attachment is necessary in the case of a decree for money when it is provided that if it is not paid by a certain date specific immoveable property should be sold.

Where a landlord obtains a decree, for rent against his tenant without creating a charge and which is on the face of it a decree for money, he is at liberty in execution to bring to sale the property of the judgment-debtor other than the tenure.—*Tarini Prasad v. Narayan Kumari*, 17 C. 301. See also *Fotick Chunder v. Foley*, 15 C. 492 (14 C. 14 explained). See also *Bhabani Charan v. Pratap Chandra*, 8 C. W. N. 575 and *Sourendra Mohan v. Surnomoyi*, 26 C. 103: 3 C. W. N. 38.

Detention in civil prison.—The High Court's power to imprison for contempt is a jurisdiction inherited from the old Supreme Court, and it has not been affected by the Code.—*Martin v. Lawrence*, 4 C. 655. See also *Hassanbhoj v. Cowasji*, 7 B. 1; and *Narivahoo v. Narotamdas*, 7 B. 5.

An insolvent, who has obtained a protection order, is not liable to arrest or imprisonment for arrears of maintenance included in the schedule filed by him.—*Tokee Bibee v. Abdool Khan*, 5 C. 536: 5 C. L. R. 458.

**31.** (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out.

of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months, from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease. [S. 259.]

### COMMENTARY.

**Alteration.**—In sub-rule (1) the words “or for the recovery of a wife” which occurred after “any share in specific moveable,” in the old section have been omitted; for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him, which may be enforced in case of disobedience, either by the imprisonment of the defendant or by the attachment of his property, or by both.

**Applicability.**—This rule is not applicable where the property sought to be attached is not in the possession of the judgment-debtor, e.g., with the Bank.—*Pudmanund v. Okundi Dat*, 1 C. W. N. 170.

**“Specific moveable property.”**—This means the property recovered in specie, i.e., the very property itself, not any equivalent, substitute or reparation. It does not include money; *Sankunni v. Govinda*, 37 M. 381. As to what entitles the plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree, see *Jaldu Venkatasubba v. Asiatic S. N. Co.*, 39 M. 1.

Where a decree directs recovery of moveables and recovery of price thereof if the moveables be not delivered and there is no question of deterioration in value of the articles to be recovered, the decree-holder is not entitled to execute the money part of the decree before applying for delivery of the articles (*Manavikraman v. Moyan Kutti*, 13 M. L. J. 444 applied).—*Balmakunda v. B. N. Railway*, 55 C. 26: 31 C. W. N. 850: 103 I. C. 740: A. I. R. 1927 Cal. 652.

A decree for certain moveable and immovable property was given, and it was directed that the amín was to ascertain the extent of the moveables. Held that the Court in execution could not enquire into the value of such of the moveables as could not be found in order to give alternative damages.—*Dhobun Mohinze v. Gobind Chunder*, 19 W. R. 82.

See S. 11 of the Specific Relief Act.

**32.** (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction,

Decree for specific performance, for restitution of conjugal rights, or for an injunction

has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced *in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.*

[PARA. 1, S. 260.]

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention. [New.]

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

[PARA. 2, S. 260.]

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

[PARA. 3, S. 250.]

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree. [New.]

*Illustration.*

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceeding.

**COMMENTARY**

**Alterations.**—In sub-rule (1) the words, "or for an injunction, has been passed," have been substituted for the words, "or for the performance of, or abstention from, any other particular act has been made," and the words, "*detention in the civil prison*," have been substituted for the word "imprisonment." The italicized words in sub-rule (1) were inserted by Amendment Act XXIX of 1923.

Sub-rule (2) is new; there was no similar provision in the old section.

Sub-rule (5) with the illustration is new and corresponds with the English Or. XLII, r. 30; see notes.

**Scope and applicability**—This rule applies equally to cases where a party is directed to carry out something as well as to cases where he is directed to abstain from doing an act, *Manikaran v. Somayajipad*, 6 I. C. 299; 7 M. L. T. 227. It applies also to cases where the injunction restrains certain persons from doing certain things in perpetuity and not only to cases where the imprisonment or attachment can be continued until the decree has been executed; *Aiyana v. Vashar*, 32 I. C. 693; 19 M. L. T. 132.

The provisions of this rule are intended chiefly to provide something in the nature of a penalty for breach of an order of Court, though sub-rule (3) does provide that some portion of the price realised by sale may be allocated as compensation to the decree-holder in the suit. In such a case the judgment-debtors have no *locus standi* to apply to set aside the sale under Or. XXI, r. 89. (See *Semble*, the only remedy is to obey the decree and pay all costs of executing the same).—*Gahurati v. Asia Khatun*, 56 C. L. J. 140.

**Decree for specific performance of contract.**—See Ss. 12 to 30 of the Specific Relief Act (I of 1887).

Incidental to the relief to which a plaintiff is entitled in a decree for specific performance arising on a contract for sale, the Court has a right to grant possession of the property. A contract for sale includes not only the execution of the necessary document but also putting the vendee in possession of the property. Therefore, if there is an omission in the plaint or in the decree about possession the executing Court is not debarred from granting the plaintiff the possession of the property (33 M. 693 *disented from*; 5 P. L. J. 314 *followed*).—*Atal Behary v. Barada*, 131 I. C. 529; 12 P. L. J. 636; A. I. R. 1931 Pat. 179.

"Decree for restitution of conjugal rights."—These words were added in the Code of 1877, as S. 200 of the Code of 1859 was held to be inadequate for enforcement of a decree for restitution of conjugal rights (see *Gatha Ram v. Moohita*, 14 B. L. R. 298, 23 W. R. 179). It was however held that a decree for restitution of conjugal rights between Mahomedans or Hindus may be enforced under this section—*Yamunabai v. Narayan*, 1 B. 164. See also *Chotun Beebe v. Amcer*, 6 W. R. 105, 1 Ind. Jur. N. S. 317. The introduction of rule 33, now gives the Court a discretion where executing such a decree.

In an application for execution of a decree for restitution of conjugal rights, the Court will not issue an attachment, without notice to the defendant. The Court must also be satisfied on affidavit that the decree has been served on the defendant, and that he has had an opportunity of obeying it, that the plaintiff has a house to take her to, and that he has given her notice thereof, and that she had refused—*Troylukho Nath v. Radharani*, 3 C. W. N. xxxix (39).

A mother directed by a decree to refrain from preventing her daughter returning to her husband, permitted her to reside in her house. Held that such conduct does not justify execution of the decree against her under this rule—*Iynasi Kuar v. Suraj Prasad*, 1 A. 501.

A plea by a wife that sexual intercourse is impossible owing to her incurable disease or physical malformation, is not a good defence. A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife from refusing to return to live with her husband—*Purshotamdas v. Bai Mani*, 21 B. 610. See also *Dadaji v. Rukhmabai*, 10 B. 301 (reversing 9 B. 529).

Where it was the universal custom that a child wife should remain away from her husband until a certain event had occurred, a Court was held to have been justified, while such contingency had not happened, in refusing to order such a wife to go to her husband.—*Suntosh Ram v. Gera Pattuck*, 23 W. R. 22.

The effect of a Civil Court Decree in a suit for restitution of conjugal rights, is to supersede the order of the Criminal Court for maintenance.—*Nur Muhammad v. Ayesha Bibee*, 27 A. 483 (23 B. 484 followed).

Form of decree in suits for restitution of conjugal rights.—A decree should be passed in the form that the husband is entitled to conjugal rights, that his wife do return to live with him, and that the parents do not interfere in any manner to prevent her so doing.—*Ram Tahul v. Madho*, 2 Agra 111; *Koobur Khansama v. Jan Khansama*, 8 W. R. 467; *Jaffree Khanum v. Imdad Hossein*, 2 N. W. P. H. C. R. 314; *Kuroonamoyee v. Gungadhur*, 20 W. R. 50; *Lall Nath v. Shoburn*, 20 W. R. 92; *Toofeah v. Jussaada*, 2 Agra 337; and *Imamum v. Mahomed*, 3 Agra 98. A decree that "the case be decreed awarding the plaintiff to take the defendant as his married wife," is not a proper form of decree.—*Gatha Ram v. Moohita*, 14 B. L. R. 298; 23 W. R. 179.

As to the discretion of Court while passing a decree for restitution of conjugal rights, see r. 33, which is new.



**Sub-rule (1)—Decree for injunction.**—Sub-rule (1) applies to both prohibitory and mandatory injunction; *Sachi Prasad v. Amarnath*, 46 C. 103 : 22 C. W. N. 851 : 27 C. L. J. 506 : 45 I. C. 864. Where a decree for perpetual injunction was made restraining a party from erecting a pucca building and he in defiance erected it; *held* that it was not obligatory on the Court to make an order of attachment under this rule against the judgment-debtor without previous service of notice upon him, calling upon him to comply with the order; *Durga Das v. Dewraj*, 33 C. 306 : 10 C. W. N. 297 : 3 C. L. J. 112.

A decree ordering the removal and pulling down of a wall should be executed by the imprisonment of the judgment-debtor or by attachment of his property, or by both—*Protab v. Pyari*, 8 C. 174 : 9 C. L. R. 453 (followed in *Khatri Bibee v. Hurry Das*, 2 C. L. J. 59-n). See also *Bhoobun Mohun v. Nobin*, 10 B. L. R. Ap. 12 : 18 W. R. 282.

*Held*, that a decree, directing performance of specific acts, and also declaring rights of the decree-holders was not incapable of execution on the objection that it was only declaratory.—*Kishore Bun v. Dwarka*, 21 C. 784 (P. C.)

A compromise decree in a suit relating to a right of easement by which it was provided that certain things should be done and certain other things not to be done, can be enforced under this rule as being a decree for an injunction and execution might be ordered as under sub-rule (1) or under sub-rule (5).—*Sampath v. Sankara*, (1930) M. W. N. 809.

It was held under the old section, that an order directing a defendant to render accounts within a specified time was "an order requiring the performance of a particular act" within the meaning of that section, and that disobedience to the order was punishable under that section; *Degambar v. Kallynath*, 7 C. 654; *Rajhunath v. Ganpatji*, 27 A. 374.

Where a decree directs particular acts to be performed in the management of a temple, it may be enforced by the imprisonment of the defendants, or by the attachment of their property, or by both.—*Damodar Bhat v. Bhogi Lal*, 24 B. 45.

A decree restraining a defendant in his use of certain land, cannot be executed against the purchaser of the said land, as the injunction does not run with the land—*Dahyabhai v. Bapa Lal*, 26 B. 140. See also *Jamsetji v. Hari Dayal*, 32 B. 181. But in *Sakarlal v. Parvatibai*, 26 B. 283, it has been held that such a decree can be executed against the heirs of a deceased person against whom the decree had been made.

The plaintiff obtained a decree for mandatory injunction directing the defendant to remove a wall erected by him within two months. Two years after the plaintiff sued for damages alleging his cause of action to be defendant's disobedience of the mandatory injunction. *Held* that the suit was not maintainable as the plaintiff's remedy was in execution.—*Jawtiri v. Emile*, 13 A. 98.

A suit is not maintainable for enforcement of a prohibitory injunction embodied in decree but the remedy lies by execution under Or. XXI, r. 32 of the C. P. Code; *Sachi Prasad v. Amarnath*, 46 C. 103 : 22 C. W. N. 851 : 27 C. L. J. 506 : 45 I. C. 864.

A decree for injunction passed against the father as the manager and representative of the joint family can be executed against the son who, on his father's death, represents the joint family (26 B. 293; 33 Bom. L. R. 266 and 51 B. 37 followed, 42 B. 504 distinguished).—*Ganesh v. Narayan*, 55 B. 709; 134 I. C. 961; 33 Bom. L. R. 1144; A. I. R. 1931 Bom. 484; *Manilal v. Kikabhai*, 134 I. C. 968; 33 Bom. L. R. 1118; A. I. R. 1931 Bom. 482.

Sub-rule (3).—The rule is a highly penal one and must be construed strictly. Under it the following conditions must exist before a sale is ordered: (a) a valid original attachment; (b) application within one year of that attachment by decree-holder for sale; (c) lapse of one year from date of attachment; *Badri v. Fakira*, 10 I. C. 34; 170 P. L. R. 1911.

Sub-rule (5)—Disobedience to order for injunction or for specific performance of contract.—This sub-rule is new. It has been borrowed from Or. XLII, r. 30 of the English rules, and supplies a distinct want. The illustration, newly added, clearly explains its meaning. Under the old Code, it was held that a decree for injunction could only be executed by the imprisonment of the judgment-debtor or by attachment of his property as laid down in the old section. That relief was not adequate; *Protap v. Peary*, 8 C. 174; 9 C. L. R. 453; *Durgadas v. Dewraj*, 33 C. 306; 10 C. W. N. 297; 3 C. L. J. 112; *Sakaral v. Parvatibai*, 26 B. 283. The new provision will give immediate relief wherever possible by causing the decree to be executed through the agency of the decree-holder so far as practicable or by appointment of some officer of the Court by removal of the obstruction or building.—*Sachi Prasad v. Amarnath*, 46 C. 103; 22 C. W. N. 851; 27 C. L. J. 506; 45 I. C. 864. But the Court has no power under this rule to order the police to see that its decree is carried out; *Goswami Gordhanlalji v. Goswami Maksudan*, 40 A. 648; 48 I. C. 26.

This new sub-rule is likely to facilitate the execution of injunction decrees against the legal representatives or persons other than the original judgment-debtor.—*Amritlal v. Kantilal*, 133 I. C. 244; 33 Bom. L. R. 266; A. I. R. 1931 Bom. 280.

The expression "the act required to be done" in sub-rule (5) means what has to be done to enforce the injunction; *Sachi Prasad v. Amarnath*, noted ante.

Disobedience to order of injunction—Contempt of Court.—The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt.—*In the matter of Chandra Kanta*, 6 C. 445; 7 C. L. R. 350. See also *Pran Jivan Das v. Mayaram*, 1 B. H. C. R. 148 and *Advocate-General of Bombay v. Gangji Akhai*, 19 B. 152.

Where a plaintiff has once obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff to sue again for similar relief, if in future the defendant ignores such injunction. Disobedience is contempt of Court, and the Court can take proceedings to enforce the injunction.—*The Limitation Act, 1877*.—*In Bhagwan v. Sukhda*.

Even a temporary disobedience is punishable; *Aiyana v. Vathiar*, 32 I. C. 648. The procedure is to punish for contempt and not to discharge the decree so as to prevent a decree-holder from taking further steps; *Ahmadi Begam v. Amanat*, 1 A. L. J. 431.

As to failure to carry out the Court's order and contempt of Court, see *Dharmapal v. Krista Dayal*, 10 C. L. J. 631.

**Limitation.**—Where a perpetual injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within 3 years of such breach under Art. 178 of the Limitation Act, 1877. The decree-holder is not bound to take action in respect of every petty infringement; and the injunction does not by his inaction become inoperative after 3 years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed.—*Venkatachallam v. Veerappa Pillai*, 29 M. 314. See also *Bhagwan v. Sukhdei*, 28 A. 300 : (1906) A. W. N. 10 : 3 A. L. J. 836.

**"An opportunity of obeying"**—Notice not obligatory.—Before issuing execution the Court is to see whether the judgment-debtor has ample opportunities of obeying the injunction or decree, and has wilfully disobeyed it. Where there was opportunity of obeying but the defendant wilfully failed to obey, no notice is necessary. It is not obligatory to issue any notice before execution under this rule. It is in the discretion of the Court; *Durgadas v. Deoraj*, 33 C. 306 : 10 C. W. N. 297 : 3 C. L. J. 112. See also *Bhagwan v. Sukhdei*, 28 A. 300 : (1906) A. W. N. 10 : 3 A. L. J. 836. The proper course is to issue a notice first, fixing a time within which to comply with the order; *Protap v. Peary*, 8 C. 174 : 9 C. L. R. 453 (*distinguished* in 33 C. 306). Where an application has been dismissed on the ground that the debtor has had no opportunity of obeying, there is no bar to a subsequent application after such opportunity was given; *Kishore v. Dwarka*, 21 C. 784.

**33. (1)** Notwithstanding anything in rule 32, the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the

same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money. [NEW.]

### COMMENTARY.

**Alteration in the rule.**—The italicized words, "*against a husband*" in sub-rule (1) were added by the Amendment Act XXIX of 1923 and the words, "*shall be executed in the manner provided in this rule,*" were substituted for the words, "shall not be executed by detention in prison." The words, "and the decree-holder is the wife," which occurred in sub-rule (2), were omitted by the same Act.

**34. (1)** Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court. [PARA. 1, S. 261.]

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf. [PARA. 2, S. 261.]

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft as it thinks fit. [PARA. 3, S. 261.]

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered. [PARAS. 3, 4, S. 261.]

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

"C. D., Judge of the Court of.....  
"(or as the case may be), for A. B., in a suit by E. F. against  
A. B.,

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same. [S. 261.]

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration. [New.]

### COMMENTARY.

**Alterations.**—This rule embodies the provisions of Ss. 261 and 262, C. P. Code, 1882, in a re-arranged and modified form. Throughout, the word 'document' has been substituted for "conveyance." The rule has been brought into conformity with the chronological order of events, and a provision has been added to meet the requirements of the Indian Registration Act (see sub-rule 6). It was pointed out, in decisions under the old Code, that the endorsement by the Judge on the back of a mortgage-deed of over Rs. 100, showing its transfer to an auction-purchaser requires registration; *Kanahia v. Kali Din*, 2 A. 392.

**Execution of document or endorsement by Court.**—This rule prescribes the machinery for enforcing a decree, which directs the execution of a conveyance, and the form and the effect of such a conveyance.—*Atul Krato v. Mutty Lal*, 3 C. W. N. 30.

Where a decree directed the defendant to execute a conveyance and provided that if he failed, the Court would execute it, and the conveyance was executed by the Court, nothing further remained to be done in execution proceedings, and if either of the parties wanted to enforce his rights under it, a separate suit was maintainable; *Kali Narain v. Harinath*, 12 C. L. J. 599.

Where a decree based upon a compromise directed that one party should execute a *kobala* in favour of another within a certain time after the date of the decree; held that the proper course for the parties would have been to proceed regularly as if a decree for specific performance was made. Either party ought to have submitted to the Court a draft of the *kobala* to be served on the other side, the other side having the right to object to the terms of the draft. Then the matter should have been taken up by the Court, or by a proper officer of the Court to settle the terms of the *kobala* and then the person who was to execute the document should have executed it and filed it in Court and the execution should have been attested by persons known to the recipient of the *kobala* or by other respectable persons.—*Hare Krishna v. Priya Nath*, 10 C. W. N. 345.

Where in a suit for declaration of title, a compromise-decree was passed under which the respondents were directed to execute a mortgage-bond  
 a suit must depend upon the facts of each case and in the present case, the

decree was capable of execution under this rule; *Soudamini v. Behary*, 25 O. W. N. 68.

The provision in a *solenama*, which *solenama* has been embodied in a decree, that one of the parties shall execute a *patta* in favour of the other, can be executed under Or. XXI, r. 34; *Ashwini v. Ram Gopal*, 95 I. C. 179; A. I. R. 1926 Cal. 975.

So also a decree directing transfer of shares may be executed under this rule; *Brojendra v. Kalinath*, 41 I. O. 77.

The Registrar of the High Court has authority, when so directed, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any conveyance on his behalf.—*Ram Chunder v. Dwarka Nath*, 16 C. 330.

In a suit for specific performance of an oral agreement, if the defendant fails or refuses to comply with the decree, the Court shall proceed to exercise the power under this rule for carrying out the conveyance.—*Chunder Kant v. Krishna Sunder*, 10 C. 710.

In a suit for specific performance of a contract of sale and to execute a sale deed, the Court ordered the defendant to execute a deed of sale. On failure of the defendant to do so, the Court executed a deed of sale in plaintiff's favour under this rule.—*Nathu v. Budhu*, 18 B. 537.

Courts in British India cannot direct an agent to convey to the principal properties situate outside jurisdiction. The only way to grant relief is under Or. XXI, r. 52; *Ramasami v. Karuppan*, 29 M. L. J. 551.

**Form of decree.**—Form of decree under this rule pointed out.—*Goffur v. Bhikaji*, 26 B. 159. See also *Sarju Prasad v. Wazir Ali*, 23 A. 119.

**Registration.**—See notes under heading "Alteration," ante.

**Appeal.**—An order on an objection to a draft conveyance or endorsement under this rule, is appealable under Or. XLIII, r. 1 (i).

**35.** (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. [S. 263.]

Decree for im-  
movable pro-  
perty.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. [New.]

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may,

after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. [New.]

### COMMENTARY.

**Alterations.**—Sub-rule (1) corresponds with S. 263, C. P. Code, 1882 with some verbal changes only.

Sub-rule (2) is new. It makes provision for delivery of joint possession of immoveable property, to the owner of an undivided share or the purchaser of the rights of a co-sharer, as there was no such provision in the old Code.

Sub-rule (3) is also new. The provision is made in this rule for delivery of *khas* possession by removing or opening any lock or bolt or by breaking open any door, etc., etc.

"Bound by the decree."—In delivering possession the first thing to be seen is, whether the person who refuses to vacate is bound by the decree or not. If he is not bound by the decree and is a stranger, then he cannot be removed, nor his doors can be broken open.

This rule should be read with S. 146, and proceedings under it may be taken against persons claiming under the judgment-debtor, *e.g.*, the representatives of a deceased judgment-debtor.

A landlord obtaining a decree for ejectment against his lessee can execute the decree against the sub-lessee also, because he is bound by the decree and it is not necessary in such a case to institute separate proceedings under r. 97 of Or. XXI.—*Yusuf Sheikh v. Jyotish Chandra*, 35 C. W. N. 1182.

**Delivery of possession—Symbolical and actual.**—Possession may be delivered in two ways, *viz.*, delivery of *actual* or *khas* possession and delivery of *formal* or *symbolical* possession. Sub-rules (1) and (3) speak of *actual* possession, and sub-rule (2) contemplates *symbolical* possession. Rule 95 contemplates *actual* possession. Rule 96 (next rule) and r. 96 contemplate *symbolical* possession. Rules 95 and 96 deal with possession to be given to the auction-purchaser.

Distinction between *actual* or *khas* possession under this rule and *formal* possession under r. 36 explained and the mode of taking possession under each of the above rules pointed out by Edge, C. J.—*Sitaram v. Ram Lal*, 18-A. 440 (F. B.) (pages 449, 450 and 451).

"Constructive" possession by receipt of rent from tenants is not physical possession.—*Batul Begum v. Mansur Ali*, 20 A. 315 (F. B.).

Symbolical possession does not amount to dispossession as contemplated by S. 335, C. P. Code, 1882 (Or. XXI, rr. 97, 103).—*Ibrahim v. Ram Jadu*, 30 C. 710.

Where the service-report states that *symbolical* possession was delivered, it may be presumed in the absence of anything to the contrary, that the requisites as to fixation of warrant had been complied with.—*Ohhajju v. Kirpa Ram*, 132 I. C. 181 : 31 P. L. R. 1001.

**Effect of symbolical possession.**—Delivery of symbolical possession in execution operates in point of law and fact, as between the parties, a complete transfer of possession from one party to another, and forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit for possession of the property, although such possession is of no avail as against third parties.—*Juggobundhu v. Ram Chunder*, 5 C. 584 (F. B.); 5 C. L. R. 548; *Jogobundhu v. Purnanund*, 16 C. 530 (F. B.) (10 C. 402 overruled); *Shama Charan v. Madhab Chandra*, 11 C. 93; *Janaki Nath v. Baikunthanath*, A. I. R. 1922 Cal. 175; *Radha Krishna v. Ram Bahadur*, 22 C. W. N. 330 (P. C.); 27 C. L. J. 191; 34 M. L. J. 97; 20 Bom. L. R. 502; 15 A. L. J. 33; 43 I. C. 268; *Mahadevappa v. Dhima*, 45 B. 710; 56 I. C. 320; 24 Bom. L. R. 232; A. I. R. 1923 Bom. 27—28; *Ranganatha v. Srinivasa*, 49 M. L. J. 555; 90 I. C. 1037; A. I. R. 1925 Mad. 42; *Jogendra Krishna v. Joy Shib*, 96 I. C. 481; A. I. R. 1925 Cal. 1172; *Ali Husain v. Afzal Husain*, 3 L. 130; A. I. R. 1928 Cudh 8; 105 I. C. 781.

Though symbolical possession is delivered where actual possession should have been given, still so far as the judgment-debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession; *Maharaja Pratap v. Bhaiani Sunder Bans*, 71 I. C. 999. Formal delivery under rule 35 (1) amounts to actual delivery; *Pandurang v. Sampat*, 72 I. C. 318; A. I. R. 1923 Nag. 237; *Babu Edal Singh v. Babu Ram Bahori Lal*, 2 P. L. T. 743. But the delivery of symbolical possession is effective only in cases where C. P. Code recognizes such possession. Such symbolical possession does not affect persons impleaded as parties to the suit against whom, however, there is no decree for possession; *Raghunath v. Kondiba*, 46 B. 932; 58 I. C. 91; A. I. R. 1923 Bom. 2; 24 Bom. L. R. 499.

Where a decree-holder is under the terms of his decree entitled to *khas* possession, he cannot take by way of first instalment symbolical possession only and thereafter apply for supplementing what he has got by being given actual possession. His remedy is only to institute a fresh suit, if he has not repudiated the delivery of symbolical possession by the Court-poon.—*Jagadish v. Nafar*, 35 C. W. N. 12; 131 I. C. 698; A. I. R. 1931 Cal. 427.

**Symbolical possession and limitation.**—Merely formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor, where the latter remains in actual possession. *Janu Namji*, 35 B. 373 (F. B.); 1 m. L. R. 499; 58 I. C. 91; A. I. R. 1922 Bom. 2; *Shridhar v. Ganpati*, 43 B. 559. The effect of this decision is that symbolical possession given in circumstances in which actual possession ought to have been given is a nullity, and the period of limitation for a suit for actual possession is 12 years from the date of sale. The Allahabad High Court in *Jang Bahadur v. Hanwant*, 43 A. 520 (F. B.), took the same view as the Bombay High Court. The Madras High Court in an earlier case (*Govind v. Venkata*, 17 M. L. J. 598), took the same view as the Calcutta High Court, but in later cases (*Dharmala Kamayya v. Dhima-rasetti*, 49 M. L. J. 303; 85 I. C. 439; A. I. R. 1925 Mad. 1140; *Govinda Sami v. Petha Perumal*, 44 I. C. 829), it followed the Bombay decisions. A contrary view has been taken by the Calcutta High Court where it has been



held that a suit by an auction-purchaser who has obtained symbolical possession for actual possession of land, brought within twelve years from the date of symbolical possession is not barred by limitation; *Hari Mohan v. Baburali*, 24 C. 715; *Bhulu Beg v. Jatindra*, 27 O. W. N. 24: 77 L. C. 1035: A. I. R. 1923 Cal. 138. See also the Calcutta cases 'noted above under "Effect of Symbolical Possession."

It should be noted that symbolical possession though effective against the judgment-debtor, is of no avail against third persons or strangers; *Hari Mohan v. Baburali*, 24 C. 715; *Giri Narain v. Modhusudan*, 17 O. W. N. 324; see cases noted above under "Effect of Symbolical Possession." Thus *D* conveys his property to *A* but remains in possession. *A* sells the property to *P*. In execution of a decree against *D* the property is sold as *D*'s property and purchased by *Q*. *P* then sues *A* and *D* for possession, and gets a decree in execution of which he obtains symbolical possession. When he went to take actual possession he was resisted by *Q* whose adverse possession was for more than twelve years including *D*'s adverse possession against *A*. *P* then brings a suit against *Q*. The suit is barred, as the symbolical possession obtained by *P* did not break the continuity of *Q*'s possession; *Harjivan v. Shivram*, 19 B. 620. In *Kocherlakota v. Vadrevu*, 27 M. 262, it has been held that symbolical possession will affect even a third party when it is delivered with his knowledge and in his presence. See also *Lakshman v. Moru*, 16 B. 722; *Namdeb v. Ram Chandra*, 18 B. 37; *Doyanidhi v. Kelai*, 11 C. L. R. 395.

Symbolical possession, such as may be given by sticking a bamboo into the ground or the like, of a dwelling-house of which actual possession might have been granted, is not such *bona fide* possession as will save limitation.—*Shotee Nath v. Obhoy Nund*, 5 C. 331.

It has been held that when the lease purports to be a perpetual lease without reservation to the grantors, the title is reserved to them but only a nominal right. The grantors would not be effective in limitation.—*Gossain Dalmar Puri v. Dipin Senary*, 15 C. 520 (4 C. 327 referred to).

If a person obtaining formal possession in execution of a decree, allows 12 years to elapse without taking any steps to acquire and assert actual possession, he loses the title conferred by the decree.—*Pearce Mohun v. Jugobundhu*, 24 W. R. 418. See also *Bagdu Majhi v. Durga Prosad*, 9 C. W. N. 292; *Ramlal v. Masum Ali*, 25 A. 35.

Where a decree declared that the plaintiff was to get possession of certain land after *batwara* being made, and the decree-holder, after allowing his right to be barred by lapse of time, applied to the Collector, had a *batwara* effected and obtained merely formal possession; held that such possession gave him no fresh cause of action.—*Kishore Singh v. Gobind Singh*, 24 W. R. 33.

Where formal possession has been given under a final foreclosure decree but the mortgagor continued in actual possession, the remedy is by a suit and not under S. 47 of the C. P. Code, consequently the law of limitation applicable is that governing suits, and not execution proceedings.—*Jagan Nath v. Milap Chand*, 23 A. 722; 3 A. L. J. 504: (1906) A. W. N. 213 (11 C. 93; 24 C. 715; 19 A. 499, referred to).

**Delivery of actual or khas possession.**—A decree, which is not a decree for possession, cannot be executed by an order for delivery of possession of property in the possession of a third party who has acquired a title subsequently to the institution of the suit.—*Amceeroonnissa v. Abedoonnissa*, 16 W. R. 307.

The delivery of possession under this rule contemplates the decree-holder being placed in actual possession by possibly dispossessing, in the eye of law, a third person who is not affected by the decree. The mere formal delivery of possession cannot of itself effect such dispossession, unless the deprivation of possession be complete as a fact, a conclusion which the Court has to form on the whole of the evidence.—*Ram Chandra v. Raji*, 20 B. 351 (F. B.) (13 B. 213 referred to).

If in execution of a decree for khas possession, it is necessary to remove any of the defendants from the land covered by the decree, the Court, on application, is authorized to remove such person; but if the decree is silent as to the building situated on the land, it is not within the province of the Court, which executes, to direct that the building be pulled down.—*Radha Gobind v. Brijendro Coomar*, 18 W. R. 527.

Where plaintiff sued defendant as trespasser, the prayer in the plaint being for khas possession and the defendant set up adverse title, the decree given against the latter for possession was held to give the judgment-creditor the possession sued for, i.e. legal possession as provided by this section (i.e., this rule).—*Raj Mungul v. Anund Moyee*, 11 W. R. 68.

Delivery of possession of land under a decree for redemption, includes standing crops thereon.—*Aung Bow v. Tuno Gaung*, 3 L. B. R. 129.

**Second application.**—A decree-holder who has been put in possession under this rule and has been obstructed by a third person on behalf of the judgment-debtor cannot put in a second application for possession under this rule; *Thandavaroya v. Subramania*, 29 M. L. J. 504.

But a decree-holder in a partition suit who has been given partial possession of portion of the property allotted to him in an execution case which was dismissed after delivery of formal possession, can maintain a second application in execution for actual possession under this rule; *Khetra v. Jogendra*, 45 I. C. 7.

**Joint possession.—Undivided share.**—When in execution of a decree held by her, the decree-holder purchased an undivided share in a house which the judgment-debtor owned jointly with a third person, and the judgment-debtor resisted the decree-holder when attempting to get possession—held on a construction of this rule and r. 95, he was entitled to have the judgment-debtor removed from the premises; *Sarvi Begam v. Taj Begam*, 36 A. 181.

The provisions of this rule clearly show that a plaintiff who is entitled to joint-possession can be granted decree for joint-possession, whether he was originally in joint-possession, and was subsequently dispossessed, or whether he had never been in possession; *Jagarnath v. Ramphal*, 34 A. 150 (*Phani Singh v. Nawab Singh*, 28 A. 161 dissented from); *Hanuman Prasad v. Mathura*, 51 A. 303 (F. B.); 26 A. L. J. 992; 112 I. C. 143; A. I. R. 1928 All. 472. The Court has discretion in the matter, but it is not to be guided by

any other consideration than the rights of the parties. If the plaintiff is entitled to a decree in accordance with the principles of justice, equity and good conscience, the Court must give him a decree, whether it believes that it would be useful or not.—*Ibid.*

*Per Oldfield, J.*—An usufructuary mortgagee of the share of a co-parcener in a joint-family property is not entitled to a decree for joint-possession.—(*Per Napier, J., contra*) in *Kota Balabhadra v. Ketra*, 16 M. L. T. 229.

**Break open.**—In a case in which the officers of a Court were unable to give possession on account of the house being locked up by the judgment-debtor; held that the Court was bound to remove the lock and to place the decree-holder in possession of the house—*Gunesh Chunder v. Ram Dhunee*, 22 W. R. 283.

Where a decree only directed plaintiff's right of passage through a doorway, and to remove the brick-work with which it was filled; Held that, in executing it, the decree-holder was not authorized to remove a wooden door in existence there—*Roonee Kant v. Nund Lal*, 25 W. R. 120.

**Use of force in giving possession.**—A bailiff authorised to give possession may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same. If the writ simply authorizes "to give possession" and there are no words expressly authorising forcible removal, the omission is immaterial; *Meredith v. Sanjibani* 42 O. 313 : 19 C. W. N. 273.

**Resistance or obstruction to delivery of possession.**—See r. 97 et seq and notes.

**36.** Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. [S. 264.]

### COMMENTARY.

**Symbolical possession and khas possession.**—See notes to r. 35 above.

**Procedure for delivery of possession.**—This rule imperatively requires that a copy of the writ of delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder. Failure to comply with this procedure is fatal to the delivery of possession; *Jauhari v. Peman*, 55 I. C. 19; *Nidhiram v. Parsaram*, 74 I. C. 1; *Harnam Singh v. Miekhi Ram*, 11 L. L. J. 146; 118 I. C. 391; A. L. R. 1929 Lah. 545.

**Applicability of the rule.**—Order XXI, r. 36 applies only to a case where the property is in the exclusive possession of a person not bound by the

decree and entitled to remain in possession. It does not apply to a case of a joint-holding which is covered by r. 35; *Devi Sahai v. Ramji Lal*, 27 P. L. R. 617 · 97 I. C. 170; A. I. R. 1926 Lah. 668.

**Delivery of property in occupancy of tenants, etc.**—Where a decree is partly for a share of land in the khas possession of the defendant, and partly for a share of land in the possession of the ryots, the decree as to the former can only be executed under r. 35 and as to the latter according to this rule.—*Shama Soonderee v. Jardine Skinner & Co.*, 7 W. R. 376 (reversing 3 W. R. 144).

If there is a decree for partition and the lands are in the possession of tenants, delivery can be given under this rule.—*Uppala Raghava v. Uppala Ramanuja*, 26 M. 78.

An order for delivery of possession of a house according to this rule is correct when the objector asserts that he has a right of residence in it; *Jiban v. Simrikha*, 20 I. C. 571.

A person disturbing the possession of another, without any right legitimately derived from any competent person to do so, is not a "person entitled to occupy" the property within the meaning of this rule; *Ibrahim v. Konammal*, 43 M. L. J. 179; 70 I. C. 755; A. I. R. 1923 Mad. 25.

**Possession without the intervention of Court.**—The Code of Civil Procedure does not limit the applicant to any particular manner of obtaining possession, and there is nothing in the Code to prevent the decree-holder or auction-purchaser to obtain possession without the assistance of the Court. Possession actually taken without the intervention of Court is equally effectual.—*Obhoya Ohum v. Rajendro Coomar*, 22 W. R. 406; *Salig Ram v. Meheen Lal*, 2 Agra 235; *Lillu v. Annaji*, 5 B. 387; and *Bandu v. Naba*, 15 B. 238.

**Suit for khas possession after symbolical possession.**—A suit by an auction-purchaser to obtain possession of lands the subject of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has become unsuccessful.—*Isvar Pershad v. Jai Narain*, 12 C. 169 (10 C. L. R. 258 distinguished). See also *Seru Mohun v. Bhagoban Din*, 9 C. 602; *Balvant Santaram v. Babaji*, 8 B. 602; and *Sevu v. Mutlu Sami*, 10 M. 53. A plaintiff who has obtained only symbolical possession in execution of a former decree, is entitled to maintain a fresh suit against the same defendant to obtain actual possession.—*Shankar Bisto v. Narsingrav*, 22 B. 667; *Jagadis v. Nafar*, 35 C. W. N. 12; 131 I. C. 698; A. I. R. 1931 Cal. 427.

**Magistrate to give effect to Civil Court's decree for possession.**—A magistrate is bound to give effect to the decree of the Civil Courts and to maintain the party in possession, who under the decree has already been put in possession of the property in dispute.—*Kunja Behari v. Khetra Pal*, 29 C. 208; 6 C. W. N. 38 (26 C. 625 referred to; distd. in *Ragava v. Krishnasami*, 31 M. 416).

It is duty of the Magistrate in proceedings under S. 145, Cr. P. Code, to find possession in accordance with the decree of the Civil Court under which possession has been delivered.—*Gulraj Marwari v. Sheik Bhatoo*, 32 C. 796 (22 C. 297 cited; approved in *Kulada v. Danesh*, 33 C. 33; 10 C. W. N. 257; 2 C. L. J. 271; *Akhoy v. Basu Rai*, 37 C. L. J. 256). The weight to

be attached to such previous orders depends on the particular circumstances of the case; see *Parmeshwar v. Kailaspati*, 1 P. L. J. 236. See also *Krishna v. Abdul*, 30 C. 155 (F. B.).

There having been considerable conflict of authority the Calcutta High Court has settled the question in a Full Bench decision in which the majority (Mukerji, J., dissenting) has held that the words "actual possession" in Sub-sec. (1) of Sec. 145, Cr. P. C., mean actual physical possession even though wrongful, *e. g.*, that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145; that the word "dispute" in the same subsection means actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to the right to possession has already been decided by a Civil Court. See also the dissentient judgment in which the previous authorities have been referred to and it has been said that the words "actual possession" in Sub-sec. (1) of S. 145 mean actual physical possession even though wrongful, *e. g.*, that of a recent trespasser in actual physical possession at the time of the proceeding under S. 145, but the words have this meaning only in cases in which the dispute as to possession has not been determined by a Civil Court as explained below; that the word "dispute" in the same subsection does not mean any dispute but dispute as to actual possession. It further means actual disagreement existing between the parties at the time of the proceeding under S. 145 but when there has been a previous decision of a Civil Court it has this meaning if the decision of the Civil Court amounts only to a determination of the right to possession. It has not this meaning where such right and a consequent claim to possession have been negatived by a decree which is either *inter partes* or may be treated as such and where *khas* or actual possession has been delivered by the Civil Court either *inter partes* or between parties who may in effect be regarded as parties to the proceeding.—*Agni Kumar v. Mantazaddin*, 32 C. W. N. 1173 : 48 C. L. J. 193.

### ARREST AND DETENTION IN THE CIVIL PRISON.

**37.** (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. [S. 245-B.]

### COMMENTARY.

Notwithstanding anything in these rules.—See rr. 11 and 21 of this Order.

**Issue of warrant when judgment-debtor does not reside within the jurisdiction of the Court.**—The fact that the judgment-debtor does not reside within the jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for his arrest, although such a warrant can be executed only within the Court's territorial jurisdiction. In such cases the Court should fix a date for the return of the warrant; *Krishna v. Bidya*, 44 I. C. 296: 3 P. L. J. 95.

**Arrest of a judgment-debtor in execution of a mortgage-decree.**—In a mortgage-decree, execution of which is being taken with a view to bring the mortgaged property to sale, it is not competent to the executing Court to direct the arrest of the judgment-debtor.—*Bhagirath v. Bank of Northern India*, 31 P. L. R. 143: 121 I. C. 293: A. I. R. 1930 Lah. 103.

**"Issue notice".**—The Court may issue notice against a judgment-debtor who in other execution proceedings has applied for insolvency; *Ganpat v. Mahadev*, 22 B. 731.

The issue of a notice under this rule is not a revivor of a decree for purposes of limitation; *Chatterput v. Daya Chand*, 11 I. C. 216.

The Court may choose between two alternative courses. It may issue a notice to show cause or it may issue at once a warrant of arrest. It cannot issue a notice and a warrant at the same time.—*Puna Mahton v. Emperor*, 13 P. L. J. 502.

**Appearance after notice.**—*See* r. 40 for procedure to be followed after appearance.

**Undischarged insolvent can be arrested under civil warrant in absence of protection order.**—As S. 28 of the Provincial Insolvency Act of 1920 does no longer protect the insolvent from arrest, an adjudged insolvent has to apply for protection from arrest or detention under S. 31 of the Act and in the absence of a protection order, he can be arrested in execution of a decree against him; *Roshan v. Gulam Mohiddin*, 31 Bom. L. R. 206: A. I. R. 1929 Bom. 136; *Hari Ram v. Sri Krishan Ram*, 49 A. 201: 100 I. C. 320: A. I. R. 1927 All. 418.

**38.** Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid. [S. 337.]

Warrant for arrest to direct judgment-debtor to be brought up.

**39.** (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

Subsistence allowance.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) should be made to the officer in charge of the civil prison. [S. 339.]

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed. [S. 340.]

### COMMENTARY.

**Arrest.**—Subsistence money must be paid into Court before the order for arrest can be made; *Kastur Chand v. Ravji*, 4 B. 65.

**Subsistence money to be paid in advance.**—Subsistence money for a month must be paid in advance; a similar payment must be received in advance every successive month pending the imprisonment; and if any such payment be not made, the prisoner is entitled to be released and further detention is illegal.—*In re Kanoy Lall*, Bourke, O. C. 51; *Aga Ali v. Joydoyal*, Bourke, O. C. 52. See also *Speyer v. Janssen*, Bourke, O. C. 28; *In re Sumboo Chunder*, *In re Doorga*, Bourke, O. C. 59; *In the matter of Thompson*, Bourke, O. C. 421; *Dutt v. Cornelius*, 5 B. L. R. Ap. 79. Subsistence money must be paid before the commencement of the month for which it is paid; *Haladhar v. Ambika*, 5 B. L. R. Ap. 80.

**Arrest before judgment.**—Where a defendant is arrested before judgment, his subsistence money is to be fixed in the same way as in the case of an arrest in execution of a decree; and if the plaintiff fails to pay the subsistence money fixed by the Court, the defendant is entitled to his discharge from prison.—*In the matter of Callachand Das*, 1 Ind. Jur. N. S. 327; Bourke O. C. 423.

**40.** (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely:—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;
- (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;
- (c) any undue preference given by the judgment-debtor to any of his other creditors;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.



(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison. [S. 337-A.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 337-A of the C. P. Code, 1882, with a change of wording. It was added to the C. P. Code of 1882, from the Debtor's Act VI of 1888 (S. 4).

**"May disallow arrest."**—A judgment-debtor who is not able to get in his assets readily may be unable to escape arrest and imprisonment. But the Court is armed with sufficient power under this rule to prevent such a debtor from being unnecessarily harassed; *Ponnuswami v. Narayanaswami*, 21 I. C. 293; 25 M. L. J. 545.

After notice the judgment-debtor appeared and pleaded poverty. The Court after enquiry under this rule disallowed the objection and directed his immediate arrest and commitment to jail. If the cause is inefficient the Court is bound to order arrest; *Gubboy v. Ram Doyal*, 2 C. W. N. 588. Lunaey is a good cause for refusal of a warrant for arrest; *Bhanabhai v. Chotabhai*, 23 B. 961.

Where a decree is passed against three persons, and the Court is satisfied that one of them is really unable to pay while the other two possess property, the Court may reject an application made by the decree-holder for the arrest of the judgment-debtor who is unable to pay; *Lala Das v. Mina Mal*, 4 L. L. J. 266; 79 I. C. 551. A. I. R. 1932 Lah. 259.

Where a judgment-debtor against whom a warrant is issued applies to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested, it is not necessary to invoke the provisions of S. 151, as it is still open to him to surrender himself in Court and then to move it to pass an order under r. 40 (3).—*Jiwandas v. Khemchand*, 116 I. C. 101; A. I. R. 1929 Sind 110.

**Insolvency.**—An insolvent, who has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is in the hands of the Receiver; *Panna Lal v. Kanhaiya*, 16 C. 85. There is nothing to prevent the Court from issuing a warrant of arrest against a judgment-debtor at the instance of one decree-holder pending an enquiry into the judgment-debtor's application for insolvency in execution of a decree of another decree-holder; *Ganpat v. Mahadev*, 22 B. 731. Where a judgment-debtor was arrested in execution of a decree while all his properties were put into the possession of the *ad interim* Receiver appointed in the insolvency proceedings, held that the Court ought to have given him the benefit of r. 40 so long as the property was in the hands of the Receiver and should not have arrested him and sent him to jail.—*Tarachand v. Jawahar Mal*, 131 I. C. 208; 32 P. L. R. 311; A. I. R. 1931 Lah. 121.

**Failure to apply for insolvency—Surety.**—A judgment-debtor applied under S 55 (4) and a person stood surety to. Before the due date, the judgment-debtor of applying for insolvency. The Court postponed to subsequent to the date finally fixed for his appearance; but on this date the judgment-debtor remained absent. *Held* that the surety was absolved from liability as the original date fixed for the judgment-debtor's appearance was, no longer to be regarded as the date fixed for his appearance and no proceedings took place on that day; *Bhagwan v. Bhagat*, 61 P. W. R. 1910.

**Transfer, concealment, removal or any other act of bad faith.**—The Code contemplates a case of active concealment, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditors of available assets for division; *Sukrit Narain v. Raghunath*, 7 A. 445. The Court must take into consideration any allegation of the decree-holder touching the fact of the concealment, removal, transfer etc. before releasing the judgment-debtor. If the lower Court fails to do so, the High Court in second appeal may either remand the case to the lower Court or decide it itself on the evidence under S. 103 of C. P. Code.—*Bank of Behar v. Bihari Prasad*, 118 I. C. 312; A. I. R. 1929 Pat. 738.

The words "bad faith" mean bad faith in respect of the debt for which he has been imprisoned and with regard to which the application has been made.—See *Oriental Bank v. Mani Madhab*, 3 B. L. R. Ap. 14; *In re Guru Das Bose*, 7 B. L. R. Ap. 23; *Buller v. Lloyd*, 12 B. L. R. Ap. 12; *Anonymous*, 1 Ind. Jnr. N. S. 8. See, however, *Smith v. Boggs*, 5 B. L. R. Ap. 22, where it has been held that the words "bad faith" meant bad faith not only in respect of the application but included bad faith on previous occasions. In *In re Soopersaud*, 2 Ind. Jur. N. S. 91, and *In re Sub Chunder*, 2 Ind. Jur. N. S. 93-note, it was held that the acts of bad faith are not limited to acts of bad faith committed by the prisoner in his application for discharge, but included acts of bad faith in the manner of incurring his original liability. Acts of bad faith must be done wilfully.—*Karim Baksh v. Mirilal*, 7 A. 295.

Acts of bad faith towards creditors just at the period at which the applicant may be held to be a part of the matter of *v. Pierce Leslie & Co.*, 2 M. 219. See also G 118, where it has been held that the expression "any other act of bad faith" not only means any act of bad faith which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency but also includes acts of bad faith committed by the applicant for declaration of insolvency antecedent to his application. Followed in *Gaya Din v. Hira Lal*, 26 A. 517.

The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making of false statements in the application, are all acts of misconduct that will debar the applicant from obtaining the relief and the protection he seeks.—*Salamat Ali v. Minahan*, 4 A. 337.

The test of good faith is whether the transaction is genuine and colourable; *Mahammadunissa v. Bachelor*, 29 B. 423 (434).

**Undue preference.**—Cl. (c) applies to cases where the transfer would, under any enactment for the time being in force, be void, as a fraudulent preference, if the debtor were adjudged an insolvent. As to when a transfer of property by a debtor may be avoided as a fraudulent preference, see S. 37 of the Provincial Insolvency Act (III of 1907), and S. 53 of the Transfer of Property Act (IV of 1882).

A debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently; *Dadapa v. Vishnudas*, 12 B. 424. But in *Brown v. Ferguson*, 16 M. 499 (following *Butcher v. Stead*, L. R. 7 E. & I. Ap. 839), it has been held that a mortgage by the debtor to one of his creditors to secure a barred debt, since renewed, did not amount to an act of fraudulent preference within the meaning of this section. See also *Joakim v. Secretary of State*, 3 A. 530, where it has been held that an assignment by a debtor of all his property to one of his creditors, did not amount to an "undue preference" within the meaning of this section.

In deciding whether or not a payment made to a particular creditor amounts to an unfair preference, the Courts may fairly refer to, and be guided by, the provisions of the Insolvent Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings.—*In the matter of William Hastie*, 11 C. 451.

For the meaning of the word "creditor," see *In the matter of Chunni Lal*, 29 C. 503.

**Refusal or neglect to pay the amount of the decree.**—Reckless trading, although unaccompanied by any legal or moral fraud, is a ground for suspending protection.—*In re Baggot*, Bourke Ins. 5.

A Judge would not be exercising a right discretion, if he refused relief in the case of persons, who, although knowing that they had no means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually.—*Bavachi Packi v. Pierce Leslie & Co.*, 3 M. 219.

"Some part thereof" in Cl. (d) refers to decrees for payment of money generally and not only to instalment decrees; *Cowie & Co. v. Skidmore*, 7 Bur. L. T. 242.

**Clause (3)—Security**—The security to be furnished by a judgment-debtor must be proper and not illusory.—*Dharani v. Kshitipati*, 54 C. 782; 106 I. C. 66; A. I. R. 1928 Cal 62.

**Likelihood of the judgment-debtor absconding.**—A person must go away from his place of business for the purpose of being absent in order that it may be impossible or difficult for his creditors to find him, and a mere retirement to the private part of the house would not necessarily be such departure.—*In re Dhunput Singh*, 20 C. 771.

**Appeal.**—An appeal lies from an order made under this rule disallowing an application by a decree-holder for the arrest and imprisonment of the judgment-debtor, such an order being appealable as a decree under S. 47; *Raj Karm v. Karm Ilahi*, 1 L. 77; *Lala Das v. Mina Mal*, 4 L. L. J. 266; 79 I. C. 551; A. I. R. 1922 Lah. 259. Similarly, an appeal lies from an order granting an application for release under this rule; *Abdul Rahaman v. Mahomed Kattim*, 21 M. 29.

### ATTACHMENT OF PROPERTY.

- 41.** Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—
- Examination of judgment-debtor as to his property.
- (a) the judgment-debtor, or
  - (b) in the case of a corporation, any officer thereof, or
  - (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents. [Cf. S. 267.]

### COMMENTARY.

**Alteration.**—This rule has been substituted for S. 267 of the O. P. Code of 1882, which has been recast and changed. The main distinctions between this rule and the old section, are (1) that this rule refers to a *decree for payment of money*, but the language of the old section covered all sorts of decrees; (2) this rule provides for the examination of the *judgment-debtor or any other person* at the instance of the decree-holder but under the old section the Court had power to act on its own motion.

**Object.**—The object of this rule is to obtain discovery for purposes of execution, to avoid unnecessary troubles in obtaining satisfaction of money decrees. But orders for discovery or personal examination may operate harshly and ought not to be made unless the Court is satisfied about the *bona fides* of the application and its urgent necessity; *National Bank Ltd. v. Ghuznavi*, 43 C. 285: 34 I. C. 287 (on appeal, see 20 C. W. N. 562).

**"Any other person."**—This rule is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale. A person may be examined in respect of property which is *prima facie* the property of the judgment-debtor even though such person may allege that he is a mortgagee in possession of the attached property.—*In re Premji Trikum Das*, 17 B. 514. See also *Assur Purshotam v. Ruttenbas*, 16 B. 152.

**Production.**—On an application by the decree-holder for execution of the decree by attachment of a debt, the Court may require the production in Court of the judgment-debtor's books of account; *Adjoodhya v. Middleton*, 3 N. W. P. H. C. R. 334.

**Attachment.**—In the normal course of things, attachment does not *per se* create or confer a title. It only prevents an alienation of the property during the subsistence of the attachment.—*Shanker v. Mahomed Ismail*, 125 I. C. 28: A. I. R. 1930 All. 552.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined

**42.** Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

[S. 255.]

### COMMENTARY.

**Attachment after preliminary decree.**—A decree for possession and mesne profits to be ascertained after enquiry is a decree for money, and there is no irregularity in the decree-holder applying for attachment of the judgment-debtor's property, pending the ascertainment of mesne-profits.—*Sharoda Moyee v. Wooma Moyee*, 8 W. R. 9 (folld. in *Kishory v. Mahomed Muzaffar*, 18 C. 188; reld. to in *Ramasami Naik v. Ramasami Ohetti*, 30 M. 255).

If the judgment-debtor dies after preliminary decree and before final decree, his representatives will not be bound unless they were brought on the record at the time of the ascertainment of the mesne-profits; *Radha Prasad v. Lal Sahab Rai*, 17 I. A. 150; 13 A. 53 (P. C.).

**43.** Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[S. 269, PARAS. 1 and 2.]

### COMMENTARY.

C. P. than the 1 para. 1 of the old section.

as. 1 and 2 of S. 269, ins. The words, "other" the words "other than 66," which occurred in

**Moveable property.**—Under the present Code moveable property includes growing crops. See S. 2, Cl. (13); but money is not "moveable property."—*Maung Lun Bye v. Maung Po Nyun*, A. I. R. 1924 Rang. 21.

**Property outside jurisdiction.**—The attachment under this rule can be effected only when the property is situate within the jurisdiction of the Court issuing attachment; *Devg Dunlop & Co. v. Jayannath*, 39 C. 104, 110.

**Actual seizure.**—A warrant of attachment was executed by affixing it to the outer door of a warehouse in which goods belonging to the judgment-debtor were stored. The door was not broken open nor was physical possession taken of the goods inside. *Held* that this in effect, was actual seizure within the meaning of the Act. *Lachand v. Bank of Madras*, 27 M. 346.

It is not always necessary that there should be actual seizure of the cattle by physical contact. Thus where the cattle have already been tied and secured it is sufficient if the officer goes sufficiently near them to explain to others that he has come to attach the property and to intimate his intention to do so.—*Rajamraju v. Tirapatiraju*, 126 I. C. 601; A. I. R. 1930 Mad. 670. Removal of articles by the Amin with the help of coolies is seizure.—*Narasinhani v. Narasimhamurthy*, (1930) M. W. N. 487.

Where after the removal of attachment and delivery of the property to a third person, a suit was brought by the decree-holder for a declaration that the property belongs to the judgment-debtor and the suit was decreed, the attachment cannot be restored by the mere force of the decree. A first seizure and custody are necessary for the attachment.—*Lakshmichand v. Chettyar*, 8 R. 401; 126 I. C. 223; A. I. R. 1930 Rang. 247.

**"Shall be responsible for the due custody thereof."**—An attaching officer deputed to attach moveable properties before attachment, having attached the properties, entrusted them to a third person without the permission of the Court. The property was lost. *Held* that the attaching officer must make good the loss and not the third person entrusted with the property, and the Court had power under Or. XXI, r. 43 to make the order; *Badri Prasad v. Chokhelal*, 24 A. L. J. 561; 48 A. 510; A. I. R. 1926 All. 406. But where a person to whom goods attached were made over for safe custody by the attaching officer, on his executing a bond undertaking to produce them in Court, fails to produce the goods when required by the Court, the decree-holder is not competent to proceed against the surety under S. 145; *Raja of Venkatagiri v. Sura*, 39 M. L. J. 472; 60 I. C. 134. The Allahabad High Court, in *Madho Prasad v. Pearey Lal*, 19 A. L. J. 247; 62 I. C. 719, held that the surety could be proceeded against under S. 145. Where the petitioner was given the custody of certain cart-loads of timber and tiles belonging to the judgment-debtor on executing a bond to produce them before the Court when required, and subsequently, when required by the Court to do so, represented that he would deliver the goods to the purchaser at the Court-sale whoever he might be, and the Court therefore forfeited his bond, *held*, that having regard to the nature of the goods, the Court went wrong in ordering their production in Court, that the goods must have been sold on the spot where they were stored and the order of forfeiture of the bond should be set aside.—*Alagappan v. Sankarakailasan*, (1927) M. W. N. 919. So far as the question of the responsibility of the attaching officer is concerned there is no conflict between rr. 43 and 122 as added by the Allahabad High Court. It is his duty to make the most convenient and economical arrangement but his legal responsibility will continue till the Court approves of the arrangement. When the Court has approved of it his responsibility comes to an end, but pending approval it subsists (48 A. 510 overruled).—*Shakir Husain v. Chandoo Lal*, 134 I. C. 836 (F. B.); 29 A. L. J. 865; A. I. R. 1931 All. 567.

Attachment of property by the attaching officer is illegal.—*Emperor v. 128: 48 C. L. J. 288: 33 C. W. N. 111. A. I. R. 1931 All. 815.*

Attachment of agricultural produce  
44. Where the property to be attached:  
be agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment.

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out, grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[New.];

### COMMENTARY.

*Growing crops.*—"Growing crops" are moveable property. See the definition in R. 2 (10). The definition of moveable property, as given in the present Code, has rendered the following cases obsolete and inoperative; 5 A. I. R. 104; 10 W. R. 275; 14 A. 30, 15 A. 394, and 6 B. 592.

*Agricultural produce*—As to exemption, see S. 61.

*Property passing from the judgment-debtor.*—Where the attachment of moveable crops is made merely by beat of drum and the procedure prescribed by this rule is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into the possession of the Court.—*Jinn Sakal v. Emperor*, 129 I. C. 715; A. I. R. 1931 All. 142.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any

subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered. [New.]

**46:** (1) In the case of—

Attachment of  
debt, share and  
other property not  
in possession of  
judgment-debtor.

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.



(2) A copy of such order shall be affixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[S. 268.]

### COMMENTARY.

"Debt."—The term 'debt' in this rule is used in its legal sense of a debt either due or accruing due. An annuity not yet due is not a debt and cannot be attached, *Padmanund v. Rama Prasad*, 14 C. L. J. 127. A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation—*Per Lindley, L. J., in Webb v. Stenton*, 11 Q. B. D. 518; 52 L. J. Q. B. 584. See also *Bancharam v. Adyanath*, 36 C. 936 (F. B.); 13 C. W. N. 966. An existing debt though payable at a future date is attachable; *Tuffuzzool v. Rughoonath*, 14 M. I. A. 40, 50. A sum payable upon a contingency, however, is not a debt and does not become a debt until the contingency happens. Thus when A is bound under a deed to pay to B a monthly allowance during the lifetime of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to A on a date anterior to the time when the same falls due to B; *Haridas v. Baroda*, 27 C. 38. See also *Padmanund v. Rama Prasad*, 14 C. L. J. 127.

Attachment of debt payable by person outside jurisdiction.—It is not competent to a Court, in execution of a decree for money, to attach under this rule, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of the Court. Thus J, in execution of a decree against H in the Burdwan Court, applied there for an order of attachment of Rs. 6,750 alleged to be due to H from a firm in Calcutta and a prohibitory order was issued upon the said firm. Held that the debt could not be attached by the Burdwan Court; *Begg Dunlop & Co. v. Jagannath*, 39 C. 104 (*Obiter dictum* in *Re Hollick*, 2 B. L. R. 108; 10 W. R. 447, not followed). An order under this rule can be justified only if the Judge issuing the order has jurisdiction over the place where the attachment is to be made.—*Nazarali v. Bala*, 107 I. C. 663; A. I. R. 1929 Nag. 210. Payments to be made to a railway contractor for work done as well as the salary and the allowance of a servant of a railway company cannot be attached under Or. XXI, r. 46; the Station-master of the place where the contract work was done is not the proper person to address in the matter.—*Ibid.* See also *Dilas Mal v. Hari Das*, 118 I. C. 908; A. I. R. 1929 Lah. 645, and Or. XXI, r. 48, *post*; *Haridas v. National Insurance Co.*, 35 C. W. N. 1096, noted under the heading "Other moveable property not in possession of judgment-debtor," *post*.

Effect of attachment.—This rule does not mean that, while a debt is under attachment, the person to whom the debt was originally owing should

he debarred from bringing a suit in respect of it. What it prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. An order of attachment under this rule is not an injunction or order staying a suit within the meaning of S. 15 of the Limitation Act.—*Shib Singh v. Sita Ram*, 13 A. 76 (followed in *Collector of Etawah v. Beti Maharani*, 14 A. 162; affirmed by the P. C. in 17 A 198 (P. C.)). See also *Musst. Sheoraja v. Jagan*, 49 I. C. 83.

An order of attachment under this rule only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when those rights are not exercised before the presentation of an insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment.—*Krishnasawmy v. Official Assignee*, 26 M. 673. The effect of attachment is only to prevent private alienation, it does not confer title. But a vesting order passed by a competent Foreign Court (Secunderabad) is a transfer by operation of law and the rights of the Official Receiver override those under an earlier attachment in British India (41 I A. 251; 42 C. 72, referred to; 29 C. 423 explained and 26 M. 673, relied on).—*Official Receiver of Secunderabad v. Lakshi Narayana*, 54 M. 727; 132 I C 297; (1931) M. W. N. 444; A. I. R. 1931 Mad. 474; 61 M. L. J. 774.

An attaching creditor is not in the same position as an assignee for value without notice of a prior assignment but stands in respect of prior assignments in no better position than his judgment-debtor; *Megji Hansraj v. Ranji Jeita*, 8 B. H. C. R. O. C. 169.

**Requisites to make a debt attachable.**—It is essential that the relation of creditor and debtor should exist between the judgment-debtor and the garnishee (judgment-debtor's debtor), and two practical tests are applied: (1) Could the judgment-debtor sue the garnishee for the amount and recover it? (2) Would the debt vest in the judgment-debtor's trustee in the case of bankruptcy?

**Annuity.**—Annuities payable by trustees are attachable; *Nash v. Pease*, 47 L. J. Q. B. 766, but the money must have reached their hands and be also payable, *Webb v. Stenton*, 11 Q. B. D. 518; 52 L. J. Q. B. 584. Annuity not yet due is not a debt; *Padmanund v. Rama Prasad*, 14 C. L. J. 127.

**Life policy.**—Where a life policy is payable "on proof to the satisfaction of the directors of the death of the assured," the policy amount cannot be said to be a "debt" due by the Company before such proof is given.—*J. D. John v. Oriental Government Security Life Assurance Co.*, 58 M. L. J. 299; A. I. R. 1929 Mad. 347.

**Right to receive debt or rent.**—A right to receive a debt or to collect rent can be attached under this rule; *Basavayya v. Syed Abbas*, 24 M. 20 (dissented from in *Ohidambara v. Ramasamy*, 27 M. 67).

Rent due can be attached; *Mitchell v. Lee*, (1867) L. R. 2 Q. B. 359. But it is not attachable unless it becomes payable by the tenant; *Barnett v. Eastman*, (1898) 67 L. J. Q. B. 517.

Where after the Court-sale and before its confirmation the judgment-debtor was shown to have leased the property and realised a portion of the rent, and thereupon the purchaser applied for a prohibitory order against the judgment-debtor and the tenant as regards the paying and receiving of rent;

held, that though the prohibitory order could not be issued under S. 47 or Or. XXI, r. 46, it could be passed under S. 151 as the ends of justice required the same.—*Abdul Ghani v. Simla Banking and Industrial Co.*, 33 P. L. R. 435 : A. I. R. 1932 Lah. 295 : 136 I. C. 4.

**Monthly allowance.**—Monthly allowance payable to a judgment-debtor is a debt, and is attachable under this section.—*Maharani Dambar Koori v. Rai Sham Kissen*, 9 C. W. N. 703.

**Debt payable by instalments.**—A garnishee order can be made where the debt, is payable by instalments, for payment of the accruing instalments as they become payable from time to time; *Tapp v. Jones*, (1875) L. R. 10 Q. B. 591.

**Decree**—A decree of a Revenue Court stands in the position of an ordinary debt, and may be dealt with under this rule.—*Aulia Bibi v. Abu Jafar*, 21 A. 405 (7 B. L. R. 318 : 15 W. R. 34 ; 2 A. 290 referred to).

**Attachment of debt already paid by cheque.**—If the attachment is made after a cheque for money due on contracts has been delivered, the payment of the cheque cannot be stopped.—*Bhagvan Das v. Abdul Hussein*, 3 B 49

Where the judgment-debtor has been paid by cheque which is stopped by the garnishee upon his being served with a garnishee order nisi, there is an attachable debt, *Cohen v. Hale*, (1871) 3 Q. B. D. 371; but not if the garnishee does not stop the cheque, nor is he bound to do so; *Elwell v. Jackson*, (1835) 1 Times L. R. 454 C. A.

**Debt not immediately payable.**—An attaching creditor can attach any debt though not immediately payable. Money deposited by the judgment-debtor as security for the due performance of a contract can be attached, though it is not payable to the judgment-debtor till the completion of the contract and may even be liable to forfeiture; *S. B. Das v. Muthia Chetty*, 56 I C 948.

A Court cannot make an order on the garnishee to pay the money into Court before the debt has become actually payable.—*Jetha v. Durgadutt*, 29 Bom. L. R. 416 : 102 I. C. 418 : A. I. R. 1927 Bom. 365.

**Joint-decree against two or more persons.**—A judgment-creditor who has got a joint-decree against two or more persons, can attach a debt owing to any of his judgment-debtors (*Miller v. Mynn*, (1859) 28 L. J. Q. B. 521) by a third person, but not apparently by one judgment-debtor; *Chapman v. Callis*, (1862) 6 L. T. 282.

**Attachment of mortgage debt.**—It was held that if the property to be attached is a mortgage debt, where the mortgagee is not in possession nor is entitled to possession, it is attachable under this rule and not under r. 54; *Aulia Bibi v. Abu Jafar*, 21 A. 405. The question was considered in a recent case in Madras and it has been held that the words "debt not secured by a negotiable instrument" are secured by a hypothecation bond or of execution, a debt due to a judgment-creditor is attachable. To moveable property within the meaning of Order XXI, r. 54 is not applicable to such cases though the General Clauses Act and the T. P. Act speak of such debt as

r. 46.

an interest in immoveable property; *Nataraja v. South Indian Bank of Tinnevely*, 37 M. 51: 10 M. L. T. 503: 2 M. W. N. 590 (*Sami Ayyar v. Krishnaswami*, 10 M. 169 and the view of the majority in *Appaswami v. Scott*, 9 M. 5, not followed). See also *Venkalakshmi v. Mathurbutham*, (1929) M. W. N. 135, which held that a debt under a usufructuary mortgage deed can be attached under Or. XXI, r. 46 as moveable property and not under r. 54 as immoveable property; *Sri Ram v. Nanhu Mal*, 29 I. C. 274: 7 O. W. N. 944: A. I. R. 1930 Oudh 473. This decision follows and is in agreement with the earlier decisions in *Debendra v. Ruplall*, 12 C. 546; *Kashinath v. Sadasiv*, 20 C. 805; *Bajinath v. Binoyendra*, 6 C. W. N. 5; *Baldev Dhanrup v. Ram Chandra*, 19 B. 121; *Tarvadi v. Bai Kashi*, 26 B. 305; *Muniappa v. Subramaniya*, 18 M. 437 (12 C. 546 and 20 O. 805 approved); *Karimunnissa v. Phul Chand*, 15 A. 134; *Satya Charan v. Madhub*, 9 C. W. N. 693; *Lal Umrao v. Lal Singh*, 22 A. L. J. 840: 80 I. O. 890: A. I. R. 1924 All. 796. The same view has been taken in *Chullile v. Nambiar*, 27 M. L. J. 239, where it has been held (following 37 M. 51) that the attachment of a mortgage debt should be made under this rule. The fact of the mortgagee being in possession, actual or constructive, of the mortgaged property makes no difference. There is a diversity of judicial opinion on the question; and in another series of cases it has been held that a debt secured by a mortgage of immoveable property cannot be sold in execution under the provisions of the Code applicable to moveable property but that such interest is immoveable property for the purpose of attachment and sale; see *Srinath v. Gopal*, 9 O. 511: 12 C. L. R. 445; *Parashram v. Govind*, 21 B. 226; *Appasami v. Scott*, 9 M. 5; *Sheo Charan v. Sheo Sewak*, 18 A. 469; *Sewa Ram v. Dheru*, 18 I. C. 318: 125 P. L. R. 1913. It would appear that the weight of opinion is in favour of the first view. See also *Shah Mohammad Yusuf v. Lachminarain*, 50 I. C. 157.

A debt secured by a usufructuary mortgage cannot be attached as if it were a simple debt under Or. XXI, r. 46. Where in accordance with the document the mortgagee cannot claim to recover any debt from the mortgagor nor the mortgagor claim to make any payment to the mortgagee, it would seem that the attachment of rights arising under such a document cannot take the form contained in Or. XXI, r. 46, for that form consists of prohibitions from making and receiving payments; it would be meaningless to prohibit persons from making and receiving payments when their relationship is such that no payments are contemplated (35 B. 288, (1918) M. W. N. 672. and 39 M. 389 at 394 *rel. an.*; 27 M. 526 (F. B.). A. I. R. 1924 Mad. 513 and 27 M. L. J. 239 *dist.*).—*Subraya v. Subramania*, A. I. R. 1928 Mad. 648. There is a distinction between a purely usufructuary right in the judgment-debtor where he cannot realise a debt and the case where the debt is realisable. If a debt is realisable then the procedure under Or. XXI, r. 46 is the correct procedure to apply. In the case of the former or a purely usufructuary mortgage, the proper procedure for attachment is under Or. XXI, r. 54.—*Gajadhar v. Bechraj*, 130 I. C. 265: A. I. R. 1931 Pat. 63; *Monilal v. Matibhai*, 35 B. 288 (26 B. 305 explained).

A debt secured by a mortgage of property under the management of the Court of Wards should be attached and sold by the Court within whose jurisdiction the Manager of the Court of Wards resides and not by the Court in whose jurisdiction the mortgaged property is situated, because what is

attached and sold is not a mortgage-debt but a right to receive payment from the said manager (39 C. 104 and 4 P. L. J. 141 *rel. on*).—*Khantabala v. Baijnath*, A. I. R. 1932 Pat. 148.

When a debt which is not secured by a negotiable instrument is attached under this section a claim may be preferred by a third party and may be investigated under r. 58; *Chudambara v. Ramasamy*, 27 M. 67.

It was held under the corresponding section in the Code of 1877 (S. 268, under which an attachment could not remain in force for more than six months) that bonds on which recovery will be time-barred before the date on which a sale can be legally made, cannot be made available for the satisfaction of a judgment-creditor's debt, by a Court of Small Causes; *Nursingdas v. Tulsiram*, 2 B 558.

See notes to r. 53, under the heading "Attachment of Mortgage Debt."

**Shares**—A deed of transfer of shares in a Company which does not comply with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company, is invalid as against a person who has purchased the shares in execution of a decree against the share-holder; *Nagabhushanam v. Rama Chandra*, 45 M. 537; 70 I. C. 659; A. I. R. 1923 Mad. 241.

**Other moveable property not in possession of judgment-debtor.**—This rule provides for the attachment, in execution of a money-decree, of moveable property belonging to the judgment-debtor in the possession of a third person, while r. 52, applies to a case where the property of the judgment-debtor is deposited in or in the custody of any Court or public officer.—*Padmanund v. Chundi Dat*, 1 C. W. N. 170.

Rule 46 provides means for dealing by the attaching officer with goods which are in the physical possession of a third party whether or not the ownership of the goods be in the judgment-debtor or in the third party and whether or not the legal right to possession be in the judgment-debtor or in the third party. It is only intended to deal with the case of physical possession by a party other than the judgment-debtor. The rule does not authorise the attaching officer to seal up premises other than that used by the judgment-debtor—*Nagarmal v. Emperor*, 11 P. 493.

Money deposited as security for the performance of the duties of a servant may be attached subject to the employer's lien, but cannot be sold or realised until the deposit is at the disposal of the judgment-debtor freed from the lien; *Karuthan v. Subramanya*, 9 M. 203.

Money deposited with a third person for a special purpose which fails, is attachable in his hands; *Stumore v. Campbell*, (1892) 1 Q. B. 314 C. A. Money standing at a bank to the judgment-debtor's credit is attachable; see *Rogers v. Whiteley*, (1892) A. C. 118. Money placed on deposit at a bank is not an attachable debt until notice of withdrawal has been given; *Cowley v. Taylor*, (1908) 121 L. T. J. 509. Money is not attachable in the hands of the police, which was found upon a judgment-debtor when arrested, who is afterwards convicted; *Jervis v. Peel*, (1885) 1 T. L. R. 306.

If the moveable property such as money, against which execution is sought, is not within the territorial limits of the executing Court, the only other way in which the Court may have jurisdiction to execute the decree is when the person against whom the execution is sought resides within the jurisdiction of the Court. Where neither of these circumstances exist, the proper course would be for the Court to transfer the case under S. 39. An attachment and sale in contravention of this is invalid.—*Hari Das v. National Insurance Co.*, 35 C. W. N. 1096.

**Form of prohibitory order.**—See App. E, Form No. 17, First Schedule.

Unlike a garnishee order nisi in England " . . . . . " is of a purely negative character. It does not prevent the garnishee from paying, and his debtor from receiving  
*Official Receiver of Secunderabad v. Lakshmi N*  
297: (1931) M. W. N. 444: A. I. R. 1931 Mad. 474: 61 M. L. J. 774.

**Where garnishee denies debt.**—He cannot be asked to pay; *Kishen v. Bhewya*, 18 W. R. 40.

If the property of which the sale is sought, is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and, if it comes to the conclusion that no debt exists, it should abstain from proceeding to sale.—*Hari Lal Amthabhai v. Abhesang*, 4 B. 323.

When a debt alleged to be due by a third party (garnishee) to the judgment-debtor has been attached by a prohibitory order, the Court may make an order to pay the debt to the judgment-creditor in case he admits the debt; but if he denies the debt, there is no other course open to the judgment-creditor than to have it sold or to have a Receiver appointed; *Toolsa v. Antona*, 11 B. 448; *Maharaja of Benares v. Patraj Kunwar*, 28 A. 262: (1905) A. W. N. 277; *Nanak Chand v. Chheda Lal*, 97 I. C. 467: A. I. R. 1927 All. 41; *Ma Saw Yin v. Hockto*, 4 R. 100: A. I. R. 1926 Rang. 175: 97 I. C. 247.

Where the debt is not due, there is nothing to be attached.—*Webb v. Stenton*, 11 Q. B. D. 518 C. A. Where in spite of the objection of the garnishee that nothing is due from him, the order of attachment is made absolute, the order is not conclusive of the rights of the garnishee for the simple reason that it is not the business of the Courts in attachment proceedings to determine whether the debts are really due. All that the Court can do is to attach the debt at its face value and the effect of attachment would be to prevent any subsequent transfer.—*Seshagiri v. Ramachandra*, (1931) M. W. N. 259: A. I. R. 1931 Mad. 570; *Alwar v. Subramania*, 34 L. W. 906: 61 M. L. J. 863. If the garnishee denies the debt he can make an application under r. 58 of Or. XXI and the Court can pass an order under r. 63 (38 B. 631 rel. co).—*Maruti v. Ramchandra*, 133 I. C. 248: 33 Bom. L. R. 396: A. I. R. 1931 Bom. 288.

**"May pay into Court"**—Where attached debt is not paid into Court.—A sued B and obtained attachment before judgment of a debt on the allegation that B was the real creditor. The debt was ostensibly due from C to D. The Court issued a prohibitory order on C and called on him to pay the money into Court which he did, on a conditional order that it would

he retained till the adjudication of the question whether *B* or *D* was beneficially interested therein. *A* obtained an *ex parte* decree against *B* and withdrew the money. *D* subsequently sued *C* and got judgment. *C* now sued *A* to recover the money withdrawn. It was incumbent on the Court to enquire as to who was the real creditor of *C* and it had full authority to compel the defendant (*A*) to bring back the money; *Harinath v. Haradas*, 20 C. W. N. 188: 23 C. L. J. 163.

Where the debt was fraudulently sold at an undervalue with the connivance of the judgment-debtor, although the garnishee was willing to pay the money into Court, it was held that the remedy of the decree-holders claiming rateable distribution was in a suit for compensation.—*Nanak Chand v. Chheda Lal*, 97 I. C. 467. A. I. R. 1927 All. 41.

A voluntary payment by a debtor of his own choice and at his own risk, into a Court of inferior jurisdiction with full knowledge of the attachment by a higher Court will not discharge him; *Ramasamy v. Chakrapany*, 17 M. L. J. 488.

Where *A* has been ordered to pay money into Court, a third party cannot be compelled by garnishee proceedings to pay into Court a debt owing from him to *A*; *In re Greer*, (1893) 2 Ch. 217.

Where a debt attached under this rule was not paid into Court, the Court cannot call on the person to pay or to show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due; the debt then must be sold and delivery made; *Siriah v. Mukanachary*, 10 M. 194.

It has been held in Bombay that the Court may make an order for payment of the debt into Court, which the person is to obey, as also an order for payment to the judgment-creditor; *Toolsa v. Antone*, 11 B. 489.

**Payment out of Court.**—Where a debt, attached under this rule was paid out of Court to the only person who, had the money due been paid into Court as required, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was held that this amounted to a sufficient compliance with the requirements of this rule; *Fida Husain v. Moula Bakhsh*, 21 A. 145.

**Garnishee's right to set-off.**—If a cross-debt is due to the garnishee at the date of the attachment, from the judgment-debtor, the garnishee has a right of set-off; and the equity can be set up without payment of Court-fee; *Tayaballi v. Almaram*, 38 B. 631, 636 (*Tapp v. Jones*, L. R. 10 Q. B. 591, 593 followed).

**Service of prohibitory order.**—When the service of the prohibitory order was effected by affixing it to the wall of the dwelling-house of the person on whom it was intended to serve, it was not a sufficient service. It ought to have been served by delivery, or by registered letter.—*Gobind v. Kherode*, 10 B. L. R. Ap. 12. Until notice is given, the debtor is bound to pay the debt to the creditor, and it is no part of the duty of the debtor to make enquiries whether his creditor is or is not entitled to receive money.—*Thakoor v. Luchmeeput*, 7 W. R. 10.

Where the Company, being a private one, has no Secretary, the Managing Director is the proper officer of the Company within the rule, and the prohibitory order served on the attorney of such a person is duly served though it is addressed to the Secretary of the Company.—*Moola v. Chartered Bank*, 5 R. 635 : A. I. R. 1928 Rang. 36 : 107 I. C. 860.

**Notice to debtor.**—Where the decree-holder attached certain money held in deposit by him on behalf of the judgment-debtor, no notice on the judgment-debtor is necessary as the property was not in his possession; *Rajab Ali v. Upper India Courier Mills Co.*, 15 O. C. 289.

**"Copy of order shall be affixed in Court-house."**—Omission to comply with this invalidates an attachment as against a subsequent assignment; *Satya Charn v. Madhub*, 9 C. W. N. 693.

Where the legal mode has not been followed, there is no legal attachment, and a conviction for dishonest removal of property attached is bad.—*Mya Gyok v. Emperor*, A. I. R. 1928 Rang. 285 : 117 I. C. 243.

**Procedure where debtor of attached debt admits liability but does not pay**—The procedure to be followed when a debtor who admits that he owes money to a judgment-debtor, but does not pay it into Court is indicated in Or. XXI, r. 46 (a), and was added to the Code by the Chief Court of Lower Burma. All that can be done is to warn him that if he fails to pay the amount due by him, he may be subject to a suit; *P. L. M. Firm v. Daisy M. Stacey*, 33 I. C. 169.

**47.** Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. [New.]

Attachment of  
share in move-  
ables.

### COMMENTARY.

**Addition.**—This is a new rule.

This new provision has been made because a share or interest in moveable property is incapable of actual seizure. There is nothing in Or. XXI, r. 60 preventing the Court from releasing the entire property from attachment. Where on objection under Or. XXI, r. 58 the Court finds that the claimant has a half share in the moveable property attached it would be the better course for the Court to release the entire property and to proceed by way of attachment under Or. XXI, r. 47.—*Rajendra v. Chairman, Jessore District Board*, A. I. R. 1932 Cal. 408

Where the undivided interest of a co-parcener in moveable property belonging to a Hindu joint family is sought to be proceeded against to recover a fine levied by a Criminal Court the proper procedure is that prescribed by Or. XXI, r. 47. The Court can either appoint a Receiver or issue a prohibitory order in respect of the delinquent's share, but it cannot attach such property by way of seizure.—*In re Marina Narasama*, 55 M. 1041 : 138 I. C. 548 : (1932) M. W. N. 457 : A. I. R. 1932 Mad. 538 : 63 M. L. J. 142.



**48.** (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

Attachment of salary or allowances of public officer or servant of railway company or local authority.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

[NEW.]

### COMMENTARY.

**Attachment of salary of public officer, etc.**—This rule is not altogether new. It was embodied in the provisions contained in the last three paras. of S. 269, C. P. Code, 1882, with considerable additions and alterations. It is on the lines of S. 151 (3) of the Army Act (44 and 45 Vict., c. 58) which applied only to officers of the Army. It has been made applicable to all public officers and servants of Railway Companies or public authorities.

Under the law as it existed before the Code of 1909, it was held that the salary of a public officer or Railway servant, could not be attached, unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree; see *Rango v. Bal Krishna*, 12 B. 44; *Sayad Khan v. Davies*, 23 B. 193; *Abdul Gafur v. Albyn*, 30 C. 713; 7 C. W. N. 821 (6 A. 43 and 3 C. L. R. 30 followed). This led to considerable difficulties in the execution of such decrees, and in most cases yielded no result although the expense was great. The Legislature has by this rule provided a less expensive and at the same time a more effective remedy.

The Court has now full power to attach the salary of a public officer or of a Railway servant, whether the disbursing officer or the judgment-debtor is or is not within the local limits of its jurisdiction. It overrides the decisions noted above. A Court to which a decree is transferred for execution has the same power.—*Kunwar Lal v. Lala Beni*, 1 Luck. 46; 91 I. C. 1043; A. I. R. 1927 Oudh 112.

This rule as well as r. 3 is an exception to the general rule that a Court cannot attach the property of a judgment-debtor situated beyond the local limits of the jurisdiction of the Court executing the decree. See *Begg Dunlop & Co. v. Jagannath*, 39 C. 109, noted under r. 46.

The salary of a public officer is to be attached under this rule and not under r. 52 which does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.—*Tulaji v. Balabhai*, 22 B. 39.

It does not apply to the wages of persons employed by a public officer who are in private service.—*Byramji v. Virasami Mudali*, 21 M. 393. It does not apply to persons who are in private service.—*Byramji*, 13.

Where money deposited with a Railway Company by one of its servants as a guarantee for the due performance of his duties, is attached by a judgment-creditor of such a servant, the creditor is not entitled to have his decree satisfied out of the deposit but is entitled to a stop-order and also to payment of the interest, if any, due by the company on such deposit to the servant.—*Karuthan v. Subramanya*, 9 M. 203.

A compulsory deposit under the Provident Funds Act (IX of 1897) is not liable to be attached under this rule.—*Veerachand v. B. B. & C. I. Ry. Co.*, 29 B. 259.

**Extent of attachment.**—See S. 60 (h), (i).

An order on the 23rd of a month attaching the judgment-debtor's pay for the whole of the month, is illegal as the pay that would fall due on the first of each month is not a debt on the date of the order, nor can the pay of the 23 days be attached as an employee engaged by the month is not entitled to wages for the current month if he wrongfully leaves employment during the month and so the right to receive pay for 23 days is contingent on the due performance of service for the entire month (27 C. 38 and 13 C. 80 rel. on).—*Byramji v. Khemkaran*, A. I. R. 1929 Nag. 333.

Pay or pension for the month is due on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month.—*Imperial Bank of India v. Muthiya*, 126 I. C. 643; A. I. R. 1930 Rang. 161.

**Sub-rule (2).**—In case of a previous attachment, the return of the subsequent order suggests that there can be no rateable distribution of the salary already under attachment. The attachable portion can be attached again, after the satisfaction of the decree in execution of which it was attached before.

It has however been held that where the salary of a Government officer is once attached and then another attachment takes place, the party attaching subsequently is entitled to claim rateable distribution under S. 73 because it amounts to assets within the meaning of that section. There is no inconsistency between the explanation to S. 64 and Cl. (2) of this rule; *Velchand v. Nussan*, 14 Bom. L. R. 633.

**Sub-rule (3)**—indicates that if the judgment-debtor lives beyond the limits of British India, and receives salary or emoluments from the Indian revenues or from the funds of a Railway Company in British India, they will also be available and unless the order is returned in accordance with the provisions of sub-rule (2) it will bind the Government or the Company.

When an officer commanding, refuses to comply with an order under this rule, the Civil Court should proceed to recover from Government the sums which should have been paid from the judgment-debtor's pay leaving the Government to settle up as it pleases with its officer and the judgment-debtor; *Oakes & Co. v. Discarrie*, 5 I. C. 802: 10 P. R. 1910. No order can be made against Government without bringing it on the record. Therefore Government money cannot be attached on an application in which the debtor alone is impleaded; *Nadar v. Biddulph*, 14 I. C. 737: 93 P. R. 1912

**49. (1)** Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

**(2)** The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

**(3)** The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served. [New.]

### COMMENTARY.

**Addition.**—This rule is new. Sub-rules (1), (2) and (3) have been taken from S. 23, English Partnership Act, 1890 (33 and 34 Vict., c. 39), with variations, and the rest from Or. XLVI, rr. 1-A and 1-B of the English Rules.

"Shall not be attached or sold in execution of a decree, etc."—This rule provides that no execution can issue against any partnership property except on a decree passed against the firm or against the partners of the firm as such; *Karimbhai v. Conservator of Forests*, 4 B 222; but the decree-holder of a partner in a firm can under sub-rule (3) apply for an order charging the interest of such partner and for the appointment of a Receiver. The share of a partner in the partnership business is liable to attachment. *Jagat v. Iswar Chandra*, 20 C. 693. The Court cannot, however, appoint the Receiver as the manager of the entire partnership which will involve the consequences of the dispossessing of all the other partners. It is only the interest of the partner in the partnership property which vests in the Receiver and which can be dealt with by the Court and not the entire partnership itself.—*Lachmi Narain v. Pearey Lal*, 30 A L J. 516 A I. R. 1932 All. 469.

"Against the partners in the firm as such."—These words in sub-rule (1) do not occur in the English Act. They are added to make it clear that this rule is applicable even if the decree is passed not against the firm but the partners as such. Execution under this rule can therefore issue only when the decree is against the firm or against the partners in the firm as such. But a judgment-creditor of a partner in a firm may apply for an order charging that partner's interest.

**Decree against individual partner.**—A decree against an individual partner can be made; such a decree is contemplated by Or XXI, r. 49, C. P. Code, and the Court can also direct accounts to be taken; *Krishnadhan v. Sanyasi*, 23 C. W N. 500 29 C. L J 280. An assignee of a share in a partnership who has also obtained a decree against a partner cannot (except to the limited extent provided in r. 49) force the other partners to account especially when the partnership is not been dissolved.—*Goa Petha v.* R 1932 Pat. 15: 12 P. L. T. 361.

"Direct accounts."—The discretion given to direct accounts should only be exercised under special circumstances, *e. g.*, with a view to dissolution; *Brown Janson & Co. v. Hutchinson & Co.*, 1895, 2 Q. C. 126.

50. (1) Where a decree has been passed against a firm, execution may be granted—

Execution of  
decree against  
firm.

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

[New.]

### COMMENTARY.

Similarity.—This rule corresponds with Or. XLVIII-A, r. 8 of the English Rules.

"Where a decree has been passed against a firm."—Execution under this rule can only be granted where a decree has been passed against a firm in the firm's name.

This rule applies to an award obtained without the intervention of the Court and made a rule of the Court under the provisions of the Indian Arbitration Act.—*Firm of Manghirmal v. Akharali*, 112 I. C. 126: A. I. R. 1929 Sind 28; *Bombay Co. v. Kahan Singh*, 134 I. C. 1026: A. I. R. 1931 Lah. 736; *Firm of Shiechandra v. Shivaldas*, 131 I. C. 712: A. I. R. 1931 Sind 82.

**Sub-rule (1).**—Execution under this rule may be granted against the partnership property or against the partners themselves. In the latter case, their separate property will be liable. Where a decree has been passed against a firm, execution will be granted as a matter of course against a person referred to in Cls. (b) and (c) of sub-rule (1), but where the decree-holder claims to execute it against any person other than those mentioned in Cls. (b) and (c) as being a partner, he is enabled by sub-rule (2) to apply for leave, and that sub-rule provides the procedure then to be applied; *Jagat Chandra v. Gunny Hajeer*, 53 C. 214: 30 C. W. N. 11: 91 I. C. 824: A. I. R. 1926 Cal. 271.

Where a judgment is against a firm, execution may issue only against any property of the partnership, so far as partners, who are not individually served and those who have not appeared, are concerned; *Sahib Thambi v. Hamid*, 2 M. W. N. 534.

In a suit against a firm, the names of the partners were not disclosed in the plaint, but summons was served by order of Court on B as a partner of the firm. A decree was passed against the firm—*Held* that execution could be proceeded with against B under sub-rule (1), Cl. (c); *Baishnab Charan v. Bank of Bengal*, 19 C. L. J. 591. *Per* Beachcroft, J.—Sub-rule (2) is only applicable in the absence of the conditions in sub-rule (1). But see *Jetha Devji & Co. v. Javhersing*, 26 S. L. R. 228, where it has been held that a person who has been served as a partner and has entered his appearance under protest denying that he is a partner is not entitled to an issue in the suit to try the question of his partnership; the proper stage at which the question can be determined is after the passing of the decree, in execution proceedings.

But a decree against a firm as such will not affect a partner who has not been served with summons to appear and answer so far as his other property is concerned.—*Jitraj v. Bhagavan Das*, 68 I. C. 627: A. I. R. 1923 Bom. 66: 24 Bom. L. R. 1037. Where summons in a suit against a firm was duly served upon a person who had a power of attorney executed by the partners of the firm which empowered him to act not only on behalf of the firm but on behalf of each partner individually and jointly, service must be deemed to have been made on each partner individually. In such a case the decree passed in the suit against the firm can be executed against the partners personally without the leave of the Court under this rule.—*Lal Chand v. Firm of Dwarka Das Badri Prasad*, 103 I. C. 528: A. I. R. 1929 Lah. 528.

**Sub-rule (2).**—Execution by leave.—Sub-rule (2) applies to the case of persons against whom a decree-holder seeks to execute the decree other than the persons mentioned in Cls. (b) and (c) of sub-rule (1). Clauses (b) and (c) refer to persons who have appeared or who have been individually served as partners and who have failed to appear. The intention of sub-rule (2) is that when an application for leave mentioned in the sub-rule is made, it should be on notice to the person who is alleged to be liable as a partner; he

is to be served with a summons and called upon to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability. If the person who is sought to be made liable as a partner, having been served with the summons and having appeared to answer, disputes his liability, then the issue is to be tried in any manner in which any issue in a suit may be tried and determined. "In my opinion the meaning of sub-rules (2) and (4) is that a decree obtained against the firm cannot be forced except as to partnership property against a person alleged to be a partner, and against whom an application has been made under sub-rule (2), unless he has been served with a summons to appear and answer the application and has had an opportunity of disputing his liability as a partner if he desires to do so."—*Per Sanderson, C. J.*, in *Jagat Chandra v. Gunny Hajee*, 53 C. 214: 91 I. C. 824 · A. I. R. 1926 Cal. 271. The executing Court would have power to determine the question under this sub-rule whether a person is a partner in a firm or not.—*E. D. Sassoon v. Shiyji*, 115 I. C. 536: A. I. R. 1929 Lah. 228. Where a party elects to go against a firm, the question whether a particular person is or is not a partner of such firm and is bound by the decree or the award as the case may be, is a question which can be dealt with either in execution proceedings or in a separate suit.—*Babu Kirparam v. Jawahar*, 84 Bom. L. R. 737 · A. I. R. 1932 Bom. 375. The decree-holder, however, is not entitled to cause the decree to be executed against a partner who left the firm to the knowledge of the plaintiff before the institution of the suit. Leave cannot be granted in such case, in view of the proviso to Or. XXX, r. 3. If there has been a dissolution to the knowledge of the plaintiff, he cannot make an out-going partner liable unless he serves the writ upon him. If he omits to do this, and applies under this rule for leave to issue execution on the ground that he was a partner when the debt was contracted, the Court will refuse to issue execution against such partner because he was not made liable by being served with the writ; *Wigram v. Cox*, 1894, 1 Q. B. 792. The wording of sub-rule (2) is wide enough to cover the case of a deceased partner; *Jivraj v. Bhagvandas*, 24 Bom. L. R. 1037 · 68 I. C. 627: A. I. R. 1923 Bom. 66. In such a case a combined notice under sub-rule (2) and Or. XXI, r. 22 may be given; *Jagat v. Gunny*, 53 C. 214 · 30 C. W. N. 11: 91 I. C. 824: A. I. R. 1926 Cal. 271. But see *Mahmud Yusuf v. Mahammad Sadulla*, noted under the next heading. If a decree against a firm makes a partner personally liable under sub-rule (1) (a) or (1) (b), it may be executed against his legal representative after notice under r. 22.—*Jagat Chandra v. Gunny*, 53 C. 214, 225: 30 C. W. N. 11: 91 I. C. 824: A. I. R. 1926 Cal. 271.

Rule 50 (2) applies only where members of a partnership who have not been impleaded as such are sought to be arrested in execution of a decree against the firm; *Bank of Bengal v. Ramanadhan*, 28 I. C. 260: (1915) M. W. N. 180. It is intended to apply to cases where in a decree obtained against a firm, it is sought to make a person alleged to be a partner in the firm personally liable.—*Lal Chand v. Ghanaya Lal*, 120 I. C. 611: A. I. R. 1930 Lah. 243. This rule is not controlled by Or. XXX, r. 2 (3).—*Natwarial v. Sassoon & Co.*, 51 B. 794: 103 I. C. 256: A. I. R. 1927 Bom. 447: 29 Bom. L. R. 921.

Notwithstanding the wording of Or. XXI, r. 50, a Court to which a decree is sent for execution has power to decide whether a particular person

against whom it is desired to proceed is a partner or not. Where a decree has been passed against a firm and an application is made to execute it against a particular person as an individual partner of that firm, no separate application for leave to execute the decree against the partner need be put in as the application for execution against that particular person necessarily implies such a prayer for leave to proceed against him as an individual partner.—*Bombay Co. v. Kahan Singh*, 13 L. 327 : 134 I. C. 1026 : A. I. R. 1931 Lah. 736.

No doubt when an award is filed in Court it becomes enforceable as a decree, but the proceedings leading up to the decree cannot be said to be a suit so as to attract the provisions of Or. XXX or Or. XXI, r. 50 (1) (c); and consequently before a partner can be proceeded against in execution as an individual partner, the Court passing the decree in accordance with the award or the Court to which a decree has been transferred for execution, must decide the liability of the person as an individual partner.—*Ibid*.

A proceeding in which leave is applied for to execute the decree under r. 50 (2) is not a suit but is an application in execution, and it can be made at any time during which the decree remains capable of being executed. A decree-holder can proceed first against the partnership property and need not apply for leave under sub-rule (2) of r. 50, against any individual partner until he has exhausted all his remedies against the partnership property. When these remedies are exhausted he can then apply for execution against one or all of the individual partners, at the same time obtaining leave, if necessary, under sub-rule (2), and he could do this even if more than three years have elapsed since the passing of the decree, provided always that the execution has not become barred in any other way —*Ibid*. See also *Kanji v. Jivaraj*, 123 I. C. 17 : A. I. R. 1930 Bom. 412.

The executing Court to which the decree has been transferred has the power to grant leave to execute the decree against any particular person as a partner.—*Abdul Hamid v. Dhanpat*, 131 I. C. 376 : A. I. R. 1931 Lah. 507. But see *Shivchandra v. Shivaldas*, 131 I. C. 712 : A. I. R. 1931 Sind 82, where it has been held that an application for leave to execute a decree is in no sense an application for execution of the decree, it is only a subsidiary or preliminary application which should be made to the Court which passed the decree and not the Court to which the decree is transferred for execution. The application under Cl (2) for leave to execute

is also made under r. 50. Cl. (2) is not barred so long as the decree against the firm is alive —*Bhaqvan v. Hiraji*, 34 Bom L. R. 1112.

The words " the Court which passed the decree " do not include the executing Court. They refer to the original Court which actually passed the decree (27 C. 488 and 25 A. 443 *folld.* ; 61 I. C. 401 *dissented from*).—*Kalu Ram v. Firm of Sheonand*, 11 P. 580.

Representatives of a partner dying before institution of suit can be proceeded against in execution of such decree.—Where a decree is



obtained against the firm is a suit brought against the firm, the legal representatives of a person who was a partner in such firm at the time when the cause of action arose, but who died before the institution of the suit, can be proceeded against in execution of such decree under Or. XXI, r. 50 (2); *Firm of Gokaldas Khatao v. Lachmandas*, A. I. R. 1927 Sind 130 (F. B.); 23 S. L. R. 137. The sons of a deceased partner are liable for debts to the extent of their father's assets.—*Rajmal v. Isherdas*, 107 I. C. 221. A Full Bench of the Madras High Court has held to the contrary that the legal personal representatives are not liable; sub-rule (2) would apply only when the decree is sought to be executed against a person as being a partner in the firm. Order XXX, r. 4 only gives the legal representatives a right to apply to be a party to the suits in the name of firm. It has been enacted in the Code evidently to obviate difficulties that might otherwise be suggested having regard to the provisions of S. 45 of the Contract Act. But it does not enable a decree-holder to claim the right claimed in the present case—*Mahomed Yusuf v. Mahammad Sadulla*, 52 M. 885: 119 I. C. 603: A. I. R. 1929 Mad. 733: 57 M. L. J. 344 (F. B.). Sub-rule (2) is subject to Or. XXX, r. 3 and it does not empower the Court to give leave to execute the decree against the legal representatives.—*Mathuradas v. Ibrahim*, 51 B. 986: 105 I. C. 305: A. I. R. 1927 Bom. 591.

"Execution may be granted."—As to subsequent proceedings, see Or. XXX, rr. 6-8. Where judgment is recovered by a firm suing in the firm's name, and afterwards one partner dies, the surviving partner may issue execution by leave, *Davis & Son v. Andrews*, (1884) W. N. 94.

"Against any person who has appeared, etc."—As to the effect of entry of appearance, see Or. XXX, rr. 6-8.

"Has failed to appear."—Where one person is trading as a firm, execution cannot issue against him under Cl. (c) unless he has been individually served (either personally or by substituted service) and the judgment in default is based upon such service or leave has been obtained under this rule. See Or. XXX, r. 10.

"Claims to be entitled to cause the decree to be executed."—See notes under the heading "Execution by leave."

Where such liability is disputed.—This rule is to be read subject to the provisions of Or. XXX. It is not open to a partner, against whom execution is applied for of a decree obtained against the firm, to deny in the first instance that he is a partner and then if that be found against, to plead, in the alternative, that none of the partners had any authority to enter into the transaction which gave rise to the liability.—*Malabar Forest and Rubber Co. Ltd., In re*, 34 Bom. L. R. 617. In the absence of fraud or collusion on the part of other partners resulting in a decree against the firm it is not open to any partner who has not been served in the said suit to sue for a declaration "that the proper course for him is to dispute the liability can be disputed, not only by proving that he was not a partner at all, but on the basis of any appropriate defence, as for instance that though he is a partner, he is not bound by the reference to arbitration consented to by his co-partner and the award or the decree passed in pursuance thereof."—*Ibid.*

**Minor partner.**—Where a decree has been passed against a firm having a minor partner who is admitted to the benefits of a partnership, execution may be granted against the property of the firm including the share of such minor partner in the partnership property, but it cannot be executed against the separate property of the minor, see *Sanyasi v. Krishnadhan*, 49 I. A. 108: 49 C. 560 (P. C.): A. I. R. 1922 P. C. 237.

**Sub-rule (3).**—An *ex parte* order granting leave to apply for execution is not a decree nor has it the force of a decree because sub-rule (3) indicates that only such order granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit, is to have the force of a decree; *G. Atherton v. S. Habib Baksh*, 27 A. L. J. 553: A. I. R. 1929 All. 390: 115 I. C. 865.

A proceeding in which leave is applied for to execute a decree under r. 50 (2) is not a suit within the meaning of S. 33 of the Presidency Small Cause Courts Act, 1892—*Kanjiv. Jivraj*, 129 I. C. 17: A. I. R. 1930 Bom. 412

An appeal against an order under Or. XXI, r. 50 (3) requires an *ad valorem* fee—*Punjab National Bank v. Ranchoredas*, 127 I. C. 704: A. I. R. 1930 Sind 255.

**Sub-rule (4).**—"The summons to appear and answer" mentioned in this sub-rule means a summons or a notice to appear and answer the decree-holder's application for leave mentioned in sub-rule (2). The object of sub-rule (4) is to give the person, against whom the decree-holder seeks to execute his decree as an alleged partner, an opportunity of disputing his liability as a partner if he desires to do so; *Jagat v. Gunny*, 53 C. 214: 91 I. C. 824: A. I. R. 1926 Cal. 271; *Jivraj v. Bhagvandas*, 24 Bom. L. R. 1037: 69 I. C. 627: A. I. R. 1923 Bom. 66; *E. D. Sassoon v. Shwji*, 115 I. C. 536: A. I. R. 1929 Lah. 228; *Mathura Das v. Ebrahim*, 51 B. 986: 105 I. C. 305: A. I. R. 1927 Bom. 531: 29 Bom. L. R. 1296

**Insolvency of firm.**—The insolvency of a firm after the passing of the decree is no bar to execution of the decree against any individual partner who was served with the summons; *Vaishno Das v. Tirath Das*, 89 I. C. 138: A. I. R. 1925 Lah. 379: 7 L. L. J. 165.

## 51. Where the property is a negotiable instrument not

Attachment of  
negotiable instru-  
ments.

deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court. [S. 271.]

## COMMENTARY.

A mere prohibitory order will not constitute a valid attachment of a negotiable instrument and hence S. 64 of the Code will not have the effect of invalidating an endorsee's title; but if the endorsee was aware of the prohibitory order and yet fraudulently took an endorsement he will not be protected.—*Subramania v. Chokkalinga*, 46 M. 415: 72 I. C. 189: A. I. R. 1923 Mad. 317: 44 M. L. J. 206. See also *Namagiri v. Muthu Velappa*, 56 M. L. J. 70: 111 I. C. 887: A. I. R. 1928 Mad. 940.

**52.** Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Attachment of property in custody of Court or public officer.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court. [S. 271.]

### COMMENTARY.

**Attachment of negotiable instrument.**—The proper mode of attaching a promissory note is by its actual seizure and not by the issue of a prohibitory order; *Subramania v. Chokkalinga*, 46. M. 415; A. I. R. 1923 Mad. 317; 44 M. L. J. 206; 72 I. C. 189; *Namagiri v. Muthu Velappa*, 56 M. L. J. 73.

**"Property to be attached."**—A judgment-debtor was entitled to a life-interest in certain trust funds of which the Official Trustee was the trustee. The life-interest was attached by a decree-holder by giving notice to the Official Trustee but there were no funds in the hands of the Official Trustee which would have been attachable under r. 46, held that the interest of the judgment-debtor was not validly attached.—*Abdul Lateef v. Doutre*, 12 M. 250.

Letters in the Post Office, addressed to certain judgment-debtors, were attached. The day before the attachment, the senders had applied to have the letters returned to them. Held that the letters in the Post Office were held in trust for the judgment-debtor and were, therefore, attachable on the application of the decree-holder.—*Narasimhulu v. Adiappa*, 13 M. 242.

Property yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under this rule; and such revenue, interest or dividend payable in future can be attached under the same rule; *Umabai v. Amritrao*, 39 B. 80; 17 Bom. L. R. 133; 29 I. C. 18.

**"Custody of Court."**—This rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.—*Tulaji v. Valabhai*, 22 B. 39 (followed in *Raja Padmanund v. Rama Prasad*, 14 C. L. J. 127). The principle of the rule is that what is attached must be something in existence and not merely in future; *Umabai v. Amritrao*, 39 B. 80; 17 Bom. L. R. 133; 29 I. C. 18. See also *Thakurdas v. Joseph Iskendar*, 44 C. 1072; 25 C. L. J. 595; 21 C. W. N. 887; where all these cases have been followed and discussed. Where the fund consisted of surplus sale proceeds payable

to the defendant mortgagor and it was attached before the money was paid into Court; *held* the attachment was bad as it was made before the money came in the custody of Court; *Tirutengadia v. Tirutengadia*, 26 M. L. J. 364: 24 I. C. 617.

This rule also applies to property in the custody of the same Court which executes the decree; *Surjamall v. Ramchandra*, 20 C. W. N. 412: 28 I. C. 123.

Where the money was lying in the Court which issues the order of attachment, the order of attachment is a sufficient compliance with the provisions of this rule and the issue of a precept to itself will be a meaningless formality.—*Gian Chand v. Gopichand*, 108 I. C. 173: A. I. R. 1928 Lah. 593.

**Property in receiver's hands.**—An attachment of money in the hands of the receiver, without previous permission or sanction of the Court, is improper and irregular, as he is an officer of the Court.—*Mahommed Zohuruddeen v. Mahommed Noorooddeen*, 21 C. 85. See also *Khan v. Alli Mahomed*, 16 B 577; *Natesa v. Govindasami*, A. I. R. 1930 Mad. 4. An attachment without such permission is a contempt of the Court.—*Parygan Kumar v. Dhudhar*, 130 I. C. 836: 12 P. L. T. 318: A. I. R. 1931 Pat. 204. See also *Durgadutt v. Bholaram*, A. I. R. 1927 Bom. 657: 29 Bom. L. R. 409: 102 I. C. 413; *Gulamali v. N. H. Moos*, 123 I. C. 553: 32 Bom. L. R. 1315. In case of a decree against a firm the assets of which are in the hands of a receiver appointed in a previous partnership suit, the proper course for the decree-holder to follow is to issue a notice to the receiver under this rule and not to ask the Court for a charging order.—*Nensukhgavri v. Rajabally*, 29 Bom. L. R. 689: 106 I. C. 184: A. I. R. 1927 Bom. 405.

A receiver is an officer of the Court and money in his hands is regarded as being in the custody of the Court. Therefore the only Court which has jurisdiction to decide disputes relating to such money is the Court in whose custody the money is and not any other Court; *Rani Debendra Bala v. Chandra Sekhasi*, 35 I. C. 589: 1 P. L. J. 449.

**Attachments of dividends in Official Assignee's hands.**—The Official Assignee being a public officer within the meaning of S. 2 (17) of the Code, moneys in his hands, payable by way of dividend to a creditor of an insolvent, may be attached in execution of a decree against the creditor under this rule; *Hurdayal v. Haji Adam*, 49 B. 638: 87 I. C. 1011: A. I. R. 1925 Bom. 344: 27 Bom. L. R. 535.

**Determination of question of title or priority.**—An attachment under this rule does not confer any priority upon the person at whose instance it was made, since at most it is an injunction relating to the fund; *Srikuma Katum Sahiba v. Hajee Mahomed*, 38 M. 221: 29 I. C. 239. See also *Thakurdas v. Joseph Iskendar*, 44 C. 1072: 25 C. L. J. 595: 21 C. W. N. 887. But see *Visvanadhan Chetty v. Arunachelam Chetty*, 44 M. 100 (F. B.): 60 I. C. 302: 39 M. L. J. 608 which has overruled the case reported in 38 M. 221 and where the case reported in 44 C. 1072 has been dissented from. See also *Nachiappa v. Subbier*, 46 M. 506: 72 I. C. 820: A. I. R. 1923 Mad. 505: 44 M. L. J. 413. The judgment-creditor, who first took out execution against a fund in Court was held entitled to have his decree satisfied to the full

in priority over other non-attaching creditors.—*Kessarbai v. Kaku*, 29 Bom. L. R. 665; 106 I. C. 113; A. I. R. 1927 Bom. 394; *Nensukhagavri v. Rajabally*, 29 Bom. L. R. 689; 106 I. C. 184; A. I. R. 1927 Bom. 405.

The proviso is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in whose custody the property is, and not by the Court which made the order of attachment. *Quære*.—Whether an order under this section is final or not; *Gopee Nath v. Achcha Bibee*, 7 C. 553; 9 C. L. R. 395. Question of priority is not to be determined by a regular suit; *Debes Pershad v. Gujadhari*, 20 W. R. 73.

Attachment under decree of High Court, of property already attached under decree of Small Cause Court; held that the Small Cause Court was the only Court to decide the question of priority.—*Jeynarayan v. Ismail*, 19 B. 710. See also *Hari Charan v. Kedar Nath*, 35 C. W. N. 517 in which 44 M. 100 (F. B.) has been referred to.

A suit will lie to set aside an order such as is contemplated by the proviso to this section; *Tikum Singh v. Sheoram Singh*, 19 C. 286.

If attached funds are in the hands of the Receiver, the Court in whose custody the money is, is the Court to decide a dispute as to priority between the mortgagee and the holder of a money-decree; *Rani Debendra Bala v. Chandra Sekhar*, 35 I. C. 589; 1 P. L. J. 449.

For charging order of High Court, see *Nensukhagavri v. Rajabally*, 106 I. C. 184; A. I. R. 1927 Bom. 405; 29 Bom. L. R. 689.

**Effect of attachment under this rule on any previous attachment.**—If there was a previous attachment, the mere fact that the respondent by way of abundant caution prayed for formal attachment under this rule, would not take away the effect of the former attachment; *Surjamall v. Ramchandra*, 20 C. W. N. 412.

**53.** (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees.

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[S. 173.]

### COMMENTARY.

... responds to S. 273, C. P. Code,  
The most important change is  
"ment of a mortgage or charge"

in sub rule (1). The present rule has been made applicable to money-decrees as well as to mortgage-decrees. The addition seems to have been made to meet those cases, in which it was held that a decree upon a mortgage is not a money-decree within the meaning of S. 273. It makes obsolete.—*Bainath v. Binayendra*, 6 C. W. N. 5; *Macnaghten v. Surja Prasad*, 11 C. L. J. 78; 4 C. W. N. 35-n; *Delhi London Bank v. Partab Singh*, 28 A. 771 (F. B.), *Jogendra v. Hiranya Kumar*, 2 C. L. J. 499. The old section has been recast and re-arranged with some changes in the details of procedure to be followed when attaching a decree.

Clause (a) of sub-rule 1, sub-rule (2), (3) and (6) are new.

This rule applies to attachment before judgment; *Gorigala Venkayya v. Mugunta Lakshmiya*, 22 M. L. J. 394; 14 I. C. 285.

This rule does not apply to a case where the creditor of a mortgagee attaches the deposit made in Court by the mortgagor to redeem the property before sale in execution—*Asua Khatun v. Nurjahan Khatun*, 59 C. 1464; 36 C. W. N. 955.

**Decree for money.**—The following have been held to be money-decrees—Decree for mesne profits to be ascertained; *Sharodamoyee v. Woomamoyee*, 8 W. R. 9. Decree for arrears of rent; *Banku Behary v. Syama Churn*, 25 C. 322. Decree for dissolution of partnership; *Sidlingappa v. Shankarappa*, 27 B. 556 (16 B. 522 and 577 and 21 C. 85, referred to). Attachment may be made after judgment though the decree is not drawn up, as the decree when drawn up relates back to the time of judgment; *Ram Kanai v. Punna Chandra*, 34 C. L. J. 494.

It has been held that money-decrees and mortgage-decrees are not to be realized by sale, *Vithal Das v. Subraya*, 45 B. 348; *Maung Lun Bye v. Maung Po Nyun*, 1 R. 360; A. I. R. 1924 Rang 21. They can only be realized in the manner prescribed by sub-rule (2); *Sultan Kuar v. Gulzar Lal*, 2 A. 290; *Tirumugoda v. Vuthalunga*, 6 M. 418; *Jotindra Nath v. Dwarka Nath*, 20 C. 111, *Sidlingappa v. Shankarappa*, 27 B. 556; *Domi Lal v. Bijoy Prasad*, 13 P. L. T. 612. A. I. R. 1932 Pat 349. There is no provision made in this rule for the realization of a decree for partition, or for foreclosure of a mortgage, or a decree for specific performance. These decrees are to be realized by a sale thereof; *Gopal v. Joharimal*, 16 B. 592; *Barhma Din v. Baij Lal*, 26 A. 91. But for the special procedure prescribed by sub-rule (2) of the present rule for the realization of money-decrees and mortgage-decrees, they would have been attachable and saleable under S. 60 as coming within the expression "all other saleable property." The special procedure prescribed by sub-rule (2) is therefore an exception to the general rule that all properties when attached can only be realized by a sale thereof. See note below under sub-rule (4).

**Mortgage-decrees.**—The addition of the words "or for sale in enforcement of a mortgage or charge" in sub-rule (1) now makes the rule applicable to mortgage-decrees, and it is now clear that mortgage-decrees are to be attached and realized in the same manner as money-decrees.

This rule lays down that the holder of a decree sought to be executed by the attachment of another decree for sale, in enforcement of a mortgage or charge, shall as the representative of the holder of the attached decree, be

entitled to execute it in any manner lawful to the holder thereof; *Kuppasami v. Subbaraya*, 22 M. L. J. 161: 13 I. C. 321.

**Sub-rule (4)—Attachment of other decrees.**—There are two ways of executing decrees obtained by a decree-holder by attachment of other decrees passed by other Courts or by the same Court. These two ways are indicated in Or. XXI, r. 53. If it is a money-decree and if the decree is one which is passed by another Court then by the combined operation of sub-cl. (1) and (2) the decree which is attached is not sold as a saleable property but is executed in terms of sub-cl. (2), by realising the net proceeds in satisfaction of the decree sought to be executed. If however the decree is not one for money then the procedure laid down in sub-cl. (4) has got to be followed; in other words the property is sold like any other saleable property. A preliminary decree passed in a partition suit is liable to be proceeded against in execution according to the procedure prescribed by Cl. (4) and not by Cl. (1).—*Sudarsan v. Manindra*, 59 C. 934: 133 I. C. 181: A. I. R. 1932 Cal. 80. The right, title, and interest of the judgment-debtor, in a decree for possession and mesne profits, was held liable to be attached and sold in execution of a money-decree.—*Ganesh Lal v. Shamsarain*, 6 C 213.

A certificate under Or. XXI, r. 71, certifying deficiency in the purchase price, being declared by that rule to be in effect "a decree for the payment of money" for the purpose of the method of its recovery, such a certificate is attachable as a decree for the payment of money under the provisions of this rule; *Abdul Jabbar v. Sita Ram*, 24 A. L. J. 385: A. I. R. 1926 All. 379: 95 I. C. 1033.

The right, title, and interest of a judgment-debtor in a partly executed decree for possession of a moiety of a taluk is liable to be attached and sold.—*Girish Chunder v. Jibanewari*, 6 C. 243 (P. C.) 7 C. L. R. 420.

A decree of a Revenue Court is not capable of attachment and sale under this section, in execution of a Civil Court decree, such a decree stands in the position of an ordinary debt, and may be dealt with under S. 60.—*Aulia Bibi v. Abu Jafar*, 21 A. 405 (16 A. 496, referred to). See *Prince Gholam Mohamed v. Indra Chand*, 7 B. L. R. 318: 15 W. R. 34, where it has been held that a decree of a Court falls within the description of "other property."

**Decrees passed by the same Court.**—Under the Code of 1877 this was held to apply also to cases where the decrees were passed by different Courts but were being executed by one Court; *Sultan Kuar v. Gulzari Lal*, 2 A. 290.

**Irregular attachment.**—The defect in the attachment in consequence of the order being passed by the executing Court, instead of by the Court which passed the decree, is not such a jurisdictional defect as to make the order void. An objection to the issue of notice under r. 53 (2) is one that the parties could waive.—*Per Sundara Iyer, J.*, 10 *Arumugha v. Yogamba*, 17 I. C. 523: 13 M. L. T. 227.

**Effect of attachment.**—The attachment of a decree under this rule has the effect of staying further execution and debarriog the Court from proceeding further until that bar has been removed in either of the ways specified therein. Where a Sub-Judge, after receiving an attachment order



from a Munsif's Court, returned it on the ground that it did not state the amount of the decree and proceeded with execution which resulted in the sale—held that the Sub-Judge was bound to comply with the order and had no jurisdiction to proceed with the sale.—*Manik Lal v. Banamali*, 32 C. 1104; 10 C. W. N. 193; 3 C. L. J. 27.

An attachment under this rule is completed by the receipt of the notice prescribed by Cl. (1) (b) of the rule in the Court to which notice was sent.—*Raja Sir S. R. M. M. A. Chettyar Firm v. Burma Oil Co.*, 9 R. 140; 134 I. C. 506; A. I. R. 1931 Rang. 185. The signature by the clerk on behalf of the Judge who was then ill, on the notice, was only an irregularity which did not prevent the attachment from being effective and any adjustment of the decree with the knowledge of the attachment was invalid.—*Ibid.*

The attaching judgment-creditor is the only person who can execute the decree, and the original holder of the decree is precluded from executing his decree, unless the Court which issued notice cancels the notice.—*Thuchakovil v. Arapayil*, 9 I. C. 786; 21 M. L. J. 577 (13 M. L. J. 265; 21 M. 417 and 24 C. 778, distinguished).

**Transfer of decree for payment of money under attachment is valid.**—There is no provision in sub-rule (1) or (2) or (6) of r. 53, which prohibits the holder of a decree for payment of money from transferring the decree attached, and the transfer is in no way affected on account of the attachment of the decree, but is a valid transfer giving the transferees a good title and entitling them to have their names substituted in place of the assignors and to apply for execution under Or. XXI, r. 16; *Hazariram v. Kidarnath*, 7 P. 726; 9 P. L. T. 822; A. I. R. 1929 Pat. 1: 113 I. C. 673. The effect of the attachment of a money-decree having been specially provided for in Or. XXI, r. 53, the general provisions of S. 64 do not apply.—*Ibid.* A person who attaches and executes a decree for money after it has been assigned by the decree-holder to a third person does not acquire any beneficial interest in the amounts realised in execution but holds the same as a trustee for the assignee of the decree. The assignment of a decree operates from the date of the assignment and does not depend for its validity upon any recognition by the Court—(99 I. C. 309 overruled).—*Co-operative Town Bank v. Raman*, 5 R. 595; 106 I. C. 853; A. I. R. 1928 Rang. 25.

The only two persons who can take out execution are the holder of the attached decree and the attaching creditor. The assignee from the holder cannot apply for execution; *Thiruvengadam v. Doridla*, 13 I. C. 659; 11 M. L. T. 144.

**Sub-rule (3)**—A person attaching a decree is a representative of the decree-holder.—A person attaching a decree is the representative of the decree-holder within S. 47 and in every case is entitled to enforce execution of the decree which he has attached.—*Peary Mohan v. Romesh*, 15 C. 371 (referred to in *Adhar v. Lal Mohun*, 24 C. 778; 1 C. W. N. 676). See also *Brojonath v. Gaya Sundari*, 6 C. L. J. 141 and *Rangasami v. Periasami*, 17 M. 58, where it has been held that an attaching decree-holder is entitled to take all steps necessary for the realization of the proceeds of the attached decree by the Court. See, however, *Sami Pillai v. Krishna Sami*, 21 M. 417, in which a different view seems to have been taken.

Such a person becomes the representative on the day when the attachment is ordered and not on the day when he applied for the attachment.—*Chandrapal v. Muharimed Salamatullah*, A.I.R. 1929 Oudh 418; 6 O.W.N. 710.

A decree-holder purchased immovable property at an auction-sale held in execution of the decree, but before the sale was confirmed, the decree was attached by a judgment-creditor of the decree-holder. *Held* that the effect of the attachment was to place the attaching creditor in the position of the decree-holder so as to entitle him to have the sale confirmed.—*Beharia Rudrani Kcer v. Ram Pertap*, 11 C. W. N. 158.

Where *A* in execution of a decree against *B* attaches, under this section, a decree which *B* holds against a company in liquidation, the Court will direct the liquidator to recognize *A* as the representative of *B* and allow him to prove for the decree-debt in the name of *B*, and to receive and apply the dividend payable to *B* in satisfaction of *A*'s judgment-debt subject to the rights of other attaching creditors to rateable distribution.—*Sesha Ayyar v. T. S. Sugar Mill Co.*, 30 M. 533.

**Sub-rule (6)—Adjustment of attached decree.**—This sub-rule is new and gives effect to the decision in *Gopal v. Jaharimal*, 16 B. 522. See also *Rattan v. Bishan*, 10 L. 143; 110 I. C. 241; A. I. R. 1928 Lah. 834. Order XXI, r. 53 (6) applies also to cases where the attachment was made already before judgment; *Gorigala Venkayya v. Mugunta Lakshmiya*, 14 I. C. 285; 22 M. L. J. 394.

A decree-holder attached a decree obtained by the judgment-debtor against a third person. The Court directed him to execute the attached decree. The decree-holder applied several times but the applications were struck off. *Held* that his decree was subsisting. 795 (16 B. 522, relied on). See also *Raja Sir S. R. & Co. Firm v. Burma Oil Co.*, 9 B. 140.

Where a simple money-decree-holder attached another decree in favour of his judgment-debtor but subsequently the latter gave up a portion of the decree-amount as part of the compromise by which an application for leave to appeal to the Privy Council was withdrawn; *held*, that the compromise was in the nature of an adjustment of the attached decree and came within Or. XXI, r. 53 (6) and that it did not take effect as against the attaching creditor.—*Lachmi Narain v. Mansa Ram*, 30 A. L. J. 792.

This sub-rule merely provides, in case of *bona fide* transactions by judgment-debtors, an exception to the general rule laid down in B. 64 of the Code. So an adjustment by a judgment-debtor before he received notice of the order of attachment under this sub-rule is valid.—*Lakshminarasimham v. Lakshminarasimham*, 50 M. 677 (F. B.); 103 I. C. 502; A. I. R. 1927 Mad. 728; 53 M. L. J. 150.

**54. (1)** Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or

Attachment of  
Immovable pro-  
perty.

charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate. . [S. 274.]

### COMMENTARY.

**Alterations.**—In sub-rule (1) the words "*from taking any benefit from such transfer or charge*" have been substituted for "*from receiving the same from him by purchase, gift, or otherwise.*" In sub-rule (2) the words "*upon a conspicuous part*" have been added before "*Court-house.*"

**Attachment of immoveable property.**—A decree for redemption is not attachable under this rule, but under r. 53 (2); *Naigar Timapa v. Bhaskar*, 10 B. 444. The equity of redemption of a mortgagor is immoveable property within this rule; *Parashram v. Govind*, 21 B. 226; *Barendra v. Martin & Co.*, 33 C. L. J. 7 : 62 I. C. 167. Bequest to a Parsi widow, of income of immoveable property, with obligation of maintaining and educating children, is an interest in immoveable property, under this rule.—*Natha Kerra v. Dhunbaiji*, 23 B. 1.

An attachment is not complete until the procedure provided by this rule has been fully followed; *Kanai Lal v. Ahed Bux*, 39 I. C. 562. See also *Sinnappan v. Arunachalam*, 42 M. 844 (F. B.) : 53 I. C. 207. An attachment operates as a valid prohibition against alienation of the attached property only from the date on which necessary proclamation is made and a copy of the order affixed as contemplated in this rule. Where no evidence of a prohibitory order under this rule and its proclamation is given an alienation by the judgment-debtor cannot be impeached (42 M. 844 *followed*).—*Saroop Singh v. Narsingh*, A. I. R. 1929 All. 846. But once it is made under this rule it is immaterial that the Collector did not enter it in his *Tonzi Register*; *Ram Khelwan v. Sunder*, 34 I. C. 34. An omission to affix a copy of an attachment order on a conspicuous part of the Court-house or to post it in the office of the Collector or to post it in some conspicuous part of the land attached is a fatal defect which invalidates an attachment of land; *Attar Singh v. Ghulam Muhammad*, 60 I. C. 527. In *Jodhan v. Kapil Nath*, 69 I. C. 563 : A. I. R. 1923 Nag. 78, it was held that omission to post a copy of the order of attachment in the office of the Collector, as required by Or. XXI, r. 54 (2), does not render the attachment invalid if all the other formalities prescribed by that rule have been observed. But this case, it is apprehended, is no longer good law. (See 51 M. 349 (P.O.) noted *infra*).

This rule does not apply to property of the nature of a debt secured by a hypothecation bond. The preponderance of judicial opinion is in favour of the view that mortgage-debts are moveable properties; *Nataraja v. South Indian Bank of Tinnevely*, 37 M. 51 : 10 M. L. T. 503 : 2 M. W. N. 590 (15 A. 134 : 12 C. 546 ; 20 C. 805 : 6 C. W. N. 5, referred to).

**Attachment of mortgage debt.**—See notes to r. 46, under the heading "*Debt not secured by negotiable instrument—Mortgage-debt.*"

In the case of a purely usufructuary mortgage, where no debt was payable by the mortgagor, the procedure should be by attachment of the interest under this rule. Order XXI, r. 46 does not apply; *Manilal v. Motibhai*, 18 Bom. L. R. 233: 10 I. C. 812. The substantial difference between attaching the interest of a usufructuary mortgagee under this rule and under r. 46 is that under r. 46 the mortgagor would have received a written order of the Court prohibiting him from making the payment to the mortgagee; and under this rule he would receive no such order nor any notice of the attachment; *Ramasami v. Srinivasa*, 39 M. 389: 28 I. C. 284: 28 M. L. J. 338. See also *Gajadhar v. Dechraj*, 130 I. C. 265: A. I. R. 1931 Pat. 63, noted under r. 46, *ante*.

**Proof of attachment.**—An attachment under this section must be strictly proved; mere production of the order-sheet is not sufficient.—*Gonesh Persad v. Brij Behary*, 1 C. L. J. 565.

**Proof of service of prohibitory order.**—When the prohibitory order under sub-rule (1) was found to be duly served on the judgment-debtors, but the return to prove the service, having been destroyed, could not be produced to prove the service, it was held that the failure to produce the return did not render the execution sale invalid, *Abdul Ghafur Khon v. Akram*, 46 A. 741: 22 A. L. J. 703: 83 I. C. 878: A. I. R. 1924 All. 747.

No property can be declared to be attached unless first the order of attachment has been issued and secondly in the execution of that order other things prescribed by the rules in the Code have been done. Where however there is no positive evidence that the attachment was not effected in accordance with law and no such contention was raised in the lower Court, it was held that the Court should give effect to the presumption regarding the regularity of official acts and proceed on the view that there was a valid attachment duly effected.—*Kiernander v. Benimadhab*, 58 C. 598: 134 I. C. 561: A. I. R. 1931 Cal. 763; *A. T. K. dc. Muthiah v. Palaniappa*, 55 I. A. 256: 51 M. 349 (P. C.): 26 A. L. J. 616: 32 C. W. N. 821: 48 C. L. J. 11: 5 O. W. N. 579: 109 I. C. 626: 30 Bom. L. R. 1353: A. I. R. 1928 P. C. 139: 55 M. L. J. 123.

**Effect of attachment.**—Where an attachment of land was made by a written order under this rule, the conditions prescribed had to be fulfilled in order to render any private alienation of the property attached null and void; *Indro Chandro v. Agra and Mosterman's Bank*, 1 B. L. R. S. N. 20: 10 W. R. 264. See also *Nur Ahmad v. Allaf Ali*, 2 A. 58.

Where no order for attachment of the property is passed in favour of the decree-holders in the manner provided, their claims are not entitled to the protection conferred by S. 64 against private alienations, *Gongadin v. Khushali*, 7 A. 702.

Attachment by prohibitory order under this section does not constitute a dispossession of the party in actual possession of the property.—*Narayanrov v. Balkrishna*, 4 B. 529.

An attachment only prevents alienation, but does not confer title.—*Moti Lal v. Korrobudin*, 24 I. A. 170: 25 O. 179 (P. C.) (referred to in *Lachmi-dayal v. Hor Danni Lal*, 25 A. 347, p. 350); *Shanker v. Mohamed Ismail*, 125 I. C. 28: A. I. R. 1930 All. 552

Conferment of occupancy rights when the property was under attachment was invalid.—*Hanuman v. Habib*, 13 R. D. 429.

This rule is not contravened if the judgment-debtor executes a deed of mortgage in pursuance of a decree for specific performance obtained against him prior to the date of attachment as such a decree could not be set aside by a prohibitory order of a later date under r. 54.—*Lakshman v. Ramchandra*, 34 Bom. L. R. 117; A. I. R. 1932 Bom. 301.

To render an attachment effectual, the affixing of the prohibitory order on the Court-house is absolutely necessary. Where such affixing is later in date than the execution of a mortgage, the mortgage lien is not effected by the attachment even though the attachment was prior to the execution of the mortgage (55 I. A. 256; 51 M. 349 *folld.*).—*Nabadweep v. Loke Nath*, 59 C. 1176; 36 C. W. N. 733.

Where the judgment-debtors having notice of an attachment made in pursuance of the amendment of the petition for execution took no objection or preferred no appeal, the order of attachment was final and could not be challenged at a later stage, although the amendment was made on erroneous grounds, the matter not coming within Or. XXI, r. 17.—*Rani Basanta Kumari v. Tulsi Chavan*, 34 C. W. N. 139; A. I. R. 1930 Cal. 353.

An execution creditor does not by attachment acquire such an interest in the attached property as will enable him to maintain an action for its wrongful removal. The rights of attaching creditors are regulated by the C. P. Code, and the provisions of S. 91 (f) of the T. P. Act. 1882, do not apply to them. The removal of the attached property in proceedings in execution as 30 M. 207; 17 M. L. J. 8; M. L. J. 334, where it has been removed by a third party the decree-holder must enforce his claim by a separate suit and not in execution. See also *Krishnasawmy v. Official Assignee of Madras*, 26 M. 673.

Effect of re-attachment.—A re-attachment of property after decree does not imply an abandonment of the attachment obtained before decree.—*Ramkrishna v. Surfunnissa*, 6 C. 129; *Kosuri Suraparaju v. Mandapaka*, 26 I. C. 81. But when an application is made for attachment of property which has been previously attached under the decree, a Court may presume that the prior attachment had ceased before the application for a second attachment was made.—*Hafiz Suleman v. Abdullah*, 16 A. 193; (12 B. L. R. 411 *referred to*).

Absence of or defective attachment.—Irregularity.—If in the attachment order there be any incorrect description as to the right and interest of the judgment-debtors in the property attached the attachment is not good in law and does not affect actual rights and interests.—*Hargu Lal v. Muhammad Rajakhan*, 13 A. 119.

Where a copy of the order for attachment was not fixed up in the Collector's Office; held that the defect in the mode of attachment might render the attachment ineffectual for the purpose of avoiding alienations made, but the attachment was effectual against the judgment-debtor, and the

defect did not afford a ground for declaring the execution proceedings ineffectual.—*Rai Balkishen v. Rai Sitaram*, 7 A. 731.

In the case of land paying revenue to Government an attachment is not effective to invalidate a subsequent transfer unless and until a copy of the order of attachment has been affixed in the office of the Collector in accordance with Or. XXI, r. 54. So a security bond executed after an order of attachment was made cannot be declared invalid in the absence of evidence on the question whether the processes of attachment had been served and, if so, whether they were served before the security bond was executed.—*Nagar Mull v. Benares Bank*, 9 P. 860; 129 I. C. 142; A. I. R. 1931 Pat. 53.

Non-compliance with the provision contained in this rule renders an attachment void and ineffectual.—*Bharat v. Gouranga*, 55 C. 545; 104 I. O. 340; A. I. R. 1927 Cal. 895 (following 9 C. W. N. 693).

Omission to have a drum beaten as required is a material irregularity so as to render a sale held in execution of a decree liable to be set aside.—*Trimbak Ravi v. Nana*, 10 B. 504.

Where revenue-paying lands were described as revenue-free lands in the order of attachment: the misdescription protected the bona fide purchaser from having the alienation set aside as void under r. 64.—*Gumani v. Hardwar*, 8 A. 698.

If there had been no attachment or a defective attachment, but a valid order for sale had been made during the life-time of the judgment-debtor, the effect will be as that of an attachment followed by an order for sale.—*Peary Lal v. Chand Charan*, 11 C. W. N. 163 5 C. L. J. 80.

After confirmation of sale and grant of certificate to the purchaser, the sale is not to be considered as a nullity merely by reason of the absence of any attachment.—*Kishory Mohun v. Mahomed Mujaffar*, 18 C. 188 (followed in *Hari Charan v. Chandra Kumar*, 34 C. 787, p. 802; 11 C. W. N. 745). See also *Sivakolundu v. Ganapathi*, 37 I. C. 964; *Acchamna v. Basappa*, 8 M. L. J. 1; *Tarak v. Shyama Charan*, 36 I. C. 292, *Sheo Dhyani v. Bholanath*, 21 A. 311; *Mohamed Alam v. Jamiat*, 121 I. C. 369. There is no provision in Act X of 1859 under which the sale of a *jote* in execution of a decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation.—*Patil Sahu v. Hari Mahanti*, 27 C. 783 5 C. W. N. 128. See also *Sharada Moyee v. Wooma Moyee*, 8 W. R. 9 and *Sheodhyani v. Bholanath*, 21 A. 311, where it has been held that the absence of an attachment, prior to the sale of immoveable property in execution of a decree, is not a material irregularity; but is not a defect which is caused thereby to vitiate the sale (10 C. W. N. 128 referred to) But see *Mahadeo Dobey v. Bholanath*, 5 A. 86 (F. B.), where it has been held that a regular attachment is an essential preliminary to a sale in execution of a money decree. Also, *Ram Chand v. Pitam Mal*, 10 A. 195.

Invalid attachment.—An attachment is null and void, if at the time of attachment the decree under which it was made had been set aside and was not in existence. The fact that a renewed decree was subsequently

passed in terms of the original decree, could not make the attachment valid.—*Chettiattil Muhamod v. Kunhi Kori*, 29 M. 175.

"Order shall be proclaimed" etc.—This section does not require that the sale proclamation should be served in each of the villages comprised in the property to be sold. The word "*property*" evidently refers to each "lot" to be sold separately from the rest. Though it is a sound rule to follow, viz., to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one, of what is publicly done on the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of this section.—*Mouli Abdul Kashem v. Benode Lal*, 12 C. W. N. 757. The provisions of this rule must be taken to have been complied with when a copy of the proclamation of sale has been affixed to any one of the properties which are all situated near one another.—*Mahomed Abdulla v. Jamiat Rai*, 121 I. C. 369. A. I. R. 1930 Lah. 685. Where several *mouzas* are put up for sale in execution of a decree, the law does not require that publication should be made in every *mouza* (40 C. 635 (P. C.) distinguished).—*Maharaj Bahadur v. P. C. Lal Chaudhury*, A. I. R. 1928 Pat. 25; 9 P. L. J. 387. In *Tripura Sundari v. Durga Charan*, 11 C. 74, it has been held that, where distinct properties are proclaimed for sale, the omission to affix a copy in each of such properties amounts to an irregularity. But in *Pedro Antonio v. Jalbhoy Ardesir*, 12 B. 368, it has been held that a mere breaking up of an area into lots does not necessarily make it several distinct properties for the purposes of a proclamation of attachment or sale. See r. 67 (8) and notes.

It is necessary that a copy of the sale proclamation should be affixed to some conspicuous place on the property attached.—*Kalyata v. Ram Coomar*, 7 C. 466; 9 C. L. R. 114.

The proclamation of sale, required to be made at some place adjacent to the property to be sold, and the affixing of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house; *Megh Lall v. Shub Pershad*, T. C. 34; 8 C. L. R. 369. See also *Mahendra v. Gopal*, 17 C. 769 (779).. See, however, *Ram Chandar v. Kamta Prasad*, 4 A. 300.

In order to constitute a valid attachment, the proclamation described in the second portion of r. 54, Or. XXI, must be made; *Mular Ram v. Jivanda Ram*, 4 L. 211; 5 L. L. J. 200; 72 I. C. 452. A. I. R. 1923 Lah. 423.

Where the order of attachment was not proclaimed by beat of drum as resistance was offered on behalf of the judgment-debtors if the order was so proclaimed, and thereupon the order was proclaimed in a loud voice adjacent to the property in dispute; *held*, that there was sufficient compliance with Or. XXI, r. 54.—*Sukhraj v. Harnam*, 136 I. C. 335; A. I. R. 1932 Oudh 76.

Irregularity in publishing sale.—See r. 90, and notes.

Attachment not necessary in mortgage-decree.—If the decree contains a direction for sale of the mortgaged premises, it is not necessary to issue an attachment. The direction for sale in the decree is in itself sufficient.

authority for the sale.—*Daya Chand v. Hem Chand*, 4 B. 515. See also *Pedro Antonio v. Jalbhoy*, 12 B. 368; *Jogendra v. Debendra*, 26 O. 127, p. 129 (where it has been held that under the Act no attachment is necessary); and *Dosibai v. Ishwardas Jagjivandas*, 9 B. 561 (affirmed by the P. C. in 15 B. 222). See also *Subrani v. Puran*, 8 A. L. J. 1327.

The omission . . . . . in execution of a decree for the realization . . . . . the validity of a sale of the mortgaged property in execution of such decree.—*Tincowri v. Shib Chandra*, 21 C. 689; *Muniappa v. Subramania*, 18 M. 437.

An attachment is a necessary preliminary to an execution proceeding. Where however the judgment-debtor executed a security bond it is impossible for him to alienate the property and consequently the person in whose favour it is executed can enforce the bond in execution without an order of attachment.—*Tata Iron and Steel Co. v. Charles Joseph*, 8 P. 801.

"Land paying revenue to Government."—*Shrotriyam* villages in the Madras Presidency are lands paying revenue to Government within the meaning of this rule: *Ganamma v. Ketireddi*, 46 M. 736; A. I. R. 1924 Mad. 217; 75 I. O. 369, *Yar Khan v. S. K. Bose*, 7 L. L. J. 501; A. I. R. 1925 Lah. 593; 83 I. O. 321.

## 55. Where—

Removal of attachment after satisfaction of decree (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed, [S. 275.]

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule. [NEW.]

## COMMENTARY.

**Alterations.**—The words "or certified to the Court" in Cl. (b) and the last para. are new. As to certifying payment, see rule 2. The effect of the added para. is that on the happening of any of the events in Cl. (a), (b) or (c), the attachment shall be deemed to be withdrawn, i.e., it shall cease of itself. Formerly an application and an express order of the Court were necessary. It is now optional with the judgment-debtor to make an application for same.

**Cases.**—Where property has been attached, an order dismissing an application for execution but not specifically withdrawing attachment or declaring the decree incapable of execution does not raise the attachment;



*Bank of Upper India v. Sheo Prasad*, 19 A. 482. The death of a judgment-debtor does not affect the attachment; *Sheo Prasad v. Hira Lal*, 12 A. 440 (F. B.). In the case of the death of a judgment-debtor of a joint *Mitakshara* family, the attachment does not cease even though the estate passed to the surviving members of the family; *Beni Pershad v. Parbati*, 20 C. 895.

An order directing putting in of a fresh petition for execution as the previous petition was closed, did not terminate attachment as the petition was not dismissed.—*Veluswami v. Balasubramania*, 106 I. C. 138 : A. I. R. 1928 Mad. 398.

Sums paid into Court under this rule are not assets under S. 73 for rateable distribution; *Sorabji v. Kala Raghunath*, 36 B. 156 : 13 Bom. L. R. 1193. But see *Pardasani v. Jeshwani*, 128 I. C. 686 : A. I. R. 1930 Sind 300, which held that there is nothing in this rule to suggest any distinction between money voluntarily paid by the judgment-debtor for avoiding attachment and money realised as a result of the attachment; both of them would equally be included in the term "assets held by the Court," within the meaning of S. 73.

**Revival of attachment.**—Where a decree under which an attachment has been made is set aside on first appeal but restored on second appeal, the attachment is revived—*Parmeswar Din v. Debi Prasad*, 48 I. C. 386.

**Satisfaction in part.**—Where satisfaction of the decree in part only is certified, the attachment cannot be deemed to be withdrawn; *Khub Chand v. Niadar*, 15 I. C. 677 : 10 A. L. J. 165.

In case of an instalment decree the instalment which has become due and in respect of which attachment has been made is the "amount decreed" within the meaning of Or. XXI, r 55; when the amount of that instalment is paid the attachment made in respect of it ceases and does not enure in respect of an instalment which has not become due.—*Bhola v. Madho*, 105 I. O. 799 : A. I. R. 1928 Nag. 65.

**56.** Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Order for payment of coin or currency notes to party entitled under decree.

[S. 277.]

## COMMENTARY.

**Alterations**—The word "current" has been added before the word "coin." The effect seems to be that if the coins attached be not current coins, they cannot be paid over to the decree-holder, but should be sold, like other moveable properties.

**57.** Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall

Determination of attachment.

either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease. [NEW.]

### COMMENTARY.

**Object and effect.**—The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file," for which there was no justification under any of the earlier Codes; *Dewan Chand v. Bedha*, 112 I. C. 294.

Under the old Code execution cases were "struck off" for relieving the congestion of the file on account of default in appearance, failure to deposit necessary papers, or for not taking any step in numerous cases (e.g., *Fakirullah*, 23 I. A. 44; 17 A. 106 (P. C.); 5 M. L. J. 3; *Srinivasa v. Sami Rau*, 17 M. 180; *Bank of Upper India v. Shoo Prasad*, 19 A. 482 and other cases noted under S. 64, under the heading "Effect of striking off Execution Proceedings"). The decisions were not harmonious and in numerous cases it was held that such an order did not necessarily put an end to the attachment and it was open to the decree-holder to revive the execution proceedings and continue it from the point where it has previously stopped. This rule sets at rest the various interpretations that were put on the previous practice. Under this Code there can be no "striking off" of applications. If there is any default of the decree-holder, the application must be dismissed and the attachment ceases forthwith, even though the Court and the parties intended that the attachment should subsist.—See notes below.

**Judgment-debtors objecting to execution proceedings** must state their objections at the earliest possible opportunity. It is only those matters which could not have been made matter of objection at the earliest opportunity that can be allowed at a later stage.—*Ganapathy v. Meera Sahib*, 121 I. C. 845; A. I. R. 1930 Mad. 303.

**Applicability.**—This rule can apply only to orders of dismissal passed after the Act came into force; *Vardiparthi v. Korukonda*, 27 I. C. 568. It cannot have a retrospective effect; *Khande v. Nara Subba*, 27 I. C. 792. See also *Raghavachariar v. Anantha*, 31 I. C. 911. This rule does not apply to a case where a Court strikes off an execution proceeding or consigns the record to the record-room to suit its own convenience, or to reduce its pending file without any default having been committed by the decree-holder. In such a case the Court may take any further steps necessary for the execution of the decree; *Aghunath Prasad*, 48 A. 698; 24 A. L. J. 734. It was also held in the above case that an application which is in substance as well as in form an application to revive a pending execution which had been suspended for non-act or default of the decree-holder, is not an application to initiate a fresh application, and the effect of such an application, if granted, is that the proceeding is continued from the stage at which it was left. An order restoring an attachment relates back to the date when the attachment is first made,

and its effect is to invalidate any private sale made during the subsistence of that attachment. See also *Khazan v. Bikram*, 107 I. C. 574; *Diwan Dhanpat Rai v. Alliance Bank*, 31 P. L. R. 321: 123 I. C. 113: A. I. R. 1930 Lah. 647.

A revival of execution proceedings does not operate as a revival of the attachment, so as to prejudice the rights of strangers who have in the interval acquired a title to the property; *Patringa v. Madhavanand*, 14 C. L. J. 476.

**Court.**—The 'Court' referred to in r. 57 is the attaching Court and not the Court the decree of which is attached (following (1927) M. W. N. 685). Where therefore, a decree of Court A is attached by Court B, and the decree-holder's application for execution presented at Court A is dismissed for default, the attachment does not, on that account, cease.—*Venugopala v. Chengayya*, (1931) M. W. N. 211.

**Attachment before judgment.**—The provisions of this rule have no application to attachment before judgment under Or. XXXVIII. This rule applies only to attachment "in execution of a decree." An order of attachment before judgment subsists for the benefit not only of the first application for execution but also for subsequent applications; *Gonesh Chandra v. Banwari*, 16 C. L. J. 86: 14 I. C. 345, *Banuddin v. Arunachalla*, 26 M. L. J. 215: 22 I. C. 351; *Bakra Akhey Ram v. Basant Lal*, 46 A. 894: 80 I. C. 106: A. I. R. 1924 All. 860, *Shibnath v. Sheikh Saberuddin*, 56 C. 416: 119 I. C. 113: A. I. R. 1929 Cal. 465, which held that an attachment before judgment *prima facie* would continue to have effect if no application for execution had been made. An attachment in execution is not, notwithstanding the provisions of Or. XXXVIII, r. 11, of itself a waiver or abandonment of the attachment before judgment. The effect of the two attachments on the same property is merely that the property is under attachment but a person is entitled to the benefit of either one of the attachments in the absence of abandonment and that no doctrine of merger is applicable to such a case. (This case has been dissented from in 55 B. 693, noted below). But see *Meyyappa Chettiar v. Chudambaram*, 47 M. 483 (F. B.): 83 I. C. 91: A. I. R. 1924 Mad. 494 in which it was held (following 44 M. 902 (F. B.) and overruling 42 M. 1) that the provisions of this rule apply to attachment before judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit; hence upon the dismissal of such an application by the decree-holder's default, the attachment made upon judgment ceases. See also *Ardeshtur v. Usman*, 31 Bom. L. R. 1101: A. I. R. 1929 Bom. 455. Unless there is a dismissal of an execution petition, attachment before judgment enures to the benefit of a decree-holder.—*Ganapathy v. Meera Sahib*, 121 I. C. 845: A. I. R. 1930 Mad. 303. An application for rateable distribution or for attachment of moveables by the decree-holder who has attached the properties of the judgment-debtor before judgment is not maintained.—*Ibid.* See also the same case in 53 B. 543: 119 I. C. 769: A. I. R. 1929 Bom. 321.

"By reason of the decree-holder's default."—There is no reason for giving a restricted meaning to the word "default" and confining it to default in appearance, in the payment of process fees, or in the production of documents. It includes failure to do what the decree-holder is bound to do, that is, to proceed with the application for execution. Omission therefore to serve notice to the judgment-debtor as required by r. 66 of this order is a default; *Namuna Bibi v. Rosha*, 38 C. 482; 15 O. W. N. 423; 9 I. C. 558; *Lakhpat Rai v. Mayya Mal*, 75 I. C. 824. So also the omission to file a proclamation; *Mandhyan v. Badram*, 17 C. W. N. 204; *Dildar Husain v. Sheo Narain*, 41 A. 157; 49 I. C. 113; *Fateh Din v. Qutab Din*, 3 L. 7; A. I. R. 1922 Lah. 108; 67 I. C. 543. So also omission on the part of the decree-holder to give security; *Ardeshir v. Usman*, 31 Bom. L. R. 1101; A. I. R. 1929 Bom. 455.

Where an execution sale is set aside for any reason other than the decree-holder's default, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property, and no fresh attachment is necessary; *Mahabharat v. Surjakanta*, 3 P. L. J. 310; 45 I. C. 529, *Venkateswarayyan v. Aswatta*, 45 M. L. J. 315; 75 I. C. 491; A. I. R. 1923 Mad. 703. But see *Ganpati Bhatta v. Devappa*, 46 B. 942; 76 I. C. 895; A. I. R. 1923 Bom. 30.

A decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards

execution application was to put an end to the attachment and that the dismissal was due to the default of the decree-holder. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder but, as has been held, default means a failure to do what one is legally bound to do; *Jai Krishna v. Bibi Soghra*, 71 I. C. 881; 4 P. L. T. 418.

"Upon the dismissal of such application, the attachment shall cease."—Where an executing Court made an order dismissing the execution case for default on the part of the decree-holder but directed that the properties should remain under attachment; it was held that the order being one dismissing the application for execution, the attachment ceased by virtue of the provision of this rule notwithstanding the Court's direction that the attachment should continue; *Namuna Bibi v. Rosha*, 38 C. 482; 15 C. W. N. 428; 9 I. C. 558; *Dildar Husain v. Sheo Narain*, 41 A. 157; 49 I. C. 113; *Kundanmal v. Mt. Aziz Begam*, A. I. R. 1929 Nag 82; *Fateh Din v. Qutab Din*, 3 L. 7; 67 I. C. 543; A. I. R. 1922 Lah. 108. Where the executing Court struck off the file an application of its own motion and without any default on the part of the decree-holder, there was no dismissal of the application within the meaning of this rule and the attachment continued.—*Bijai v. Raghunath*, 48 A. 698; 97 I. C. 102; A. I. R. 1926 All. 734. Where the Court's order was that the execution case should for the time being be dismissed but the attachment shall remain in force, it was held that the order was in effect an adjournment of the proceedings and was therefore valid; *Mahammad Mubarak v. Sahu*, 44 A. 274; A. I. R. 1922 All. 62; 65 I. C. 91.

and its effect is to invalidate any private sale made during the subsistence of that attachment. See also *Khazan v. Bikram*, 107 I. C. 574; *Diwan Dhanpat Rai v. Alliance Bank*, 31 P. L. R. 321; 123 I. C. 113; A. I. R. 1930 Lab. 647.

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**Attachment before judgment**—The provisions of this rule have no application to attachment before judgment under Or. XXXVIII. This rule applies only to attachment "in execution of a decree." An order of attachment before judgment subsists for the benefit not only of the first application for execution but also for subsequent applications; *Gonesh Chandra v. Banwari*, 16 C. L. J. 86; 14 I. C. 345; *Banuddin v. Arunachalla*, 26 M. L. J. 215; 22 I. C. 351; *Bohra Akhey Ram v. Basant Lal*, 46 A. 894; 80 I. C. 106; A. I. R. 1924 All. 860; *Shubnath v. Sheikh Saberuddin*, 56 C. 416; 119 I. C. 113; A. I. R. 1929 Cal. 465, which held that an attachment before judgment *prima facie* would continue to have effect if no application for execution had been made. An attachment in execution is not, notwithstanding the provisions of Or. XXXVIII, r. 11, of itself a waiver or abandonment of the attachment before judgment. The effect of the two attachments on the same property is merely that the property is under attachment but a person is entitled to the benefit of either one of the attachments in the absence of abandonment and that no doctrine of merger is applicable to such a case. (This case has been dissented from in 55 B. 693, noted below). But see *Meyyappa Chettiar v. Chidambaram*, 47 M. 483 (F. B.); 83 I. C. 91; A. I. R. 1924 Mad. 494 in which it was held (following 44 M. 902 (F. B.) and overruling 42 M. 1) that the provisions of this rule apply to attachment before judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit; hence upon the dismissal of such an application by the decree-holder's default, the attachment made upon judgment ceases. See also *Ardeskar v. Usman*, 31 Bom. L. R. 1101; A. I. R. 1929 Bom. 455. Unless there is a dismissal of an execution petition attached to a decree-holder's application for execution, the attachment continues to operate. 303. An application by the decree-debtor before judgment has the consequence of putting an end to the attachment and an alienation by the judgment-debtor after the dismissal of such an application is invalid.—*Hari Hari Sahai v. Shrinivas*, 55 B. 693; 134 I. C. 972; 33 Bom. L. R. 1130; A. I. R. 1930 Bom. 455. The consequence would have happened if an application for execution had been presented by the decree-holder. See also the same case in 55 B. 693; 119 I. C. 761.

"By reason of the decree-holder's default."—There is no reason for giving a restricted meaning to the word "default" and confining it to default in appearance, in the payment of process fees, or in the production of documents. It includes failure to do what the decree holder is bound to do, that is, to proceed with the application for execution. Omission therefore to serve notice to the judgment-debtor as required by r. 66 of this order is a default; *Namuna Bibi v. Roshia*, 38 C. 482: 15 C. W. N. 429: 9 I. C. 558; *Lakhpur Rai v. Mayya Mal*, 75 I. C. 821. So also the omission to file a proclamation; *Mandhyan v. Badram*, 17 C. W. N. 201; *Dildar Husain v. Sheo Narain*, 41 A. 157: 49 I. C. 113; *Fateh Din v. Qutab Din*, 3 L. 7: A. I. R. 1922 Lah. 108: 67 I. C. 513. So also omission on the part of the decree-holder to give security; *Ardeshir v. Usman*, 31 Bom. L. R. 1101: A. I. R. 1929 Bom. 455.

Where an execution sale is set aside for any reason other than the decree-holder's default, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property, and no fresh attachment is necessary; *Mahabharat v. Suryakanta*, 3 P. L. J. 310: 45 I. C. 529, *Venkateswarayyan v. Aswatta*, 45 M. L. J. 315: 75 I. C. 491: A. I. R. 1923 Mad. 703. But see *Ganpati Bhatta v. Devappa*, 46 B. 942: 76 I. C. 895: A. I. R. 1923 Bom. 30.

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"Upon the dismissal of such application, the attachment shall cease."—Where an executing Court made an order dismissing the execution case for default on the part of the decree-holder but directed that the properties should remain under attachment; it was held that the order being one dismissing the application for execution, the attachment ceased by virtue of the provision of this rule notwithstanding the Court's direction that the attachment should continue; *Namuna Bibi v. Roshia*, 38 C. 482: 15 C. W. N. 428: 9 I. C. 558; *Dildar Husain v. Sheo Narain*, 41 A. 157: 49 I. C. 113, *Kundanmal v. Mt. Aziz Begam*, A. I. R. 1929 Nag. 82; *Fateh Din v. Qutab Din*, 3 L. 7: 67 I. C. 543: A. I. R. 1922 Lah. 108. Where the executing Court struck off the file an application of its own motion and . . .

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The dismissal under r. 57 is to take place only if the Court is not able to proceed further with the execution of the application. Where a decree is attached in execution of another decree and the latter application is dismissed for default, the attachment does not terminate because the execution proceedings in the decree attached are still pending.—*Bishan Sahai v. Amir Singh*, L. R. 1931 L. 651 : 132 I. C. 667 : A. I. R. 1931 Lah. 705.

**Cases.**—Where, by mistake of the Court, an application for execution against the property under attachment was dismissed, but the decree-holder obtained a review and the executing Court was directed to proceed, and there was no order removing the attachment, *held* that the attachment subsisted and was valid as against a sale made by the judgment-debtor previous to the review; *Aziz Baksh v. Kaniz*, 34 A. 490 : 15 I. C. 49. See also *Biya v. Raghunath*, 48 A. 698 : 97 I. C. 102 : A. I. R. 1926 All. 734.

The dismissal of an execution application under this rule has the effect of vacating a prior order passed under Or. XXI, r. 23 ordering execution to proceed; *Periakarappan v. Manikka*, 2 L. W. 1055 (24 A. 282, *dissented from*).

An attachment ceases upon the dismissal of the application for execution. A subsequent application for sale only is defective but curable under S. 153 by amendment; *Kunchapudy v. Mallikarjuna*, 25 I. C. 883.

Where after attachment by a Court of first instance, the sale was stayed by an order of the appellate Court and the first Court thereupon dismissed the application, *held* that the attachment subsisted; *Vallakath Puthiah v. Thachar*, 35 I. C. 240 3 L. W. 601 (38 C. 482 *not folld.*; 34 A. 490 *approved*).

After a decree-holder attached property, a claim was filed and the Court recorded the following order on the execution petition: "Decree-holder's Vakil states that he will file a fresh application as the claim petition is pending. Struck off." The claim was allowed and the decree-holder filed a suit and succeeded in it. More than three years after the previous application, the decree-holder applied for execution. *Held* that the former attachment subsisted and this rule did not apply; *Karaturi v. Gopi Setti*, 21 M. L. T. 88.

"Striking off."—Where a sale proclamation was not made owing to the laches of the decree-holder and an order was passed "Proclamation not filed, struck off." *Held* that it amounted to a dismissal of attachment; *Mandhyan v. Badram*, 17 C. W. N. 201 : 18 I. C. 441. An order stating that the *darkhast* is "Struck off the file" or "Disposed of" is not valid.—*Govardhandas v. Official Liquidator*, 31 Bom. L. R. 1203. Such an order coupled with the direction that the property do continue under attachment is not valid. The effect is that attachment is at end and the order must be held to amount to a dismissal of the application for execution.—*Kundanmal v. Mt. Aziz Begam*, A. I. R. 1929 Nag. 82; *Sashayya v. Sathiraju*, 120 I. C. 863 : A. I. R. 1930 Mad. 414. The order closing the proceedings must be treated as a dismissal of the application for execution, involving a removal of the attachment.—*Ko Kyin v. Abas Khan*, 123 I. C. 691 : A. I. R. 1930 Rang. 325.

### INVESTIGATION OF CLAIMS AND OBJECTIONS.

**58. (1)** Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was party to the suit:

Provided-that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

[S. 278.]

## COMMENTARY

**Object and scope.**—If an order is passed after investigation under the rule, the party against whom such order is passed may bring a regular suit under r. 63. As to when an order is said to be passed on investigation, see notes to r. 63, under the heading, "Limitation of one year, when applies and when does not."

The object of this rule is to give a claimant a speedy and summary remedy and not to deprive him of his remedy by suit. The summary remedy given by this rule is alternative to the remedy by way of suit; *Kanhaya Lal v. National Bank of India*, 40 I. A. 56; 40 C. 598 (P. C.); 17 C. W. N. 541; 11 A. L. J. 413; 15 Bom. L. R. 472; 18 I. C. 949; *Shankar Prasad v. Vikrama*, 7 A. 583);

Claims may be preferred in execution proceedings, by parties to the suit or their representatives or by third persons. All objections raised by *parties to the suit* or their representatives come under S. 47, and the objector should proceed by an application under that section; a separate suit for the purpose is barred. Claims preferred to attached property by *third persons* come under this rule. It is important to note the distinction, as an order passed under S. 47, allowing or disallowing an objection to attachment, is a "decree" and is therefore *appealable*, whereas an order rejecting a claim under this rule is not appealable; *Abdul v. Muhammad*, 4 A. 190; *Dayaram v. Govardhan Das*, 28 B. 458; *Madho v. Hazari*, 8 P. 717; 10 P. L. T. 95; 116 I. C. 695.



to be a party to the suit and S. 47 applies to his case and not Or. XXI, r. 58.—*Gayaramsao v. Balkishan*, A. I. R. 1929 Nag. 179. The Court has jurisdiction to entertain a claim to the attached property even after the sale had taken place, for unless the decree is fully satisfied, the attachment subsists under r. 55 of Or. XXI, and if the Court dismisses a claim albeit if it be after the sale, and the claimant does not bring a suit to establish his claim within one year, he is estopped from raising any defence in a suit for possession as the purchaser (16 C.W.N. 1029, *dissented from*).—*Jagannadham v. Pydayya*, 61 M. L. J. 884: (1931) M. W. N. 902: 134 I. C. 809: A. I. R. 1931 Mad. 782. An unsuccessful claimant has the option to institute a separate suit for establishing his title under r. 63 and if this is not done, the order dismissing the claim is conclusive; *Rahim Bux v. Abdul Kader*, 32 C. 537; *Sardhari Lal v. Ambika*, 15 C. 521 (P. C.): 15 I. A. 123; *Rajaram v. Raghubansman*, 24 C. 563. There was a diversity of judicial opinions as to whether an objection or claim preferred by a party or his representative comes under this rule or S. 47, when the objection is based on the ground that the property is held by him on behalf of a third party as *shebait*, trustee, etc. As to this see notes to S. 47 under the heading "Objection by Trustee or Shebait, when falls within this section"

If a Court is invited by a decree-holder to sell property not duly attached and the Court is apprised of that fact by a person claiming to be interested therein, it has inherent power to investigate the matter; *Sasivama v. Meherban*, 13 C. L. J. 243: 9 I. C. 918.

The words of r. 59 show that a claim may be made by a person who has some interest in the property, although he is not in possession. A mortgagee in possession is in possession partly on his own account and partly on account of the mortgagor, i.e., to the extent of his interest. The Code requires the Court to investigate the claim of a mortgagor in such a case and to the extent of the mortgagor's interest and, if it finds it established, to release the property to the extent of the mortgagor's interest.—*Nga Tok v. Subramonian*, 10 I. C. 994. See also *Bhagwan v. Raj Nath*, 9 A. L. J. 474: 14 I. C. 790. The claim of a mortgagee which would be inconsistent with the continuance of an unqualified attachment is liable to adjudication by the Court.—*Debi Das v. Maharaj Rupchand*, 49 A. 903: 102 I. C. 792: A. I. R. 1927 All. 593. The words "on the ground that such property is not liable to attachment" refer to the case only of an objection made to attachment, and not to the case of a claim preferred to the property attached.—*Ibid.* See in this connection *Nawal Kishore v. Khyali Ram*, 11 L. 369, noted under the heading "Subject to the result of such suit, the order will be conclusive" in r. 63, *post*.

An usufructuary mortgagee cannot prefer a claim under this rule but he may come in under r. 100; *Biswanath v. Lingaraj*, 1 P. 159.

It is not a condition precedent in all cases for a claimant to show that he was in possession before he could attack the validity of an attachment.—*Kuppuswami v. Secretary of State*, 119 I. C. 33: A. I. R. 1929 Mad. 393. See notes under r. 53, *post*.

An erroneous order on an application under r. 58 does not affect the jurisdiction of the Court making the order. It only entitles the party to come to the Civil Court to have the error rectified.—*Subadar v. Ramprit*, 115 I. C. 703: A. I. R. 1929 Pat. 116.

**Objections or claims by parties or their representatives.**—See S. 47 and notes. Such objections are governed by S. 47 and not by Or. XXI, r. 58; *Gangadhar v. Jagmohan Das*, 133 I. C. 859; 33 Bom. L. R. 731; A. I. R. 1931 Bom. 446. Where an objector has misdescribed the objection as under this rule when it really is one under S. 47 and the Court acting under a misconception deals with it as one under this rule, the order nevertheless operates as a decree and is appealable under S. 47.—*Gopal Das v. Ishar Das*, 137 I. C. 258; 33 P. L. R. 496; A. I. R. 1932 Lah. 376.

**Objections or claims by Trustee or Shebait.**—Where a decree is passed against a judgment-debtor in his individual capacity and he takes an objection to the attachment of certain property in his possession upon the ground that, although it is in his possession, it is not in his possession in his personal capacity but in his possession as a manager of endowed property, the question is one between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree, and objection would lie under S. 47 and not under Or. XXI, r. 58; *Shah Naim Ata v. Girdhari Lal*, 2 Luck. 145; 100 I. C. 464; 4 O. W. N. 102; A. I. R. 1927 Oudh 120. But see *Somnagar Gir v. Mayanand*, 50 A. 801; 26 A. L. J. 477; A. I. R. 1929 All. 392; 113 I. C. 171, which held that an order passed in such a case comes under Or. XXI, r. 60 and not under S. 47, and consequently the same was not appealable. See also *Suniti-sundari v. Sri Krishna*, A. I. R. 1928 Cal. 514; 112 I. C. 649; *Fatechand v. Ganeshgir*, 27 N. L. R. 10; 128 I. C. 401; A. I. R. 1930 Nag. 293. See notes under S. 47.

**"Shall proceed to investigate."**—It is the duty of the Court to investigate. Where a muosif improperly refused to investigate a claim under this rule, he was held to have refused to exercise a jurisdiction which he was bound to exercise and the appellate Court set aside the order and ordered the investigation; *Jameela v. Luckmun*, 4 C. L. R. 74; see also 17 W. R. 74; 8 W. R. 26; 11 W. R. 54; 1 C. W. N. 24; 22 B. 875.

The extent to which the investigation should be carried, depends upon the circumstances of the case.—*Sardhari Lal v. Ambika*, 16 C. 521 (P. C.): 15 I. A. 123.

A Court has no jurisdiction to entertain a claim petition under this rule after the attached property has been sold.—*Maung Pe v. Maung Kwa*, 5 R. 751; 107 I. C. 161; A. I. R. 1928 Rang. 80.

Where a judgment-debtor was not a party to any claim proceeding, he is not bound by any order passed on the claim petition.—*Langama v. Official Receiver*, 110 I. C. 511.

A Civil Court while executing a warrant of attachment issued by a Magistrate and trying summarily a claim petition has no jurisdiction to go behind the warrant of attachment which becomes a decree of such Civil Court under S. 386, Cr. P. Code.—*Kuppuswami v. Secretary of State*, 119 I. C. 33; A. I. R. 1929 Mad. 383.

Where after the attachment before judgment of the undivided share of a member of a joint family, a suit for partition by another member was filed and a decree was passed allotting specific lots to the several members, but the creditor nevertheless brought the undivided share of his debtor in all

the lots to sale held, on objection by the other members, that the Court was bound, with a view to do substantial justice and avoid multiplicity of actions, to take notice of subsequent events and substitute in the proclamation of sale the ascertained interest of the debtor in the specific lots allotted to his share—*Someshwer v. Manilal*, 34 Bom. L. R. 206: A. I. R. 1932 Bom. 210: 137 I. C. 603

**Limits of enquiry.**—See notes to r. 60 under the heading "Extent of investigation."

**Proviso.**—If the Court is of opinion that an application has been designedly or unnecessarily delayed, it may refuse an investigation, but if it makes an investigation it is bound to pass orders under r. 60 or r. 61 and dismissal after investigation on the ground of delay would be illegal. The word "unnecessarily" must be construed in a generous way; *Nga San Balu v. Mi Thaik*, 39 I. C. 345: (1916) 2 U.B. R. 136: 11 Bur. L. T. 41. After a property which had been attached in execution of a decree, has been sold, the Court has no jurisdiction to hear an application putting forward a claim which, if successful, would result in the release of the attached property; *Kali Charan v. Sarajani* A. I. R. 1926 Cal. 468: 87 I. C. 168.

**Remedy under this rule is alternative.**—The summary remedy given by this rule is permissive and alternative. The object is not to deprive a claimant of his remedy by suit, but to give him a more speedy and summary remedy.—*Raghunath v. Sarosh*, 23 B. 266. See also *Krishnabhupati v. Vikrama*, 18 M. 13, p. 17; *Sundar Singh v. Ghasi*, 18 A. 410; *Kanhaya v. National Bank of India*, 40 I. A. 56: 17 C. W. N. 541 (P. C.): 40 C. 598 11 A. L. J. 413; 15 Bom. L. R. 472: 18 I. C. 949: 25 M. L. J. 104. But see *Man Kuar v. Tara Singh*, 7 A. 533.

**Cases that come under this rule.**—Defendants who are exempted from the operation of a decree are not parties to the suit within the meaning of S. 47 and their objection to the attachment of properties is to be investigated under this rule.—*Ram Pershad v. Jagannath*, 30 C. 134: 6 C. W. N. 10. When a suit is dismissed against one of the parties but decreed against the rest, the former is not a party to the suit within S. 47, and his objection to attachment would fall under this rule.—*Rahimuddi v. Lall Meah*, 29 C. 696: 6 C. W. N. 727.

Where the right, title, and interest of the judgment-debtor in certain lands were attached, a claim to a fractional share of the property is to be investigated under this rule.—*Raj Coomar Roy v. Kadumbiny*, 13 W. R. 63 (F. B.): 4 B. L. R. 175 (F. B.).

**Held** that an objection, made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, might have been taken under this rule at the time of attachment, and was not entertainable under Or. XXI, r. 90.—*Hub Lal v. Kanhia Lal*, 7 A. 365. Objection to attachment could be entertained before the property was sold; the executing Court has no power to entertain it after sale.—*Maung Po Pe v. Maung Kwa*, 5 R. 751: 107 I. C. 161: A. I. R. 1923 Rang. 80.

A claim set up in an investigation held under S. 237, O. P. Code, 1882 (Or. XXI, rr. 66, 70), cannot be treated as a claim under S. 278, C. P. Code, 1882 (Or. XXI, r. 58), the latter section having reference to claims and

objections to attachment of property under attachment.—*Dhiku Bal v. Khem Chand*, 14 B. 363.

Where, in execution of a money-decree against the father alone for a personal debt, the decree-holder attached the whole of the joint family property, a claim by the sons that they were entitled to a share in the property and for its release from attachment is to be investigated under this rule.—*Ram Dayal v. Durga Singh*, 12 A. 209.

Where there was no covenant to pay the debts by the transferee and if there had been such a covenant, the decree-holder would not have been entitled to proceed against the transferee with whom he had no privity.—*Jagat Narain v. Sripathi*, 129 I. C. 892: A. I. R. 1930 Pat. 390.

An objection of a third party in execution of a decree for delivery of possession falls within the provisions of this rule and not of Or. XXI, r. 99.—*Mahabir Prasad v. Parma*, 14 A. 417.

An objection in execution on the part of the legal representatives of a deceased judgment-debtor brought on record, falls under S. 47 and not under Or. XXI, rr. 59, 60.—*Maria Ursula v. Pana Navalajo*, 30 Bom. L. R. 1447.

No appeal lies from an order allowing a claim when made by a person not a party to the decree sought to be executed, as the dispute is not one under S. 47.—*Jagannath v. Jamuna*, 30 A. L. J. 125: A. I. R. 1932 All. 259: 139 I. C. 785.

Claim to "debts" attached in execution.—It was held in an earlier Bombay case that where a decree-holder attached a debt due to his judgment-debtor the Court could not ascertain under this rule a claim preferred by the person served with the prohibitory order: *Harilal v. Abhesang*, 4 B. 323. It has however been held in a Madras case that when a debt not secured by a negotiable instrument is attached a claim by a third person may be preferred under this rule; *Chidambara v. Ramasamy*, 27 M. 67 (followed in *Tayobali v. Atmaram*, 38 B. 631: 16 Bom. L. R. 520: 25 I. C. 376, where 4 B. 323 was not followed); *Central Bank v. Ramkinker*, A. I. R. 1929 Pat. 751. See also *Rajkishore v. Bhabatosh*, 49 C. L. J. 51: 116 I. C. 362: A. I. R. 1929 Cal. 225. In such a case the Court should examine not only whether the contract of assignment existed but also whether it was property which was in the judgment-debtor's possession.—*Ibid.* The garnishee who denies the debt can make an application under r. 59 and the Court can pass an order under r. 63.—*Maruti v. Ramchandra*, 33 Bom. L. R. 396: A. I. R. 1931 Bom. 288: 133 I. C. 248.

Though the order against the garnishee's claim is conclusive under r. 63 the order can hardly be said to be conclusive of the rights of the garnishee for the simple reason, that it is not the business of the Court in the attachment proceedings to determine whether the debts are really due.—*Seshagiri v. Ramachandra*, (1931) M. W. N. 259: A. I. R. 1931 Mad. 670: 136 I. C. 613.

Claim to "decrees" attached in execution.—Where in execution of a decree for money obtained by A against B, A attached a certain property (in this case a decree) belonging to B, but before the attachment O had obtained a sale deed in his favour in respect of the property attached, held that the question whether O's title is good, or whether the transfer in O's favour is fictitious, is a question relating to title to the property sought to be

attached, and so it clearly comes within the purview of Or. XXI, r. 58, and not under S. 47. The fact that the property to be attached happened to be a decree made no difference; *Pearey Lal v. Allahabad Bank*, 24 A. L. J. 334: 92 I. C. 14: A. I. R. 1926 All. 244. See also *Co-operative Town Bank v. Raman*, 5 R. 595: 6 Bur. L. J. 221: A. I. R. 1928 Rang. 25: 106 I. C. 853 (following 33 M. 62).

**Claim to "property" attached in execution of rent-decree.**—S. 170 of the B. T. Act (VIII of 1885) bars a claim under this rule to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases.—*Amrito Lal v. Nemai*, 28 C. 382 (F. B.): 5 C. W. N. 474 (4 C. W. N. 732 approved; 4 C. W. N. 734 overruled); *Dwarka Singh v. Nema Singh*, 10 P. L. T. 118: 117 I. C. 203: A. I. R. 1929 Pat. 195; even where a landlord's interest is sold after decree.—*Khetra Pal v. Kritarthamoyi Dossi*, 33 C. 566 (F. B.): 10 O. W. N. 547: 3 C. L. J. 470 (3 C. W. N. 604, overruled). But a decree for arrears of rent in respect of two holdings is not a decree for rent as contemplated in Ch. XIV of the B. T. Act. When the holdings are attached in execution of the decree, a claim under this rule is maintainable.—*Bipra Das v. Rajaram*, 13 C. W. N. 650 (11 C. W. N. 497 and 676, followed).

An attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of rent of his separate share is not such an attachment as is contemplated by S. 170 of the Bengal Tenancy Act (VIII of 1885), and therefore this rule is applicable to such a case.—*Beni Madhub v. Jaod Ali*, 17 C. 390 (F. B.) (14 C. 201 cited).

Where a claimant contended that the property attached was neither a tenure nor a holding but homestead land let out for building purposes to which B. T. Act does not apply, the Court had jurisdiction to investigate the claim; *Sarba Sundari v. Harendra*, 7 I. C. 490.

**Claim by Official Assignee after vesting order.**—Where, after attachment of property, the judgment-debtor was declared insolvent, and his property vested in the Official Assignee, who made an application for removal of the attachment, held that the Court had jurisdiction in the matter under this rule, and not under S. 47.—*Kashi Prasad v. Miller*, 7 A. 752. See also *Sardarmol v. Aranvayol*, 21 B. 205; and *Turner v. Pestonji*, 20 B. 403 (10 C. 150, and 8 M. 551, followed). See, however, *Miller v. Lukhimani Debi*, 28 C. 419: 5 C. W. N. 761 (14 W. R. 33 (F. B.) followed).

Where property has been attached under the C. P. Code, the right of an objector and the jurisdiction of the Court to entertain the objection, are not ousted by the mere circumstances that the judgment-debtor has been declared insolvent, and his property vested in a receiver.—*Poros Rom v. Korom*, 9 A. 232. See also *Donepudi v. Nune*, 119 I. C. 46: A. I. R. 1929 Mad. 323: 56 M. L. J. 489.

**Claim to property seized by a receiver.**—Where property of an insolvent is seized by a receiver in insolvency, a claim cannot be preferred under this rule. The remedy is under S. 22, Prov. Insolvency Act; *Mul Chand v. Murori*, 36 A. 8.

**Claim to property ordered to be sold under a mortgage-decree.**—Though the execution of a mortgage-decree is expressly incorporated in the Code, the Committee still thinks that claims and objections arising out of the

execution of such decrees should not be the subject of summary proceedings under this and the following rules, nor should be determined in the ordinary course. This does not imply that the procedure under the later rules as to resistance to possession does not apply."—*Report of the Special Committee.*

Proceedings by way of claim as provided by this rule are not applicable where the property is directed to be sold under a mortgage-decree for it does not require to be attached to execution; *Ata Muhammad v. Rahmat*, 116 I. C. 892; A. I. R. 1929 Lah. 760. See also *Himmatram v. Khushal*, 18 B. 98; *Deefholts v. Peters*, 14 C. 631 (*folld.* in *Harimohan v. Lachmi Chand*, 18 I. C. 215); *Joy Prokash v. Abhoy*, 1 C. W. N. 701; *Sanwal Das v. Bismillah*, 19 A. 480; *Laladhar v. Chaturbhuj*, 21 A. 277; *Hukam Singh v. Raghubir*, 27 A. 700; (1905) A. W. N. 157; *Ragho v. Musst. Lachan*, (1919) Pat. 79: 50 I. C. 448; *Ratan v. Bala*, 44 I. C. 986; *Mahabir Prasad v. Jogendra Nath*, 26 C. W. N. 50; 63 I. C. 271; *Wamandhar v. Kampta Prasad*, 97 I. C. 178; 22 N. L. R. 94; A. I. R. 1926 Nag. 423; *Darbar Sahib v. Central Bank*, 117 I. C. 815; A. I. R. 1929 Lah. 167; *Kundan Lall v. Allah Bakhsh*, 33 P. L. R. 863; A. I. R. 1932 Lah. 618. The remedies of the aggrieved person being either to file a suit for recovery or to resist delivery proceedings if he is really in possession (following 14 C. 631, 19 A. 480 and 27 A. 700).—*Krishnaswami v. Nagarathnammal*, 125 I. C. 559; A. I. R. 1930 Mad. 712.

**Dismissal of claim if bars a fresh claim.**—Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained.—*Mohadeb Mundul v. Modhoo*, 16 W. R. 59. A Judge has no jurisdiction to try the same objector's claim under this section a second time as against the same attachment, or to re-open a question finally decided on the former occasion.—*Khelat Chunder v. Bhuggobutty*, 14 W. R. 144.

Where no objection under this rule was struck off for default, the High Court refused to interfere in revision, holding that the remedy of the petitioner was under Or. IX, r. 4 read with S. 141 or a suit under r. 63.—*Shoo Prasad v. Kastura Kuar*, 10 A. 119. See also *Kishen Parshad v. Punjab National Bank Ltd.*, 105 I. C. 693; A. I. R. 1927 Lah. 872.

**Rejection of claim debars assertion of title under rr. 97, 99 and 101.**—Rejection of a claim under this rule debars the claimant from asserting his title against an auction-purchaser in a proceeding under S. 335, G. P. Code, 1882 (Or. XXI, rr. 97, 99 and 101).—*Nilo Pandurang v. Rama Patloji*, 9 B. 35. See also *In the matter of Banee Madhub Roy*, 13 W. R. 431.

**Decision in a claim case is binding upon the parties thereto.**—Where property which has been attached is ordered to be released, the order is made with reference to the particular claimant obtaining the order. This order is not to be regarded as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor.—*Imam Bandee Begum v. Mahomed Tukee*, 8 W. R. 27; and *Booliroom-nissa v. Kureemonnissa*, 21 W. R. 230. See also *Jagan Nath v. Ganesh*, 18 A. 413, where it has been held that an order under this rule does not secure for the benefit of other decree-holders, who are not parties to the proceedings. The order is not binding as against the judgment-debtor

he availed of by any one

. *Dronamraju*, 31 M. 163;

35 (F. B.); 18. A. 413,

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attached, and so it clearly comes within the purview of Or. XXI, r. 58, and not under S. 47. The fact that the property to be attached happened to be a decree made no difference; *Pearcy Lal v. Allahabad Bank*, 24 A. L. J. 334: 92 I. C. 14: A. I. R. 1926 All. 244. See also *Co-operative Town Bank v. Raman*, 5 R. 595: 6 Bur. L. J. 221: A. I. R. 1928 Rang. 25: 106 I. C. 853 (following 33 M. 62).

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**Claim to property ordered to be sold under a mortgage-decree.**—Though the execution of a mortgage-decree is governed by the C. P. Code, the Committee still thi-

execution of such decrees should not be the subject of summary procedure under this and the following rules, but should be determined in the ordinary course. This does not imply that the procedure under the later rules as to resistance to possession does not apply."—*Report of the Special Committee.*

Proceedings by way of claim as provided by this rule are not applicable where the property is directed to be sold under a mortgage-decree for it does not require to be attached in execution. *Ata Muhammad v. Rahmat*, 116 I. C. 882; A. I. R. 1929 Lah. 760. See also *Hamatram v. Khushal*, 18 B. 98; *Deefholls v. Peters*, 14 C. 631 (folld. in *Harimohan v. Lachmi Chand*, 18 I. C. 215); *Joy Prokash v. Abhay*, 1 C. W. N. 701; *Sanwal Das v. Bismillah*, 19 A. 480; *Laladhar v. Chaturbhuj*, 21 A. 277; *Hukam Singh v. Raghubir*, 27 A. 700; (1905) A. W. N. 157; *Ragha v. Musst. Lachan*, (1919) Pat. 79; 50 I. C. 448; *Ratan v. Bala*, 44 I. C. 986; *Mahabir Prasad v. Jogendra Nath*, 26 C. W. N. 50; 63 I. C. 271; *Wamandhar v. Kampta Prasad*, 97 I. C. 178; 22 N. L. R. 94; A. I. R. 1926 Nag. 423; *Darbar Sahib v. Central Bank*, 117 I. C. 815; A. I. R. 1929 Lah. 167; *Kundan Lall v. Allah Bakhsh*, 33 P. L. R. 868; A. I. R. 1932 Lah. 618. The remedies of the aggrieved person being either to file a suit for recovery or to resist delivery proceedings if he is really in possession (following 14 C. 631, 19 A. 480 and 27 A. 700).—*Krishnaswami v. Nagarathnammal*, 125 I. C. 559; A. I. R. 1930 Mad. 712.

Dismissal of claim if bars a fresh claim.—Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained.—*Mohadeb Mundul v. Modhoo*, 16 W. R. 59. A Judge has no jurisdiction to try the same objector's claim under this section a second time as against the same attachment, or to re-open a question finally decided on the former occasion.—*Khelat Ohunder v. Bhuggobutty*, 14 W. R. 144.

Where an objection under this rule was struck off for default, the High Court refused to interfere in revision, holding that the remedy of the petitioner was under Or. IX, r. 4 read with S. 141 or a suit under r. 63.—*Shoo Prasad v. Kastura Kuar*, 10 A. 119. See also *Kishen Parshad v. Punjab National Bank Ltd.*, 105 I. C. 693; A. I. R. 1927 Lah. 872.

Rejection of claim debars assertion of title under rr. 97, 99 and 101.—Rejection of a claim under this rule debars the claimant from asserting his title against an auction-purchaser in a proceeding under S. 335, C. P. Code, 1882 (Or. XXI, rr. 97, 99 and 101).—*Nilo Pandurang v. Rama Patloji*, 9 B. 35. See also *In the matter of Bance Madhub Roy*, 13 W. R. 431.

Decision in a claim case is binding upon the parties thereto.—When property which has been attached is ordered to be released, the order is made with reference to the particular claimant obtaining the order. This order is not to be regarded as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor.—*Imam Bandee Begum v. Mahomed Tukee*, 8 W. R. 27; and *Booliroomnissa v. Kureemonnissa*, 21 W. R. 230. See also *Jagan Nath v. Ganesh*, 18 A. 413, where it has been held that an order under this rule does not enure for the benefit of other decree-holders, who are not parties to the proceedings. The order is not binding as against the judgment-debtor unless he is a party to the proceedings, and cannot be availed of by any one who is not a party to the proceedings.—*Vadapalli v. Dronamraju*, 31 M. 163; 18 M. L. J. 26 (13 M. 366; 25 M. 721; 30 M. 335 (F. B.)); 18. A. 413, followed).



In the objection proceedings and the proceedings that arise therefrom (such as proceedings under S. 144) the objector under r. 58 is to be deemed to be a party to the suit, the decree-holder and the judgment-debtor being other parties.—*Sohnun v. Mast Ram*, 118 I. C. 389 : A. I. R. 1929 Lah. 657.

See notes under r. 63, *post*.

**Appeal.**—No appeal lies from an order in a claim case. An appeal may lie under S. 15 of the Letters Patent.—*Sabhapathi v. Narayanasami*, 25 M. 555 ; *Venugopal v. Venkatasubbiah*, 39 M. 1196. But see *contra*, *Jamal v. Chip Moh & Co.*, 5 R. 381 : 104 I. C. 330 : A. I. R. 1927 Rang. 287.

**59.** The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. [S. 279.]

Evidence to be adduced by claimant.

### COMMENTARY.

**Scope**—This rule does not mean that if the claimant establishes that he has some interest in the property, he is entitled to succeed irrespective of the question of possession, nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession of the judgment-debtor. In each of the cases mentioned in rr. 60 and 61, the Court must determine the question of possession of the judgment-debtor. The Court cannot base its decision on the question of the validity of the claim or the determination of the title to the property attached ; *Satkari v. Tirtha Narain*, 24 I. C. 62.

**"Some interest."**—To reconcile this rule with rr. 60 and 61, the words "some interest" must be taken to imply such interest as would make the possession of the judgment-debtor, possession not on his own account but on account of, or in trust for the claimant.—*Mohunt Bhagwan v. Khetter Moni*, 1 C. W. N. 617, *Nga Tok v. Subramonian*, 10 I. C. 994. See also *Sabhapathi v. Narayanasami*, 25 M. 555 ; *Satkari v. Thritnarayan*, 24 I. C. 62. A beneficial interest is as much an interest within the meaning of this rule as a legal interest in the property attached.—*Sabhapathi v. Narayanasami*, noted above. An objector may raise an objection to the attachment of property, not only on the ground that he is in possession of it, but also on the ground that he has an interest in the property attached and having regard to the provisions of rr. 58, 59, 60 and 61. When an executing Court disallows the claim of an objector, the Court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of the claimant's interest. *A. L. J.* 474 : 14 I. C. 790.

**"Was possessed of."**—The word "possessed" is not used in a restricted sense as relating to a mere tangible or physical possession. It includes constructive possession, or possession in law, of debts and other intangible property.—*Chidambara v. Ramasamy*, 27 M. 67 (F. B.) (24 M. 20 *dissented from*). See notes to r. 60.

**Extent of investigation.**—Rules 58 to 62 are directed to give a means by which execution proceedings may be made effective and not too

closely entangled with disputes between third parties and the debtor. Provision is made for investigation of claims in a limited fashion. The scope of the enquiry being confined, the investigation will not always be at all elaborate, and the Privy Council, in *Sardhari v. Ambika*, 15 I. A. 123 : 15 C. 521 (P. C.) have pointed out that sometimes that investigation may well be very slight indeed. Rules 60 and 61 provide then for a summary investigation into possession as distinct from a thorough trial of ultimate right. It is impossible to separate altogether the question of possession and of title. Thus if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another, and this has to be enquired into . . . To that extent the title may be part of the enquiry in a claim case, but no ultimate questions of trust are intended to be threshed out"; (per Rankin, J.) *Najimunnessa v. Nacharuddin*, 51 C. 548 : 39 C. L. J. 418 : A. I. R. 1924 Cal. 744 : 83 I. C. 233; *Sardhari v. Ambika*, noted above; *Mohant Bhagwan v. Khetter Moni*, 1 C. W. N. 617; *Hamid Bakhut v. Buktear Chand*, 14 C. 617; *Sheoraj Nandan v. Gopal Suran*, 18 C. 290; *Ganesh Lal v. Mahabir*, 119 I. C. 909 A. I. R. 1929 Pat. 273.

In investigating the claim preferred by the claimant under Or. XXI, r. 58, the only questions which the Court is competent to consider are whether the property when it was attached was in the possession of the judgment-debtor as his own property; if such property was in the possession of some other person, whether it was in his possession in trust for the judgment-debtor or in the claimant's occupation as the tenant of the judgment-debtor. An investigation of questions of title to the properties is entirely beyond the scope of the investigation directed by the Code when a claim to attached properties is preferred.—*Ramaswami v. Karuppa*, 27 L. W. 536 : 103 I. C. 67 : A. I. R. 1923 Mad. 163 : 54 M. L. J. 321; *Ram Saran v. Chhote Lal*, 110 I. C. 365 : A. I. R. 1923 All. 659; *Sheikh Mahomed v. Pandurang*, 115 I. C. 167 : A. I. R. 1929 Nag. 66. So is an investigation of question as to the intention of the judgment-debtor in transferring the property to the objector.—*Imam Din v. Mathra*, 132 I. C. 666 : A. I. R. 1931 Lah. 666.

It is not within the scope of the enquiry in applications for removal of attachment to decide whether the attaching creditor had the right to execute the decree and an order cannot be refused merely because the application in execution was time-barred.—*Somasundaram v. Ma Shwe*, 7 R. 132 : 117 I. C. 578 : A. I. R. 1929 Rang. 152.

**Benami.**—Where the claimant alleges that the property attached is in his own possession on his account, and the decree-holder says that he is a *benamdar* of the judgment-debtor it should be released as the question of *benami* is a question of title; *Monmohiney v. Radha Kristo*, 29 C. 543; *Sheoraj v. Gopal*, 18 C. 290; *Hamid v. Buktear*, 14 C. 617; *Ganesh Lal v. Mahabir*, 119 I. C. 909 : A. I. R. 1929 Pat. 273.

**Onus of proof.**—The *onus* is on the claimant to prove that the property attached was his or in his possession, and therefore not in the possession of the judgment-debtor. His evidence must be confined to proving his own title in a third person.—*Nga Tha* 1 W. R. 8 (P. B) (8 W. R. 353 over- 10 L. L. J. 42 : 107 I. C. 783 See *Abdul Rahman v. Mahomed Azim*, 4 C. W. N. 151, noted under S. 53.

**60.** Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. [S. 280.]

### COMMENTARY.

"Possession of the judgment-debtor or of some person in trust for him," etc.—The question to be determined under this rule is the question of possession; the words "possession of the judgment-debtor or some person in trust for him," refer to cases in which the possession of a claimant as a trustee is of such a character, as to be really in the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances.—*Hamid Bakht v. Buktear Chand*, 14 C. 617 (followed in *Sheoraj Nandan v. Gopal Suran*, 18 C 290, and *Monmohiney v. Radha Kristo*, 29 C. 543). See also *Mohunt Bhagwan v. Kheller Moni*, 1 C. W. N. 617; *Bhaiji v. Administrator-General of Bombay*, 23 B. 423.

Partly on his own account and partly on account of some other person.—Held that the latter portion of this rule applies only where the property is in possession of the judgment-debtor, "partly on his own account and partly on account of some other person," and not where the property was at the time of the attachment, and had been for some months previously, in the sole possession of a trustee, and neither wholly nor partly in the possession of the judgment-debtor.—*Burjorji Dorabji v. Dhunbai*, 16 B. 1. For the meaning of the expressions "on account of" or "in trust for," as used in this rule, see *Velji Hirji & Co. v. Bharmal*, 21 B. 287.

Where on objection under Or. XXI, r. 53 the Court finds that the claimant has a half share in the moveable property attached it would be the better course for the Court to release the entire property and to proceed by way of attachment under Or. XXI, r. 47.—*Rajendra v. Chairman, Jessore District Board*, 59 C. 803: 54 C. L. J. 488: 137 I. C. 672: A. I. R. 1932. Cal. 408.

Effect of order of release.—The order for release under this rule is not final but provisional, as r. 63 declares it to be subject to the result of any suit which the attaching creditor may bring to establish the right which he claims to the property in dispute. The order of release made under this rule has not therefore the effect of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property in any way he likes. The result is that any private alienation of the property by

the claimant, though made after the order of release passed under this rule, will be void under S. 64, if in a title suit subsequently brought by the aggrieved party under r. 63, the right to attach the property is established: *Bonmali v. Prosunno*, 23 C. 823; *Ram Chandra v. Mudeshwar*, 33 C. 1158; *Protap v. Sarai*, 25 C W N 511; 62 I C 319, *Ahmad Khan v. Darsi Dhar*, 31 A. 367; *Anthaya v. Manjappa*, 45 M. 81. 63 I. C 642; A. I. R. 1922 Mad. 176; *In the matter of Nasse*, 7 R. 201 118 I. C. 616; A. I. R. 1929 Rang. 229.

A release from attachment can only be made under this rule, which indicates the conditions on which alone that release can be directed. A Court before directing release must hold those conditions established.—*Chiman Lal v. Macleod*, 8 Bom. L. R. 794.

This rule contemplates not only the entire release of the property from attachment, but also the retention of the attachment to such extent as the Court thinks fit.—*Yashwant Shetty v. Pithora Sheti*, 12 B. 231.

Where property has been released from attachment under this rule, and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal by virtue of the provisions of Or. XXI, r. 63.—*Fathula v. Munyappa*, 6 M. 98.

As to whether a judgment-debtor is a party to the proceedings under this section or not, see notes under rule 63.

**Appeal and revision.**—An order under r. 60 is not conclusive, if it is based on a misapprehension of fact and law. Such an order can be held to be without jurisdiction and can be set aside in revision.—*Bhado v. Khodabur*, 123 I. C. 407; A. I. R. 1929 Pat. 746. Where the lower Court did not decide the question of possession (the only question it was competent to decide) and decided the question of title (the question it was not competent to decide) the High Court interfered in revision.—*Satkari v. Tirtha*, 24 I C. 62. See also *Sabhapathi v. Narayanasami*, 25 M. 555; *Phemon Singh v. A. J. Wells*, 2 Bur. L. J. 134; *Imam Din v. Mathra*, 132 I. C. 666; A. I. R. 1931 Lah. 666.

No appeal lies from an order under r. 60. The High Court also refused to interfere in revision.—*Dayaram v. Gobardhandas*, 28 B. 468; *Jagannath v. Jamuna*, 30 A. L. J. 125; A. I. R. 1932 All. 263; 139 I. C. 785.

**61.** Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim. [S. 281.]

Disallowance of claim to property attached.

### COMMENTARY.

**Disallowance of claim.**—If the Court erroneously does not enter into the question of possession but disallows the claim on some other grounds,

**60.** Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. [S. 280.]

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Effect of order of release.—The order for release under this rule is not final but provisional, as r. 63 declares it to be subject to the result of any suit which the attaching creditor may bring to establish the right which he claims to the property in dispute. The order of release made under this rule has not therefore the effect of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property in any way he likes. The result is that any private alienation of the property by-

the claimant, though made after the order of release passed under this rule, will be void under S. 61, if in a title suit subsequently brought by the aggrieved party under r. 63, the right to attach the property is established; *Bonomali v. Prosunno*, 23 C. 829; *Ram Chandra v. Mudeshwar*, 33 C. 1168; *Protap v. Saral*, 25 C. W. N. 544; 62 I. C. 348; *Ahmad Khan v. Banshi Dhar*, 31 A. 367; *Anthaya v. Manjaya*, 45 M. 84; 69 I. O. 642; A. I. R. 1932 Mad. 176; *In the matter of Nasse*, 7 R. 201; 118 I. C. 616; A. I. R. 1929 Rang. 229.

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**Appeal and revision.**—An order under r. 60 is not conclusive, if it is based on a misapprehension of fact and law. Such an order can be held to be without jurisdiction and can be set aside in revision.—*Bhado v. Khodabux*, 123 I. C. 407; A. I. R. 1929 Pat. 746. Where the lower Court did not decide the question of possession (the only question it was competent to decide) and decided the question of title (the question it was not competent to decide) the High Court interfered in revision.—*Satkari v. Tirtha*, 24 I. C. 62. See also *Sabhapathi v. Narayanasami*, 25 M. 555; *Phomon Singh v. A. J. Wellis*, 2 Bur. L. J. 134; *Imam Din v. Mathra*, 132 I. C. 666; A. I. R. 1931 Lah. 666.

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Disallowance of claim to property attached.

## COMMENTARY.

**Disallowance of claim.**—If the Court erroneously does not enter into the question of possession but disallows the claim on some other grounds,

the order disallowing the claim cannot for this reason only be said to have been made without jurisdiction and therefore a nullity. Such an order is conclusive and binding on the claimant till a suit under r. 63 is brought by the claimant; *Bhagwan Das v. Raj Nath*, 34 A. 365: 14 I. C. 790.

A certain property having been attached in execution, the plaintiff intervened claiming the property, and was directed to adduce evidence, which however, he failed to do, and the case was struck off. *Held* that the order striking off the case must be taken as an order disallowing the claim.—*Rash Behari v. Buddun Chunder*, 12 C. L. R. 550.

When a claim is preferred, the Court should define the respective shares of the judgment-debtor and intervenor and sell the judgment-debtor's share only. If without doing so, the Court simply orders the sale of the property subject to the claim of the claimant, the order would not be a valid one, and one year's limitation would not be applicable; *Udit Narain v. Murtaza*, 2 A. L. J. 178: 27 A. 464 (4 W. R. 35 *fold.*).

The claim of a person in possession under a collusive sale should be rejected on the ground that the property was in possession in trust for the judgment-debtor; *McIntosh v. Bidhu Bhusan*, 16 C. W. N. 959.

Where the alleged purchaser was in possession of the property but there was no registered deed of sale, *held*, that the title continued in the judgment-debtor and that the property was liable to be sold.—*Hriday v. Benode*, 127 I. C. 670: 34 C. W. N. 254: A. I. R. 1930 Cal. 390.

**Effect of order under this rule.**—The effect of an order disallowing a claim to attached property is to give the auction-purchaser a title as against the claimant, unless the order is set aside by a suit.—*Khub Lal v. Ram Lochan*, 17 C. 260 (15 C. 521 (P. C.) *referred to*). An order in favour of one of several decree-holders made under this rule does not onuro for the benefit of the other decree-holders who are not parties to the proceedings; *Jagan Nath v. Ganesh*, 18 A. 413.

**Appeal and revision.**—In execution of a decree against a firm, certain property, was attached, to which a partner objected that it was his private property. The Court disallowed the objection. *Held* that the order was not under S. 47 and was not appealable.—*Abdul Rahman v. Muhammad Yar*, 4 A. 190.

Where a Court disallowed an application for the release of certain property attached before judgment—*held* that there being a remedy by suit under Or. XXI, r. 63 the High Court should not interfere in revision.—*J. J. Guise v. Jaisraj*, 15 A. 405 (8 M. 484 (F. B.)), 10 A. 119, and 11 A. 383 *referred to*; *Subbu Reddiar v. Kumaraswamy*, 21 I. C. 461: 1913 M. W. N. 856; *Sheo Prasad v. Kastura*, 10 A. 119; *Mangu Ram v. Homeshwar*, 125 I. C. 575: A. I. R. 1930 Pat. 394. *See, however, Sathari v. Tirtha Narain*, 24 I. C. 62. Where the Court refused to adjudicate the claim and it appeared that it failed to consider the law applicable and prejudice was thereby caused: *held*, that the High Court could interfere in revision.—*Somasundaram v. Ma Shwe Thit*, 7 R. 132: 117 I. C. 578: A. I. R. 1929 Rang. 152.

**62.** Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge. [S. 282.]

Continuance of attachment subject to claim of incumbrancer.

## COMMENTARY.

"Subject to a mortgage"—This rule lays down that where during the investigation of claims or objections, the Court is satisfied that the property is subject to a mortgage it may direct it to be sold subject to that mortgage, i.e., the right of redemption is offered for sale. Rule 66 says that when a property is ordered to be sold, the sale-proclamation should specify any incumbrance to which the property is liable. So that in the latter case the purchaser buys it simply with notice of mortgage or charge but there is no finding that the mortgage really exists. It may turn out that there is no subsisting mortgage or that the mortgage is invalid. The auction-purchaser is not debarred from contesting the validity or otherwise of the mortgage. If such mortgage is declared invalid, he is entitled to the benefit and the judgment-debtor cannot claim from him the amount due on the mortgage (*Izzatunnisa v. Partab*, 13 O. W. N. 1143 (P. G.): 31 A. 593: 36 I. A. 203: 3 I. C. 793: 19 M. L. J. 682: 11 Bom. L. R. 1220). Under this rule, the Court decides that a mortgage subsists and the property is sold subject to it, and a purchaser cannot question the validity of the incumbrance.—*Gur Charan v. Bachm*, 30 I. C. 238; *Maroti v. Musst. Sona Bai*, 26 N. L. R. 136 (F. B.): 123 I. C. 474: A. I. R. 1930 Nag. 116.

The Court, may, in a claim preferred under r. 58 on the ground that the property is subject to a mortgage, decide that there is no such mortgage and in such a case the order has the effect of cutting down the mortgagee's time for suing to establish the mortgage to one year, the limitation provided for bringing a suit under r. 63, *post*. See *Debi Das v. Maharaj Rupchand*, 49 A. 903: 102 I. C. 792: A. I. R. 1927 All. 593; *Velu v. Arumugam*, 38 M. L. J. 397: 56 I. C. 481; *Lakshumanan v. Parasivan*, 37 M. L. J. 159: 52 I. C. 720; *Nawal Kishore v. Khyali Ram*, 11 L. 369: A. I. R. 1929 Lab. 865: 12 I. C. 679. It is under r. 63, the only effect will be that the mortgage would wipe out the original mortgage.—*Sankuratri Dorayya v. Govindarajulu Narasimham*, 110 I. C. 567: A. I. R. 1928 Mad. 525.

The distinction between r. 62 and r. 66 is that in the former case the Court, being satisfied of the existence of the mortgage, sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter case the Court decides nothing as to the existence of the mortgage and the purchaser buys subject to such risks as the notice might involve. Thus, in execution of a money-decree the rights of a mortgagor in certain property, ostensibly subject to mortgage, were sold. The property was not sold subject to the mortgage as contemplated by this rule. But the existence of the mortgage was notified in the sale-proclamation without enquiry, *held*, on a suit brought by the mortgagee for sale, that the auction-purchaser was not debarred from proving



the order disallowing the claim cannot for this reason only be said to have been made without jurisdiction and therefore a nullity. Such an order is conclusive and binding on the claimant till a suit under r. 63 is brought by the claimant; *Bhagwan Das v. Raj Nath*, 34 A. 365; 14 I. C. 790.

A certain property having been attached in execution, the plaintiff intervened claiming the property, and was directed to adduce evidence, which however, he failed to do, and the case was struck off. *Held* that the order striking off the case must be taken as an order disallowing the claim.—*Rash Behari v. Buddun Ghunder*, 12 C. L. R. 550.

When a claim is preferred, the Court should define the respective shares of the judgment-debtor and intervenor and sell the judgment-debtor's share only. If without doing so, the Court simply orders the sale of the property subject to the claim of the claimant, the order would not be a valid one, and one year's limitation would not be applicable; *Udit Narain v. Murtaza*, 2 A. L. J. 178; 27 A. 464 (4 W. R. 35 *folld.*).

The claim of a person in possession under a collusive sale should be rejected on the ground that the property was in possession in trust for the judgment-debtor; *McIntosh v. Bidhu Bhusan*, 16 C. W. N. 959.

Where the alleged purchaser was in possession of the property but there was no registered deed of sale, *held*, that the title continued in the judgment-debtor and that the property was liable to be sold.—*Hriday v. Benode*, 127 I. C. 670; 34 C. W. N. 254; A. I. R. 1930 Cal. 390.

**Effect of order under this rule.**—The effect of an order disallowing a claim to attached property is to give the auction-purchaser a title as against the claimant, unless the order is set aside by a suit.—*Khub Lal v. Ram Lochun*, 17 C. 260 (15 C. 521 (P. C.) *referred to*). An order in favour of one of several decree-holders made under this rule does not onuro for the benefit of the other decree-holders who are not parties to the proceedings; *Jagan Nath v. Ganesh*, 18 A. 413.

**Appeal and revision**—In execution of a decree against a firm, certain property, was attached, to which a partner objected that it was his private property. The Court disallowed the objection. *Held* that the order was not under S. 47 and was not appealable.—*Abdul Rahman v. Muhammad Yar*, 4 A. 190.

Where a Court disallowed an application for the release of certain property attached before judgment—*held* that there being a remedy by suit under Or. XXI, r. 63 the High Court should not interfere in revision.—*J. J. Guise v. Jaisraj*, 15 A. 405 (8 M. 484 (F. B.), 10 A. 119, and 11 A. 383 *referred to*); *Subbu Reddiar v. Kumaraswamy*, 21 I. C. 461; 1913 M. W. N. 856; *Sheo Prasad v. Kastura*, 10 A. 119; *Mangu Ram v. Homeshwar*, 125 I. C. 575; A. I. R. 1930 Pat. 394. *See, however, Satkari v. Tirtha Narain*, 34 I. C. 62. *red that it used; held, Ma Shwe*

**62.** Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge. [S. 282.]

Continuance of attachment subject to claim of incumbrancer.

### COMMENTARY.

"Subject to a mortgage"—This rule lays down that where during the investigation of claims or objections, the Court is satisfied that the property is subject to a mortgage it may direct it to be sold subject to that mortgage, i.e., the right of redemption is offered for sale. Rule 66 says that when a property is ordered to be sold, the sale-proclamation should specify any incumbrance to which the property is liable. So that in the latter case the purchaser buys it simply with notice of mortgage or charge but there is no finding that the mortgage really exists. It may turn out that there is no subsisting mortgage or that the mortgage is invalid. The auction-purchaser is not debarred from contesting the validity or otherwise of the mortgage. If such mortgage is declared invalid, he is entitled to the benefit and the judgment-debtor cannot claim from him the amount due on the mortgage (*Izzatunnisa v. Partab*, 13 O. W. N. 1143 (P. O.) 31 A. 583: 36 I. A. 203: 3 I. C. 793: 19 M. L. J. 682: 11 Bom. L. R. 1230). Under this rule, the Court decides that a mortgage subsists and the property is sold subject to it, and a purchaser cannot question the validity of the incumbrance.—*Gur Charan v. Bachni*, 30 I. C. 238; *Maroti v. Musst. Sona Bai*, 26 N. L. R. 136 (F. B.): 123 I. C. 474: A. I. R. 1930 Nag. 116.

The Court, may, in a claim preferred under r. 58 on the ground that the property is subject to a mortgage, decide that there is no such mortgage and in such a case the order

...ing to establish the ...  
a suit under r. 63, p ...  
102 I. C. 792: A. I. R. 1927 All. 593; *Velu v. Arumugam*, 38 M. L. J. 397: 56 I. C. 481; *Lakshumanan v. Parasivan*, 37 M. L. J. 159: 52 I. C. 720; *Nawal Kishore v. Khyali Ram*, 11 L. 369: A. I. R. 1929 Lah. 865: 12 I. C. 679. If the mortgagee does not bring that suit under r. 63, the only effect will be that the attaching creditor gets priority; there is no authority for the view that the mere dismissal of the claim would wipe out the original mortgage.—*Sankuratri Dorayya v. Govindarajulu Narasimham*, 110 I. C. 567: A. I. R. 1928 Mad. 525.

The distinction between r. 62 and r. 66 is that in the former case the Court, being satisfied of the existence of the mortgage, sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter case the Court decides nothing as to the existence of the mortgage and the purchaser buys subject to such risks as the notice might involve. Thus, in execution of a money-decree the rights of a mortgagor in certain property, ostensibly subject to mortgage, were sold. The property was not sold subject to the mortgage as contemplated by this rule. But the existence of the mortgage was notified in the sale-proclamation without enquiry, held, on a suit brought by the mortgagee for sale, that the auction-purchaser was not debarred from proving

that the mortgage was fictitious and without consideration.—*Shib Kunwar v. Sheo Prasad*, 28 A. 418: 3 A. L. J. 200: 1906 A. W. N. 68 (27 A. 97, referred to); *Jairaj v. Radha Kishan*, 35 A. 257: 20 I. C. 182; *Shah Ziauddin v. Kailash Chandra*, 2 C. L. J. 599; *Bhagwan v. Ahmad Jan*, 36 I. C. 732; *Kalidas v. Prasanna*, 47 C. 446: 55 I. C. 189: 24 C. W. N. 269; *Agha Sultan v. Mohabbat Khan*, 43 A. 489: 63 I. C. 395; *Roshan Lal v. Lallu*, 44 A. 714: A. I. R. 1922 All. 443: 68 I. C. 790; *Mt. Mankaur v. Ishar Das*, 11 L. 90: 31 P. L. R. 358: 120 I. C. 162: A. I. R. 1930 Lab. 40; *Wazir Husain v. Bini*, 7 O. W. N. 676: 126 I. C. 389: A. I. R. 1930 Oudh 362; *Shivlal v. Tani Ram*, A. I. R. 1928 Bom. 444: 30 Bom. L. R. 1136; *Chunilal v. Pira Miyaji*, 29 Bom. L. R. 235: 101 I. C. 335: A. I. R. 1927 Bom. 234.

G obtained a money-decree against H and attached some property. U preferred a claim alleging himself to be the owner of the property. The Court held that H was the owner but U had a lien. The property was sold subject to the lien and purchased by N. U then sued N for the amount of the lien. Held, that N was not bound by the miscellaneous order for he was neither a party nor a representative. The Court's order was not under this rule but under r. 66; *Narayan v. Umbar*, 35 B. 275: 10 I. C. 913.

In an enquiry under this rule it is not open to the Court to give a direction that the properties be sold with notice of a subsisting mortgage. If the existence of a valid mortgage is established all that the Court can do is to pass an order continuing the attachment subject to the mortgage.—*Hridoy v. Benode*, 127 I. C. 670: 34 C. W. N. 254: A. I. R. 1930 Cal. 390.

Where a claim that attached properties should be sold as subject to a mortgage or lease has been decided by an executing Court, the provisions of Or. XXI, r. 63 apply to the decision (A. I. R. 1926 Nag. 423 overruled).—*Maroti v. Mt. Sona Bai*, 26 N. L. R. 136 (F. B.): 123 I. C. 474: A. I. R. 1930 Nag. 116. So even after the sale, the decree-holder purchaser is entitled to question the validity and bona fides of the mortgage within a year of the order in the claim case.—*Kesho Ram v. Chunni Singh*, 52 A. 1032: 131 I. C. 674: 29 A. L. J. 1: A. I. R. 1931 All. 139. See also *Maung Aung v. Maung Tha*, 9 R. 367: 134 I. C. 746: A. I. R. 1931 Rang. 310.

Rule 62 does not apply to an application by a puisne mortgagee, who has purchased the property mortgaged in execution of his decree to have his prior incumbrance notified in the execution proceedings of a subsequent mortgage but the application is maintainable under Or. XXI, r. 66.—*Mathura v. Ghanshiyam*, 132 I. C. 767: 14 O. L. J. 233: 8 O. W. N. 179: A. I. R. 1931 Oudh 157.

See notes to r. 66 under the heading "Any incumbrance to which the property is liable."

**63.** Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall

Saving of suits to establish right to attached property.

be conclusive.

[S. 283].

## COMMENTARY.

**Object and scope.**—The object of a suit is not to have the order in the claim proceedings set aside, but to have the right of the claimant in the property in dispute established.—*Dibi Aliman v. Dhakeshwer*, 1 C. L. J. 296 (13 B. 72, 18 B. 211, and 13 C. 228, *dissented from*). In these latter cases it seems to have been held that the suit to be brought is one to set aside the order made in the claim case. In *Veera Pannadi v. Karuppa*, 2 I. C. 980: 6 M. L. T. 154, it has been held that a suit under this rule is one to set aside the order passed upon the claim, and is a form of appeal therefrom. A suit under this rule is a suit to alter or set aside a summary decision or order of the Court and is a method of obtaining a review; *Jamahar Kumari v. Askaran*, 22 C. L. J. 27 (35 C. 203: 7 C. L. J. 36, *folld.*).

This rule is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation. Under the new Code such orders become final if not set aside within one year; *Narasimha v. Vijayapala*, 27 I. C. 944: 2 L. W. 206.

The effect of the judgment in the suit brought in accordance with this rule is to supersede the order under r. 68 and to render it inconclusive.—*Kissorymohun v. Hursook Dass*, 17 I. A. 17: 17 C. 436 (P. C.).

A suit under this rule is a continuation of claim proceedings. It is merely a form of appeal in the guise of an original suit. Certain property was released after a claim was put in. The claimant sold it to another person within one year from date of release. The decree-holder sued under this rule to set aside the order in the claim case. *Held* the purchaser was an alienee *pendente lite*; *Krishnappa v. Abdul Khader*, 38 M. 535: 25 I. C. 11: 26 M. L. J. 449 (31 M. 262 *referred to*). No separate notice is required to be given in the suit under S. 49 (1) of the Court of Wards Act (*following* 35 C. 202 (P. C.)).—*Raja of Ramnad v. Subramaniam*, A. I. R. 1928 Mad. 1201: 52 M. 465: 116 I. C. 827. When the suit is decided in favour of the decree-holder, the attachment is revived although the property was released from attachment (23 C. 829, 33 C. 1158, A. I. R. 1921 Cal. 101, A. I. R. 1922 Mad. 176, *folld.*).—*Haran Chandra v. Joy Chand*, A. I. R. 1929 Cal. 524.

But an attachment under Or. XXI, r. 43 which has been removed is not restored by the mere force of the decree passed in a suit under Or. XXI, r. 63.—*Lakshmichand v. M. E. V. de. Chettyar*, 8 R. 491: 126 I. C. 223: A. I. R. 1930 Rang. 247. The effect of a suit under this rule is to keep the execution proceedings which have given rise to it pending till the decision of the suit.—*Hasan Shah v. Mahomed Amir*, 7 O. W. N. 887: 128 I. C. 728: A. I. R. 1930 Oudh 468.

In a suit under this rule the Court is not restricted to determine only the question as to whether property ought to be attached or not. The judgment-debtor can plead that the decree was collusively obtained and the suit from the beginning to the end was a fraud; *Bama Charan v. Begala*, 23 I. C. 755 (17 M. 389 *followed*).

It is open to a judgment-debtor to bring a suit under this rule without including a prayer for possession. In a declaratory suit therefore it is not necessary to consider whether the judgment-debtor is in possession or not; *Saleka v. Malladi*, 16 M. L. T. 300.

In a suit or proceeding cognizable by the Revenue Court, where the Assistant Collector has decided an objection in a particular way and his order has been affirmed or reversed by the Collector under S. 247 of the Agra Tenancy Act, the appellate order of the Collector is not final and the party aggrieved thereby has a right of suit under this rule.—*Bikram v. Dip Singh*, 54 A. 767: 141 I. C. 606: 30 A. L. J. 514: A. I. R. 1932 All. 502.

Person objecting under rule 58 can plead invalidity of attachment when suing under rule 63.—A person who puts in a claim petition under r. 58 and, when asking for a declaration under r. 63 that his property is not liable to attachment, also show that either what was done was no attachment or that there was no invalid attachment which could not affect his rights in any way; *Venkatappayya v. Venkatachalapathi Rao*, A. I. R. 1927 Mad. 450: 99 I. C. 939.

Procedure under this rule is permissive.—The procedure prescribed by this Rule is only permissive and it does not in any way affect the right of a claimant to pay up the decretal amount in order to save the property from sale and then to sue to recover the amount from the party who wrongfully attached the property; *Kanhaya Lal v. The National Bank of India Ltd.*, 40 I. A. 56: 40 C. 598 (P. C.): 17 C. L. J. 478: 11 A. L. J. 413: 15 Bom. L. R. 472: 25 M. L. J. 104: 18 I. C. 949.

"Party against whom an order is made."—If the order is made against the decree-holder under r. 60, he may bring a suit under this rule to get a declaration of his rights to attach and sell the property; *Mitchell v. Mathura*, 12 I. A. 150: 8 A. 6 (P. C.); *Dattu Mal v. Hari Das*, 23 A. 263; *Tofail v. Banee Madhub*, 24 W. R. 394. The claimant whose claim has been disallowed under r. 61, may sue the decree-holder under this rule to establish his right to the property attached; *Narayanrao v. Balkrishna*, 4 B. 529 (F. B.). A judgment-debtor who is not in fact a party to the claim proceedings does not become such only because he happens to be the judgment-debtor. Unless, therefore, he is a party in fact, the order of release made in favour of the claimant is not binding on him, and he may institute a suit even after the lapse of one year from the date of the order, provided he does so within the ordinary period of limitation applicable to the suit, to establish his title to and recover possession of the property from the claimant; *Krishnasami v. Somasundaram*, 30 M. 335 (F. B.); *Vadapalli v. Dronamraju*, 31 M. 163; *Shivappa v. Dod*, 11 B. 114; *Kedar v. Rakhal*, 15 C. 674. The fact that a person became a representative of the judgment-debtor who was no party to the claim proceedings does not override the estoppel or relieve against the disability imposed by this rule; *Ramu Aiyar v. Palaniappa*, 35 M. 35.

Where a claim or objection is preferred by a mortgagee under r. 58, and the Court disallows the objection owing to the default of the mortgagee to produce the mortgage deed in time, the unsuccessful objector comes within the words "the party against whom the order is made"; *Debi Das v. Maharaj Rup Chand*, 49 A. 903: 25 A. L. J. 609: 102 I. C. 792: A. I. R. 1927 All. 593.

Every order which is not in favour of a party should not be construed as against him within the meaning of this rule. Where the garnishee denied the debt and his objection to the attachment was disposed of by an order in terms "the main application need not be proceeded with;" held, that there was no adverse order against him within the meaning of r. 63 and that there was no obligation on his part to bring a suit within one year to nullify that order and so he was not debarred from raising the same defence in a suit brought by the decree-holder against him to realise the debt.—*Maruti v. Ramchandra*, 133 I. C. 248; 33 Bom. L. R. 396; A. I. R. 1931 Bom. 283.

The defendant against whom the suit had been dismissed filed objections to an attachment. Order passed on such objections is one under S. 47 and not under Or. XXI., r. 53. Appeal, not revision, is the remedy.—*Madho v. Hazari*, 8 P. 717; 115 I. C. 695; A. I. R. 1929 Pat. 141; 10 P. L. T. 95.

Where the execution petition is ordered to be closed for the decree-holder's default and on the same day the claimant's application for removal of attachment is also ordered to be closed, the order cannot be said to be an order under r. 60 or an order against the decree-holder within the meaning of r. 63.—*Maung Tun v. U Tha*, 118 I. C. 634; A. I. R. 1929 Rang. 123. (In this case no notice of claim was served on the decree-holder)

No suit can lie under this section unless there has been an order either allowing or disallowing an objection to attachment. A person is not entitled to file an objection to an attachment and then to withdraw it and bring a suit under this rule.—*Mulk Raj v. Ralla*, 7 L. 235; 93 I. O. 997; A. I. R. 1926 Lah. 348.

**Necessary parties in a suit under this rule.**—This rule provides that a party against whom an order under r. 60 or r. 61 is made, may institute a suit to establish the right which he claims to the property in dispute. Such a suit must, under Art. 11 of the Limitation Act, 1908, be instituted within one year from the date of the order; otherwise the order made against him shall be conclusive. The following persons are competent to file a suit under this rule:—

(1) The claimant whose claim to the attached property has been disallowed under r. 61, may institute a suit against the decree-holder to establish his right to the attached property; *Narayanrao v. Balkrishna*, 4 B. 529 (F. B.). The judgment-debtor is a necessary party to such a suit; *Ghasi Ram v. Mangal Chand*, 28 A. 41.

(2) The decree-holder against whom an order releasing the property from an attachment is made, may institute a suit against the successful claimant for a declaration of his right to attach and sell the property; *Mitchell v. Mathura Das*, 12 I. A. 150; 8 A. 6 (P. C.). To such a suit the judgment-debtor is not necessary party; *Ghasi Ram v. Mangal Chand*, 28 A. 41, nor a purchaser (as being a purchaser *pendente lite*) from the successful claimant; he sues under this rule.—*Mitchell v. Mathura Das*, 12 I. A. 150; 8 A. 6 (P. C.). 990; A. I. R. 1925 Bom. C. 11; 26 M. L. J. 449.

(3) The judgment-debtor may also, if he is affected by the order of release, institute a declaratory suit under this rule against the claimant.

If the judgment-debtor is a party *in fact*, he will be bound by the order unless he brings the suit within one year. If he is not a party

*in fact*, his rights, are not affected and he may bring a suit within the ordinary period of limitation. An order made in a claim case is not conclusive against or in favour of the judgment-debtor unless he was a party to the proceedings in which the order was passed.—*Vadapalli Narasimham v. Dronamraju*, 31 M. 163; *Krishnasami v. Somasundaram*, 30 M. 335 (F. B.); *Kedar v. Rakhal*, 15 C. 674; *Anantram v. Damodar Das*, 22 I. C. 797.

There were two claim petitions—one on the allegation of purchase prior to attachment, the other claiming by survivorship. Both petitions were heard and the Court found that the property had passed by survivorship to one claimant, and plaintiff who was the other claimant, could not make good his claim of *bona fide* purchase. One order was however passed raising the attachment. Held that though the Court passed an adverse opinion, that did not make the plaintiff "the party against whom an order" was passed; *Ponaka Balarami v. Hazi Mahomed*, 26 M. L. J. 499.

Where a claim has been rejected and the properties have been sold and purchased by a stranger purchaser, the decree-holder is not a necessary party to a suit by the claimant; *Subbaraya v. Kandaswamy*, 32 M. L. T. 124: 70 I. C. 163; A. I. R. 1923 Mad. 53. The decree-holder is not a necessary party in a suit by an unsuccessful claimant to recover possession of property sold in execution of the decree from the auction-purchaser who claimed to be the owner thereof and was in possession thereof, inasmuch as the plaintiff in such a suit claims no relief against the decree-holder.—*Bhola Sunar v. Madho*, 105 I. C. 799; A. I. R. 1923 Nag. 65.

In a suit under this rule, the other creditors of the judgment-debtor need not be necessarily added. The attaching creditor, the judgment-debtor and the alleged transferee are the only proper parties; *Surendra v. Kiran Moyi*, 1 I. C. 428.

Where the contest was throughout between the objector and the judgment-debtor and the objection was allowed, held that the judgment-debtor was a party to the proceedings; *Anantram v. Damodar*, 22 I. C. 797; 84 P. R. 1914.

Leave of the Insolvency Court under S. 23 (2) of the Provincial Insolvency Act, 1920, is not necessary for the commencement of a suit by the attaching creditor under this rule for a declaration that the property belonged to the judgment-debtor at the date of the attachment.—*Subramanyam v. Narasimham*, 56 M. L. J. 489; 119 I. C. 46; A. I. R. 1929 Mad. 323.

As to who are necessary parties generally under this rule, see *Durga v. Jotindra*, 27 C. 493.

Claims to property attached before judgment.—Rules 53 to 63 attached before judgment.—*Mallik* (F. B.): 47 I. C. 1000; *Rajkishore v. I. R. 1929 Cal. 225; M. S. M. M. Firm v. Maung Sein*, 9 R. 561; A. I. R. 1931 Rang. 279; 135 I. C. 326. Difference between attachment in execution and attachment before judgment pointed out in *Pratap v. Sriraj*, 33 C. L. J. 201, where it has been held that even after a release of attachment in execution, the attachment will revive. if a suit under this Rule succeeds but the claimant must be made a party within the period of limitation, but the attachment before judgment falls with the dismissal of a suit and does not revive even if the appeal succeeds.

The inappropriateness of applying Or. XXI, rr. 58 and 63 to an attachment before judgment was pointed out in *Seshagiri v. Ramchandra*, 1931 M. W. N. 259 : A. I. R. 1931 Mad. 570 : 135 I. C. 543.

**Nature of suit under this rule.**—"A suit under this rule is not limited by any special standard of evidence or law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense. But if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be. So, too, the decree-holder may make out his debtor's title exactly as if it were a suit for possession by the judgment-debtor": (*per Rankin J.*) *Najimunnessa v. Nacharuddin*, 51 O. 548 : A. I. R. 1924 Cal. 744 : 83 I. C. 233 ; *Vasudeo v. Eknath*, 35 B. 79 : 8 I. C. 639. Where a claimant instituted a suit under this rule to establish his title, *viz.*, that he had purchased the property from the judgment-debtor prior to the institution of the suit by the attaching creditor, the attaching creditor can plead in defence that the transfer was in fraud of the general body of creditors.—*Ramaswami v. Mallappa*, 43 M. 760 (F. B.) : 59 I. C. 947 (overruling 41 M. 612) ; *Abdul Kadir v. Ali Mia*, 15 C. L. J. 649 : 14 I. C. 715 ; *Bimray v. Laxman*, 23 Bom. L. R. 743 : 57 I. C. 430. Similarly an attaching creditor is competent to institute a suit to establish his right to proceed against the property under this rule and is not bound to bring a representative suit on behalf of all the creditors of the judgment-debtor to set aside a transfer.—*Din Muhammad v. Uma Dutt*, 133 I. C. 118 : 32 P. L. R. 201 : A. I. R. 1931 Lah. 430 ; *R. R. O. O. Chettyar v. Ma Senn Yin*, 5 R. 588 : 105 I. C. 582 : A. I. R. 1928 Rang. 1 ; *Pokker v. Kunhamad*, 42 M. 143.

The institution of a suit by the attaching creditor under this rule is not merely a continuation of the original claim proceedings but is really in part a new legal proceeding.—*Subramanyam v. Narasimham*, 29 L. W. 349 : 119 I. C. 46 : A. I. R. 1929 Mad. 323 : 56 M. L. J. 489. A suit under this rule may not necessarily be a suit for possession, but for a declaration to set aside an order passed in the execution department, but a Court of equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable.—*Chito v. Ghunni Lal*, 124 I. C. 713 : A. I. R. 1930 All. 395. In a suit brought by the decree-holder, the title of the objector has to be negatived before his right to attach and sell the property alleged to belong to the judgment-debtor is negatived.—*Damodar v. Pearey Lal*, 130 I. C. 200 : 28 A. L. J. 1322.

There is nothing in this rule to limit the party unsuccessful in the claim proceedings under rr. 60 and 61, to a suit for a mere declaration of his alleged right. He is at liberty to pray for consequential relief to which he may be entitled. Thus it is competent for a plaintiff in a suit under this rule to pray for a declaration of his right to moveables and also for a direction that the defendant at whose instance they were attached, he ordered to pay him the value of the moveables ; *Basivi Reddi v. Ramayya*, 40 M. 733 : 31 M. L. J. 394 : 36 I. C. 445 ; *Sadu v. Ram*, 16 B. 603 ; *Abdul Rahim v. Sital*, 41 A. 653 : 54 I. C. 793. In a suit to establish a right under this rule, the plaintiff may include a prayer for refund of costs which he has been ordered to pay in the claim proceedings, and if he does not do so, the Court which tried the claim proceedings, cannot make an order



for refund of the costs; *Raghu Nath v. Badri Prasad*, 6 A. 21; *Maung Tha Dun v. Ma Mai Ein*, 119 I. C. 213; A. I. R. 1929 Rang. 128. See also *Abdul Azir v. Alliance Bank*, 132 I. C. 215; A. I. R. 1931 Lah. 483; *V. E. R. Firm v. Maung Po Kyone*, 6 R. 408; 112 I. C. 285; A. I. R. 1928 Rang. 248.

The words "*the right which he claims to the property in dispute*" mean the right which is claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. Rules 58, 61 and 63 must be read together. Where therefore, a claimant being unsuccessful in a claim case has got the property released from attachment by coming to terms with the decree-holder without notice to the judgment debtor, a suit subsequently brought by him against the judgment-debtor for recovery of possession is not barred by this rule.—*Morshia Borayal v. Elohi Bux*, 3 O. L. J. 381 (15 C. 674 and 31 C. 228 followed). In an enquiry under this rule the Court may, in a proper case, go into questions of title and is not necessarily restricted to the question of possession.—*Maung Po v. Somasundram*, 39 I. C. 275.

The suit contemplated by the section is a suit to establish the right which the plaintiff claims in the claim petition and the cause of action in the suit filed under r. 63 must be the cause of action comprised in the claim petition.—*Venkata Subba v. Vigneeswaradu*, 1928 M. W. N. 336; 28 L. W. 82; 110 I. C. 554; A. I. R. 1928 Mad. 840; 56 M. L. J. 52. Where the dispute was only as to priority between the attaching creditor and petitioning claimant, and the claim was dismissed and the dismissal not set aside by suit, the only effect is that the attaching creditor gets priority. Here is no authority for the view that in such cases the mere dismissal of the claim would wipe out the original mortgage, especially when there is no dispute between the parties as to that.—*Dorayya v. Narasimham*, 110 I. C. 567; A. I. R. 1929 Mad. 525. Causes of action arising subsequent to the dismissal of the claim need not be joined in a suit under Or. XXI, r. 63 to set aside the order under Or. XXI, r. 58. Where the plaintiff's claim under r. 58 was dismissed and on dismissal the defendant purchased and obtained possession of the property attached and a suit under r. 63 by the plaintiff for a declaration of title was decreed in his favour; held, that subsequent suit by plaintiff for possession of the property was not barred by Or. II, r. 2.—*Venkata Subba v. Vigneeswaradu*, 1928 M. W. N. 336; 28 L. W. 82; 110 I. C. 554; A. I. R. 1928 Mad. 840. Where a party has applied for removal of attachment from his share and has been unsuccessful, the only remedy left is to file a declaratory suit under Or. XXI, r. 63 and not a suit under the Specific Relief Act, s. 42.—*Ma Than Yin v. Sena Mahomed*, 115 I. C. 912; A. I. R. 1929 Rang. 101. A person who has failed to make a claim or objection under Or. XXI, r. 58, is not entitled to sue for a mere declaration under r. 63 where he is able to seek further relief.—*U Po Thein v. O. A. O. &c. Firm*, 5 R. 699; 106 I. C. 368; A. I. R. 1929 Rang. 34.

"Subject to the result of such suit, the order shall be conclusive."—It was held under the old Code that an order passed under r. 61 rejecting a claim after investigation, would, if not contested by the claimant, operate as an estoppel in a subsequent suit.—*Doilur Krishna v. Lakshmana*, 4 M. 302; *Velayuthan v. Lokshmana*, 8 M. 506; *Krishnan v. Chodayon Kutti*, 17 M. 17; *Nemogunda v. Paresha*, 22 B. 640; and *Surnomoyi v.*

*Ashutosh*, 27 C. 714; but an order passed without investigation is not conclusive.—*Karsan v. Ganpatram*, 23 B. 875; nor is an order passed without jurisdiction, in a claim proffered in execution of a mortgage-decree.—*Joy Prokash v. Abhoy*, 1 C. W. N. 701. Under the present Code the order is conclusive, whether passed on investigation or not, and even when the claim case is dismissed for default.—*Satindra Nath v. Shiva Prosad*, 26 O. W. N. 126; *Durga Das v. Gori Mal*, 26 A. L. J. 794; A. I. R. 1928 All. 327; 116 I. C. 81; *Govindaswami, In re*, A. I. R. 1929 Mad. 1259; 113 I. C. 359; or dismissed on a preliminary ground; *Subadar Singh v. Rampri*, 115 I. C. 703; A. I. R. 1929 Pat. 116. An order . . . . . ever kind under Or. XXI, r. 59 comes under r. . . . . a suit filed within one year.—*Damodar v. Pec* . . . . . L. J. 1322. See also *Ran Bahadur v. Salig Ram*, 131 I. C. 77 (F. B.); 7 O. W. N. 1173; A. I. R. 1931 Oudh 1. The alteration in the wordings of rr. 61-63 and Art. 11 of the Limitation Act should be particularly noticed. See also *Machi Raju v. Sri Raja*, 41 M. 985 (F. B.); 48 I. C. 370, where it has been held that an order refusing to investigate a claim is one under this rule and therefore conclusive if not set aside by a suit within the time prescribed by Art. 11 of the Limitation Act; and the practice of notifying claims to intending purchasers without deciding the claim case is condemned. Even where the attachment was not necessary as in the case of the execution of a mortgage decree, such attachment cannot be said to be wholly void and ineffective and where a person puts in a claim by reference to such attachment the order on the claim can be made binding on him and it must be set aside within one year.—*Dorayya v. Narasimham*, 110 I. C. 567; A. I. R. 1929 Mad. 525.

If a person chooses to take advantage of a summary procedure, he must suffer its disadvantages as well as enjoy its benefit. Where, therefore, a mortgagee without possession, chooses to prefer an objection under Or. XXI, r. 58 on the strength of his alleged mortgage and an adverse order is passed against him in the objection proceeding such decision is conclusive against him unless he brings a declaratory suit within one year.—*Naval Kishore v. Khyali Ram*, A. I. R. 1929 Lab. 865; 120 I. C. 679; 11 L. 369. If the order be in his favour, the person who is adversely affected may bring a suit under this rule, otherwise the property will be sold subject to the incumbrance.—*Maroti v. Mt. Soma Bai*, 26 N. L. B. 136 (F. B.); 123 I. C. 474; A. I. R. 1930 Nag. 116.

Where an order has been passed against any person making a claim to a property under attachment, if such person fails to bring a suit under this rule within the prescribed time, he is precluded from asserting his title against the auction-purchaser, whether plaintiff or defendant.—*Nilo v. Roma*, 9 B. 35; *Yashwant Shenvi v. Vithova Sheti*, 12 B. 231; *Surnamoyi v. Ashutosh*, 27 C. 714; *Dinkar Ballal v. Hari Shridhar*, 14 B. 206; *Badri Prasad v. Muhammad Yusuf*, 1 A. 391 (F. B.); *Jeoni v. Bhagwan*, 1 A. 541; *Bibi Aliman v. Dhakeshwer Pershad*, 1 C. L. J. 296. Nor can he raise again his claims to the property even though he may have come to occupy the position of a defendant.—*Durga Das v. Gori Mal*, 116 I. C. 81; 26 A. L. J. 794; A. I. R. 1928 All. 327. See also *Ma Pyaw v. Latchmanan*, 131 I. C. 727; A. I. R. 1931 Rang. 183. But see *Mannu Lal v. Harsukh Das*, 3 A. 333; *Haripada v. Surendra*, A. I. R. 1922 Cal. 164; *Piara Ram v. Ganga Ram*, 71 I. C. 45. In objection proceedings the contest is really between the decree-holder who asserts that the property is liable to attachment and the claimant who alleges that it is not

in the actual or constructive possession of the judgment-debtor and therefore not liable to attachment. And the order made in such a case is either that the property be released from the attachment as not being in the possession of the judgment-debtor or that the claim be disallowed, but such an order does not affect the right or title of the judgment-debtor to the property. The order under Or. XXI, r. 63 is conclusive in the sense that it cannot be agitated again in the execution proceedings in which it was passed unless a suit is brought within one year of the date of the order, i.e., it is conclusive as between the claimant and the decree-holder who is proceeding against the property. If however the decree-holder raises the attachment within a year, obviously there is no reason why the claimant should institute a suit to set aside the order as there is no attachment in force. It makes no difference if the attachment is raised after the termination of one year. It only means that in those proceedings the claimant is running a risk and will be stopped from contesting the decree-holder's right to proceed against the property; but if the decree-holder does not sell the property and the decree is satisfied otherwise, the fact that the attachment was raised more than a year after the date of the order or the claim does not make any difference.—*Ohet Singh v. Gujar Singh*, 131 I. C. 225; A. I. R. 1931 Lah. 74. The dismissal of a previous objection is a bar to a second objection.—*Sita Ram v. Pir Bakhsh*, 130 I. C. 406; 33 P. L. R. 413; A. I. R. 1931 Lah. 6.

The expression "result of the suit" includes the result of the appeal against the decree in the suit.—*Ram Kishan v. Kundan Lal*, 5 Luck. 680; 7 O. W. N. 313; 131 I. C. 903; A. I. R. 1930 Oudh 265.

**Effect of decision in claim case regarding possession.—Whether res judicata.**—The Code, in using the words "shall be conclusive" of the order made after the limited investigation contemplated by rr. 53 to 57, is thinking not of the subsequent effects of that decision as *res judicata*, but is thinking of and dealing with a Court that is doing something. The Court has attached and is going to sell. The meaning is that the act of the Court is to be valid unless there is a suit. It means that the attachment held valid in the claim case shall be valid and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet*, the act of the Court shall not be questioned save in that way; the effect of the decision as to possession in other proceedings in which that question may again arise, is not the matter to which the words "shall be conclusive" are directly addressed; *Nayimunessa v. Nacharuddin*, 51 O. 548; A. I. R. 1934 Cal. 744; 83 I. C. 232.

Certain creditors attached some *wakf* properties and the *mutawalli* filed an objection. The Court found the *wakf* invalid and the properties were sold. An heir of the *wakf* who was a judgment-debtor brought a suit for a declaration of his title in the properties. Held, that the decision in the claim case was not *res judicata*; *Ashan Bibi v. Awaljadi*, 21 C. W. N. 222.

**Order when not conclusive.**—A claimant whose claim is dismissed, but the attachment is withdrawn at the instance of another claimant subsequent to the order but within a year of it, is not bound to sue as once the attachment goes, the order dismissing his claim does not affect him;



in the actual or constructive possession of the judgment-debtor and therefore not liable to attachment. And the order made in such a case is either that the property be released from the attachment as not being in the possession of the judgment-debtor or that the claim be disallowed, but such an order does not affect the right or title of the judgment-debtor to the property. The order under Or. XXI, r. 63 is conclusive in the sense that it cannot be agitated again in the execution proceedings in which it was passed unless a suit is brought within one year of the date of the order, i.e., it is conclusive as between the claimant and the decree-holder who is proceeding against the property. If however the decree-holder raises the attachment within a year, obviously there is no reason why the claimant should institute a suit to set aside the order as there is no attachment in force. It makes no difference if the attachment is raised after the termination of one year. It only means that in those proceedings the claimant is running a risk and will be estopped from contesting the decree-holder's right to proceed against the property; but if the decree-holder does not sell the property and the decree is satisfied otherwise, the fact that the attachment was raised more than a year after the date of the order or the claim does not make any difference.—*Chet Singh v. Gujar Singh*, 131 I. C. 225: A. I. R. 1931 Lah. 74. The dismissal of a previous objection is a bar to a second objection.—*Sita Ram v. Pir Baksh*, 130 I. C. 406. 32 P. L. R. 413. A. I. R. 1931 Lah. 6.

The expression "result of the suit" includes the result of the appeal against the decree in the suit.—*Ram Kishan v. Kundan Lal*, 5 Luck. 680: 7 O. W. N. 213: 121 I. C. 902: A. I. R. 1930 Oudh 265.

**Effect of decision in claim case regarding possession—Whether res judicata.**—The Code, in using the words "*shall be conclusive*" of the order made after the limited investigation contemplated by rr. 58 to 62, is thinking not of the subsequent effects of that decision as *res judicata*, but is thinking of and dealing with a Court that is doing something. The Court has attached and is going to sell. The meaning is that the act of the Court is to be valid unless there is a suit. It means that the attachment held valid in the claim case shall be valid and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet*, the act of the Court shall not be questioned save in that way; the effect of the decision as to possession in other proceedings in which that question may again arise, is not the matter to which the words "*shall be conclusive*" are directly addressed: *Najmunessa v. Nacharuddin*, 51 C. 548: A. I. R. 1924 Cal. 744: 83 I. C. 233.

Certain creditors attached some *wakf* properties and the *mutawalli* filed an objection. The Court found the *wakf* invalid and the properties were sold. An heir of the *wakf* who was a judgment-debtor brought a suit for a declaration of his title in the properties. *Held*, that the decision in the claim case was not *res judicata*; *Ashan Bibi v. Awaljadi*, 21 O. W. N. 222.

**Order when not conclusive.**—A claimant whose claim is dismissed, but the attachment is withdrawn at the instance of another claimant subsequent to the order but within a year of it, is not bound to sue as once the attachment goes, the order dismissing his claim does not affect him;

*Gollanapalli v. Sankara*, 42 I. C. 683. If there be a fresh application for execution and a fresh attachment a fresh objection by the claimant is sustainable.—*Basanti Devi v. Chotti Lal*, A. I. R. 1931 All. 638: 133 I. C. 318: 29 A. L. J. 856: A. I. R. 1931 All. 608. But see *Ma Pyaw v. Latchmanan*, 131 I. C. 727: A. I. R. 1931 Rang. 183. But if after the rejection of the claim case, the claimant brings a suit, which is dismissed for default, and the execution case being withdrawn by the decree-holder for want of sufficient bid, the decree-holder makes a fresh application after 1 year, the claimant cannot bring a fresh suit, as the order in the claim case was conclusive as soon as the previous suit failed. This rule has modified the old S. 283 of C. P. Code.—*Gopal v. Ganpat*, 35 I. C. 321.

**Onus of proof.**—In a suit under this rule, the burden of proof is on the plaintiff and not on the defendant; *Ram Nath v. Bindaban*, 18 A. 369; *Nannhi Jan v. Bhuri*, 30 A. 321: 5 A. L. J. 601; *Perayya v. Venkayyama*, 47 M. L. J. 14: A. I. R. 1924 Mad. 770: 79 I. C. 899; *Ai Bai v. Kahan*, 3 L. L. J. 198: 67 I. C. 876; *Ramchand v. Fazal Hussain*, 30 P. L. R. 389: 118 I. C. 897: A. I. R. 1929 Lah. 455; *Kulsambi v. Bilankhan*, 117 I. C. 220: A. I. R. 1929 Nag. 121, *Mahadeo v. Ram Prashad*, 8 P. 890: 119 I. C. 74: 10 P. L. T. 389: A. I. R. 1929 Pat. 579; *Amba Parshad v. Piare Lal*, 31 P. L. R. 394; *V. E. A. & Co. Firm v. Maung Ba Kyin*, 5 R. 852 (P. C.): 105 I. C. 788: A. I. R. 1927 P. C. 237. The mere filing of the sale deed pronounced in the claim proceedings as fictitious does not shift the onus on the other side to show that it was not a real or bona fide transaction supported by consideration.—*In re Govindaswami Pillai*, A. I. R. 1928 Mad. 1259: 113 I. C. 358; *Janki Das v. Gulzar*, 12 L. 763: 32 P. L. R. 350: A. I. R. 1932 Lah. 174: 131 I. C. 383. But see *V. E. A. & Co. Firm v. Maung Ba Kyin*, 5 R. 852 (P. C.): 105 I. C. 788: 32 C. W. N. 28: A. I. R. 1927 P. C. 237 and *Gillu Mal v. Firm Manohar*, 7 P. 777: A. I. R. 1928 Pat. 434: 9 P. L. T. 461, which held that the onus is on the defendant to prove that the apparent state of things is not the real state and the conveyance is fictitious and without consideration (46 C. L. J. 349 (P. C.) applied). See also *Elayaperumal v. Vellaikannu*, 128 I. C. 453: 32 L. W. 57: A. I. R. 1931 Mad. 40. If the plaintiff produces his deed and swears that it is genuine and for full consideration and the defendants have nothing to say to the contrary the plaintiff will succeed. But where " . . . . . itial to say to the contrary, the real the plaintiff to establish the right v . . . . . - v. Vellayan, 55 M. 748: 137 I. C. 876 . . . . . 136: A. I. R. 1932 Mad. 302 Similarly the burden lies upon the plaintiff to prove that a document duly executed and registered was in reality a fictitious and a paper transaction.—*Saraswati v. Mahabir*, 109 I. C. 272: A. I. R. 1928 All. 476.

In a suit under this rule to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtor, the onus of proof is upon him. The defendant in defending such a suit may rely upon the title of a third person.—*Adam Isufbhai v. Jamnadas*, 17 B. 94.

**Period of limitation for suits under this rule**—A suit under this rule is governed by Art. 11 of the Limitation Act IX of 1903, and the period is one year from the date of the order. "It (the order under r. 60

or r. 61) is not conclusive; a snit may be brought to claim the property notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his snit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason, a year is fixed as the time within which the suit must be brought"; *Sardhari v. Ambika*, 15 I. A. 123 : 15 C. 521 (P. C.). Where an appeal is preferred from the order, the period of one year is to be calculated from the date of the appellate order; *Venugopal v. Venkatasubbiah*, 39 M. 1196 : 28 I. C. 367.

The order contemplated by r. 61 is an order made after investigation into the facts of the case, and it is only where the order is made after such investigation that the limitation of one year is applicable to a subsequent snit under this rule.—*Chandra Bhusan v. Ram Kanth*, 12 C. 108; *Venkapa v. Chenbasapa*, 4 B. 21 and 23-note; *Rash Behari v. Buddun Chunder*, 12 C. L. R. 550; *Kachinamthodi v. Kachinamthodi*, 44 M. L. J. 141; *Gobardhan Das v. Makundi Lal*, 45 A. 438 : 21 A. L. J. 342. Order dismissing claim for default is not an order made after investigation and need not be set aside within one year.—*Sarala v. Kamsala*, 31 M. 5 (*Sarat Chandra v. Tarini*, 34 C. 494 : 11 C. W. N. 417 followed). See also *Umacharan v. Heron Moyee*, 18 C. W. N. 770. See, however, *Ponnusami v. Samu*, 31 M. L. J. 247 where it has been held that Art. 11 of Limitation Act, 1908, is more comprehensive and covers orders after full investigation as well as orders passed on default. See further notes under heading "Orders in claim proceedings to which the present rule applies," *post*. Where property is released from attachment after investigation under r. 60, limitation of one year is applicable.—*Sardhari Lal v. Ambika Pershad*, 15 I. A. 123 : 15 C. 521 (P. C.); *Khub Lal v. Ram Lochun*, 17 C. 260; *Koyyana Chittemma v. Doosy Gavaramma*, 29 M. 225 : 16 M. L. J. 136; *Bal Makund v. Saiyed Maqud*, 19 C. C. 357.

Where a claim is disallowed on the ground of the claimant not having given any evidence in support of the claim, the order is one under r. 61 and therefore the rule of one year's limitation does apply.—*Rahim Buz v. Abdul Kader*, 32 C. 537 [followed in *Kurada Venkatachalapathi v. Gudivada*, 28 I. C. 244 : (1915) M. W. N. 188]; *Bibi Aliman v. Dhakeshwar Pershad*, 1 C. L. J. 296 (15 C. 521 (P. C.) and 12 C. L. R. 43 followed). But see *Kallar Singh v. Toril Mahton*, 1 C. W. N. 24.

Where a mortgagee's claim or objection to attachment under r. 51 is disallowed, he comes within the words "the party against whom an order is made" and as such must sue within one year under Art. 11 of the Limitation Act to establish his mortgage rights. The ordinary mortgagee's term of 12 years for suing is cut down to one year by such an adverse order; *Debi Das v. Maharaj Rup Chand*, 49 A. 903 : 25 A. L. J. 609 : 102 I. C. 792 : A. I. R. 1927 All. 593; *Naval Kishore v. Khiyali Ram*, 11 L. 369 : 120 I. C. 679 : A. I. R. 1929 Lah. 865.

Where the claim preferred by a *shebait* on behalf of idol is dismissed, a suit by the prospective representatives of the idols after one year will be barred by limitation.—*Suniti Sundari v. Srikrishna*, A. I. R. 1928 Cal. 514 : 112 I. C. 649.

An essential condition precedent to a suit under this rule are the making of an attachment of some property; the objection to such

attachm . . . . . into such objection; and, lastly, c . . . . . and where these do not exist, the rule of . . . . . apply.—*Angan Lal v. Gudar Mal*, 10 A. 479. For the purposes of Art. 11, the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached. Merely passing an order of attachment is not enough. After an order of attachment had been passed, a claim was put in and rejected. There was no attachment effected at any time. Held that the order of rejection need not be set aside within one year, the order being a nullity.—*A. T. K. &c. Muthiah v. Palaniappa*, 55 I. A. 256: 51 M. 349 (P. C.): 26 A. L. J. 616: 32 C. W. N. 831: 48 C. L. J. 11: 5 O. W. N. 579: 109 I. C. 626: 30 Bom. L. R. 1353: A. I. R. 1928 P. C. 139: 55 M. L. J. 122.

Where an attachment in respect of which a claim is disallowed is finally withdrawn on the judgment-debtor's paying the decretal amount into Court, the claimant is not bound to bring his suit to establish his title to the attached property within one year.—*Ibrahimbhai v. Kabulabhai*, 13 B. 72; *Gopal Purshotam v. Bai Divali*, 18 B. 241; *Krishna Prasad v. Bepin Behary*, 31 C. 228. But all these cases have been dissented from in *Bibi Aliman v. Dhakeshwer Pershad*, 1 C. L. J. 296.

The High Court does not ordinarily interfere in revision with orders made in claim cases. Such orders are conclusive and r. 63 provides a remedy by way of suit. If a person or his Advocate chooses nevertheless to apply for revision of such an order and after the dismissal of his revision application files a declaratory suit more than a year after the passing of the order, he cannot claim the benefit of S. 14 of the Limitation Act and ask for the exclusion of the time taken up in revision proceedings. Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith.—*S. R. M. &c. Firm v. Maung Po*, 7 R. 466.

Suit under this rule not necessary if property is released from attachment within the period of limitation.—A claimant is not compelled *de bene esse* to institute a title suit under this rule within a year after his claim under r. 63 has been rejected, when the object sought by him in making the application under r. 58 has been attained by the release of the property from attachment, *e.g.*, by reason of the dismissal of the application under r. 57 for default of prosecution or by reason of the withdrawal of attachment on payment of the decretal amount by the judgment-debtor to the decree-holder. In circumstances such as these, Art. 11 of the Limitation Act of 1908 does not apply, and the claimant is not affected by any of the consequences which result from a failure to institute a . . . . .  
—*ruddin*, 51 C. 548: 83 I. Kampta Prasad, 97 I. C. 1  
*v. Thevaraya*, 48 M. L. J.  
*Din v. Qutab Din*, 3 L. 7:  
*Nathalal*, 45 B. 561: *Umesh v. Raj Bullubh*, 8 C. 379. See *V. S. Aiyar v. Maung Nyun*, A. I. R. 1929 Rang. 223 which has held that where orders have been passed against a person on his application for removal of attachment,



Or. XXI, r. 63 gives him a right to file a suit even though the attachment is withdrawn by the decree-holder.

**Suit for refund of purchase-money.**—Where the claimant whose claim to the property under r. 61 is disallowed, brings a suit against the judgment-debtor for refund of the purchase-money paid by him for purchase of the property, such a suit is not barred by limitation even if instituted more than a year after the date of the order. The reason is that r. 63 does not apply to such a suit ; *Rati Ram v. Barhmajit*, 46 A. 45 : A. I. R. 1924 All. 302 : 77 I. C. 82.

**Payment by claimant under protest.**—If the claim fails and the property is not released, the claimant is not compelled to bring a suit under this rule for a declaration of his title to the property. In such a case, he may prevent the sale of the property by paying the decretal amount to the decree-holder and then sue for the recovery of the amount so paid under pressure of execution proceedings ; *Dulichand v. Ramkishen*, 7 C. 648 (P. C.) ; *Jugdeo v. Rajah Singh*, 15 C. 657. He may also pay the decretal amount under protest and then sue for refund as stated above ; *Kanhaya Lal v. National Bank of India*, 40 C. 598 (P. C.) ; 40 I. A. 56 : 17 C. W. N. 541 : 11 A. L. J. 413 : 15 Bom. L. R. 472 : 18 I. C. 949.

**One year's limitation does not apply to persons who are not parties to claim case.**—The law of one year's limitation could not apply to a person whom the Court had refused to make a party to the proceedings under r. 58 because he came in too late.—*Roghoonath v. Bydonath*, 14 W. R. 364 See *Dorayya v. Narasimham*, 110 I. C. 567 : A. I. R. 1928 Mad. 525. which held that where a claim petition is dismissed on the ground that it is too late, it is an order which has to be set aside within one year (41 M. 985 (F. B.) followed).

A judgment-debtor is not necessarily a party to an investigation under r. 58 so as to preclude his instituting a suit after the lapse of one year from the date of the order to establish his title to the property which has been the subject-matter of a claim in execution proceedings.—*Kedar Nath v. Rakhal Das*, 15 C. 674. See also *Ghasi Ram v. Mangal Chand*, 2 A. L. J. 491 : (1905) A. W. N. 172 : 28 A. 41 ; *Krishnasami v. Somasundaram*, 30 M. 335 (F. B.) : 17 M. L. J. 95 ; *Sadaya v. Amurthachari*, 8 M. L. T. 417. In *Gurura v. Subbarayudu*, 13 M. 366, it has been held that, if there is nothing to show that the order releasing the attachment was an order against the judgment-debtor, or that he was a party to the proceeding, a suit by him for declaration of title to the property is not barred by one year's limitation. See also *Imbichi Koya v. Kakkunnat Upakki*, 1 M. 391 ; *Karsan v. Ganpatram*, 22 B. 875 ; *Lingama v. Official Receiver*, 110 I. C. 511 ; *Munshi v. Bishun*, 10 P. L. J. 581 : A. I. R. 1929 Pat. 604 : 120 I. C. 762. In *Shivapa v. Dod Nagaya*, 11 B. 114, it has been held that it must depend upon the facts of each case as to whether a judgment-debtor is to be regarded as a party to an investigation under r. 58.

If it appears that in a proceeding under r. 58 no notice was issued to the judgment-debtor, he cannot be regarded as a party to the proceedings, and the rule of one year's limitation does not apply to a suit brought by the judgment-debtor to establish his right to the property.—*Ambalathilakath*.

*Modin v. Ambalathilakath Kunhi*, 25 M. 721 (followed in *Krishnasami v. Somasundaram*, 30 M. 335 (F. B.) : 17 M. L. J. 95 (F. B.)). Even if the judgment-debtor be a party to the proceedings but if the Court does not adjudicate upon the question of the judgment-debtor's title, but decides the case on the question of possession only, he or his heirs will not be bound by the order; *Vedalingam v. Veerathal*, 54 I. C. 530.

**Orders in claim proceedings to which the present rule applies.**—An order made on an application which does not come within the purview of r. 58, is not an order to which the present rule applies; *Bala Krishna v. Rangan*, 41 M. L. J. 334 : 69 I. C. 326; *Biswanath v. Lingaraj*, 1 P. 159 : 70 I. C. 306 : A. I. R. 1922 Pat. 408; *Chunilal v. Pira Miyaji*, 29 Bom. L. R. 285 : 101 I. C. 335 : A. I. R. 1927 Bom. 234. It was held in some cases under the old Code that an order dismissing a claim for default, and without investigation, did not come under S. 293 (present rule), and such order not being "conclusive," the party against whom the order was made, was not precluded from instituting a suit more than one year after the date of the order; *Sarala v. Kamsala*, 31 M. 5, *Sarat v. Tarini*, 34 C. 491 : 11 C. W. N. 487, *Chandra Bhusan v. Ram Kanth*, 12 C. 103. But r. 63, which is more comprehensive than S. 293, applies to all orders made against a party under r. 60 or r. 61, even if the order was made for default or without full investigation; *Satindra v. Shiva*, 26 C. W. N. 126 : 64 I. C. 713 : A. I. R. 1922 Cal. 166; *Wamandhar v. Kampta Prasad*, 22 N. L. R. 94 : 97 I. C. 178 : A. I. R. 1926 Nag. 423; *Nagendra v. Fani Bhusan*, 45 C. 785; *Gopal Singh v. Ganpat Rai*, 35 I. C. 321; *Gulab v. Mutsaddi Lal*, 41 A. 628 : 50 I. C. 748; *Durgadas v. Gori Mal*, 26 A. L. J. 794 : A. I. R. 1928 All 327. But see *Maung Tun v. U Tha*, 118 I. C. 634 : A. I. R. 1929 Rang. 123. Where the Court rejects a claim or objection preferred under r. 58 on the ground that it was designedly or unnecessarily delayed, the order is one made against the claimant or objector within the meaning of this rule; *Venkataratnam v. Ranganayakamma*, 41 M. 985 (F. B.) : 48 I. C. 270; *Gobardhan Das v. Makundi Lal*, 45 A. 438 : A. I. R. 1923 All. 435 : 74 I. C. 1024; *Arsamma v. Moidin*, 47 M. 160 : A. I. R. 1924 Mad. 111 : 77 I. C. 264; *Kumara v. Thevaraya*, 48 M. L. J. 616 : 87 I. C. 635 : A. I. R. 1925 Mad. 1113.

**Withdrawal of a claim by the claimant would not attract the provisions of r. 63.**—*Lingama Naidu v. Official Receiver*, 110 I. C. 511; *Onkar Prasad v. Dhanu Ram*, 28 A. L. J. 594 : 122 I. C. 865 : A. I. R. 1930 All. 177. Dismissal of a claim petition by Court having no jurisdiction to entertain it, need not be set aside by suit.—*Sivasankara v. Purakkal*, A. I. R. 1928 Mad. 878 : 112 I. C. 619.

**Effect of attachment on adverse possession.**—Attachment of property in execution of a decree does not arrest the running of time in favour of a party holding the property adversely to the judgment-debtor; *Seetharami v. Venku*, 11 M. L. J. 344; *Ranganatha v. Srinivasa*, 49 M. L. J. 656 : A. I. R. 1926 Mad. 42 : 90 I. C. 1037. A contrary view was taken by the Calcutta High Court in *Najimunnessa v. Nacharuddin*, 51 C. 548 : 83 I. C. 233 : A. I. R. 1924 Cal. 744, and by the Bombay High Court in *Vasudeo v. Eknath*, 35 B. 79 : 8 I. C. 639.

**Step in aid of execution.**—The institution of a regular suit by the decree-holder under this rule to set aside an order in a claim case, is a step in

aid of execution within the meaning of Art. 179 (4) of the Limitation Act, 1887.—*Rudra Narain v. Pachu Maity*, 23 C. 437 (1 A. 355, 23 W. R. 183 and 5 B. 29, referred to). But see *Raghunandun v. Bhugoo Lall*, 17 C. 268 and *Desraj Singh v. Karam Khan*, 19 A. 71, where a contrary view seems to have been taken. See also *Narayana v. Pappi Brahmani*, 10 M. 22, which has been overruled by *Suppa v. Avudai*, 28 M. 50 (F. B.).

*Limitation for recovery of compensation for wrongful attachment and sale of moveables*—See notes under rule 78 of this Order.

**Jurisdiction of Provincial Small Cause Courts to entertain suits under this rule.**—A suit will not lie in the Small Cause Court to establish a right to moveable property after an adverse order under rr. 60, 61 and 62.—*Moozdeen v. Dinobundhoo*, 13 W. R. 99; *Ilahi Bakhsh v. Sita*, 5 A. 462; *Mukund v. Nasiruddin*, 4 A. 416; *Dakhyani Deba v. Dole Gobind*, 21 C. 430; *Chhaganlal v. Jeshan*, 4 B. 503 and 505-note; *Mahomed Koya v. Kasmi*, 9 M. 206; *Shiboo Narain v. Mudden*, 7 C. 608; 9 C. L. R. 8; *Goha v. Naik Ram*, 7 A. 152 (F. B.). See, however, *Pagi Partap v. Varajlal*, 8 B. 259; *Raghunath v. Sarosh*, 23 B. 266.

A suit to recover moveable property attached under colour of the Rent Recovery Act (Med. Act VIII of 1865) is cognizable by a Court of Small Causes.—*Davud Beg v. Kullappa*, 11 M. 264.

See also Schedule 11, 19 and 20 of the Provincial Small Cause Court's Act (IX of 1887).

An order made upon a claim to attach the property filed in the Small Cause Court of Calcutta under Or. XXI, r. 58, is "an order in the suit" under the Presidency Small Cause Court's Act (XV of 1882) and the party has the power and authority to determine the question of title under a mortgage over attached property; and that question is therefore *res judicata*.—*Deno Nath v. Nuffer Chunder*, 26 C. 778; 3 C. W. N. 590. See also *Ismail Solomon v. Mahomed Khan*, 18 C. 296.

**Court-fee.**—A party against whom an order has been made under rr. 60 and 61, dismissing his claim to the attached property, can bring his suit to establish his right to the property on a stamp paper of Rs. 10, under Sch. II, Art. 17 of the Court-Fees Act.—*Dhondo Sakharan v. Gobind Babaji*, 9 B. 20; *Phul Kumari v. Ghanshyam*, 35 I. A. 22; 35 C. 202 (P. C.); 12 C. W. N. 169; 7 C. L. J. 36; 5 A. L. J. 10; 10 Bom. L. R. 1; 17 M. L. J. 618 (31 C. 511, reversed); *Satindra v. Shiva*, 26 C. W. N. 126; 64 I. C. 713; A. I. R. 1922 Cal. 166; *Vithal Krishna v. Ralkrishna*, 10 B. 610 (F. B.); *Chunia v. Ram Dial*, 1 A. 360; *Dayachand v. Hemchand*, 4 B. 515; *Sadashiv v. Atmaram*, 4 B. 535; *Nagar v. Gopal*, 19 C. L. J. 358; *Gulzari Lal v. Jadaun Rai*, 2 A. 63; *Fatima Begam v. Sukh Ram*, 6 A. 341; *Manraj Kuari v. Radha Prasad*, 6 A. 466; *Gobind Nath v. Gajraj Mati*, 13 A. 389. But see *Ahmed Mirza v. Thomas*, 13 C. 162 and *Chokalingapeshana v. Achiyar*, 1 M. 40. See also *Moti Singh v. Kaunsilla*, 16 A. 308 (F. B.).

**Jurisdiction.**—In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree,

the valuation of the suit for purposes of jurisdiction is not the value of the property but the decretal amount; *Khetra v. Mumtaz*, 38 A. 72 : 31 I. C. 879; *Modhusudun v. Bakhal*, 15 C. 104; *Anandi Kunwar v. Ram Nirranjan*, 40 A. 505: 45 I. C. 494; *Phul Kumari v. Ghanshyam*, 35 C. 202 (P. C.): 35 I. A. 22: 12 C. W. N. 169: 5 A. L. J. 10: 10 Bom. L. R. 1: 17 M. L. J. 61. But see *Narayanan Singh v. Aiyasami*, 39 M. 602 (applying 35 C. 202 (P. C.)).

Where an unsuccessful claimant desires not only that the attachment should be removed, but also that his title should be declared as against the judgment-debtors, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself and not merely the value of the decree (39 M. 602; 17 A. 69 *folld.*).—*Daw Dut v. Daw Kuri*, 137 I. C. 54: A. I. R. 1932 Rang. 20.

The value of an appeal filed against the dismissal of a suit under  
C. XXI. s. 22. . . . . editor whose attachment was raised by  
allowing a claim, is the value not of the  
of the property sought to be recovered  
v. *Narasimham*, 29 L. W. 349: 119 I. C.  
L. J. 489.

## SALE GENERALLY.

**64.** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. [S. 284.]

## COMMENTARY.

**Alterations.**—The words "*executing the decree*" after the words "any Court" and the words "*by it and liable to sale*" after the word "attached" have been added.

**"May order."**—It is however obligatory on the Court to order sale when a valid application is duly made after valid attachment by the party interested and having the right to apply.—*Kamisetti v. Tangator*, 28 I. C. 92.

Rule 64 does not apply to a money-decree under attachment. The procedure in such a case is indicated in r. 53.—*Domi Lal v. Bijoy Prasad*, 13 P. 36: 141 I. C. 37: 13 P. L. T. 612: A. I. R. 1932 Pat. 349.

When a property has been sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder, under whose decree it is actually sold; and when a judicial sale  
all  
ments effected upon the property sold

*Surbanand*, 12 C. 317. See also *Prangour v. Himanta Kumari*, 12 C. 597; and *Moti Lal v. Karrabuldin*, 24 I. A. 170; 25 C. 179 (P. C.): 1 C. W. N. 639.

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity, and a valid title passes to the purchaser. Section 63 is not intended to take the jurisdiction conferred by this rule.—*Gopi Chand v. Kasimunnessa*, 34 C. 836; 6 C. L. J. 130.

A Court has no jurisdiction to sell a property which has not been duly attached: *Panchanan v. Kunja*, 42 I. C. 259.

The Code contains detailed provisions as to when an attachment validly effected ceases to be in force. There is no warrant for adding to that list by holding that when the Court loses jurisdiction, the attachment subsisting till then suddenly comes to an end. Or. XXI, r. 64 is not exhaustive of the cases where the executing Court is competent to sell property. The section does not forbid the sale by a Court of property under a subsisting attachment notwithstanding that it was a different Court that attached it.—*Manikka v. Loganatha*, 30 L. W. 649; A I. R. 1929 Mad 852.

"Such portion thereof."—It is entirely within the discretion of a Court to direct that property should be sold in portions, even though it has been attached or proclaimed as an entirety.—*Abdool Hye v. Macrae*, 23 W. R. 1, confirmed on review, in 23 W. R. 393. See also *Shew Persad v. Bikao Singh*, 3 C. L. J. 112-n.

If after the publication of the sale proclamation, one of the advertised lots is sub-divided into various lots for the purposes of the sale: *held*, that such sub-division of lots was no irregularity within r. 90.—*Sami Pillai v. Krishnasami Chetti*, 21 M. 417.

It is competent to the Court in executing a mortgage-decree to exercise its control in bringing the different items of the property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.—*Krishna Ayyar v. Muthukumara-sawmiya*, 29 M. 217.

This rule applies to a certificate issued under the Public Demands Recovery Act, against all the *maliks* with direction for realisation to be made from one of the *maliks*; *Thittar Jha v. Ramdhari*, 3 I. C. 81.

"Shall be paid to the party."—Although there is no express provision in the Code that the purchase money may be paid to the decree-holder of sale, yet this rule and S. 73 indicate that purchase-money before the date of confirmation.—*Gobind Chunder*, 12 C. 252 (6 B. 16. referred to).

A successful pauper plaintiff attached and sold for her costs certain property of a judgment-debtor. The sale-proceeds were paid into Court. The plaintiff's solicitor applied for payment of his costs out of the sale-proceeds, and the Government solicitor to have his certified Court-fees out of the sale proceeds. *Held*, that the Government was entitled to precedence. The Court is bound by this rule to pay the proceeds of the attached property to the party entitled under the decree to recover the same, and there was no necessity for the Crown to make an attachment.—*Srimaty Gayanoda Bala v. Butto Krishna*, 10 C. W. N. 857; 38 C. 1040.



*Surbanand*, 12 C. 317. See also *Prangour v. Himanta Kumari*, 12 C. 597; and *Moti Lal v. Karrabuddin*, 24 I. A. 170; 25 C. 179 (P. C.); 1 C. W. N. 639.

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A Court has no jurisdiction to sell a property which has not been duly attached; *Panchanan v. Kunja*, 42 I. C. 259.

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This rule applies to a certificate issued under the Public Demands Recovery Act, against all the *maliks* with direction for realisation to be made from one of the *maliks*; *Thillar Jha v. Randhari*, 3 I. C. 81.

"Shall be paid to the party."—Although there is no express provision in the Code that the purchase money may be paid to the decree-holder before the date of confirmation of sale, yet this rule and S. 73 indicate that a decree-holder may take out the purchase-money before the date of confirmation of sale.—*Jogendro Nath v. Gobind Chunder*, 12 C. 252 (6 B. 16 referred to).

A successful pauper plaintiff attached and sold for her costs certain property of a judgment-debtor. The sale-proceeds were paid into Court. The plaintiff's solicitor applied for payment of his costs out of the sale-proceeds, and the Government solicitor to have his certified Court-fees out of the sale proceeds. *Held*, that the Government was entitled to precedence. The Court is bound by this rule to pay the proceeds of the attached property to the party entitled under the decree to recover the same, and there was no necessity for the Crown to make an attachment.—*Srimaty Gayanoda Bala v. Butto Krishna*, 10 C. W. N. 857; 33 C. 1040.

Sales by whom  
conducted and how  
made.

**65.** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

[S. 268.]

### COMMENTARY.

**Alterations.**—The words "*save as otherwise prescribed every sale,*" "*such other*" and "*in this behalf*" are now.

As to sale of negotiable instrument, *see* S. 73; as to agricultural produce, *see* Ss 74, 75.

"Shall be conducted by an officer of the Court," etc.—It is the Nazir's business to complete the sale, although the Court (as well as the Nazir) has a discretion to decline acceptance of the highest bid when the price is extremely inadequate. The Court has a quasi-revisional jurisdiction under condition 3 of the sale proclamation and it does not require the Court itself to knock down the property. If a person bids at a sale and the property is knocked down to him, the mere fact that the Court has power to annul or confirm the Nazir's action does not leave it open to the bidder to withdraw his bid; the sale becomes complete as soon as the property is knocked down to the bidder; *Rajendra v. Upendra*, 19 C. W. N. 633; 21 C. L. J. 174; 27 I. C. 805; *Nur Din v. Bulaqui*, 131 I. C. 227; A. I. R. 1931 Lah. 78 (not following *Jai Bahadur v. Matukdhari*, 2 P. 548). *See also Maung Ohu Tin v. P. R. M. etc. Chettyar Firm*, 7 R. 425; A. I. R. 1929 Rang. 311. Even where a sale is held by an auctioneer nominated by parties the sale is regarded as a sale by the Court.—*Galstaun v. Woomesh*, 35 I. C. 850.

This rule clearly contemplates the employment of agents for the conduct of execution sales. Receipt of purchase money by agents is equivalent to receipt of assets by Court for purposes of S. 73; *Galstaun v. Woomesh*, 35 I. C. 850.

The Court executing a decree passed an order postponing a sale, but the order failed to reach the officer conducting the sale, and the sale was subsequently held. The judgment-debtor applied to set aside the sale. *Held* that the sale was illegal and void.—*Sant Lal v. Umraounnissa*, 12 A. 96 (4 A. 382; 3 A. 701; and 11 A. 333 referred to).

In sales under the direction of the Court, it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers. Where the conditions of the sale were read out in English, which the purchasers did not understand, and a purchaser was led to believe by one of its officers that a substantial property freed and discharged from all incumbrances was being sold, though as a matter of fact the property was subject to incumbrances in amount far exceeding its value; *held* that the sale was void and must be set aside on the ground of misrepresentation. Apart from this, a Court is bound to set aside a sale induced by the misrepresentation of its accredited agent.—*Mahomed Kala Mea v. Harperink*, 36 I. C. 52; 18 C. W. N. 249 (P. C.); 9 C. L. J. 165; 36 C. 323; 11 Bom. L. J. 257; 6 A. L. J. 34; 19 M. L. J. 116; 1 I. C. 122.



**66.** (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[S. 278.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 287, C. P. Code, with several additions and alterations.

In sub-rule (2) the words "*shall be drawn up after notice to the decree-holder and the judgment-debtor*" have been added. A notice is now necessary for settling the terms of sale.

Suh-rule (3) reproduces para. 2 of S. 287 of the old Code with much elaboration, embodying in it the law as laid down in the case of *Srimati Giribala v. Srimati Rani Mina Kumari*, 5 C. W. N. 497 (502), noted below. The verified petition, which under the old Code, was required to be filed at the time of attachment is under the present Code to be filed after attachment and before issue of sale-proclamation.

In sub-rule (4) the words "in the proclamation" are now.

Para. 3 of S. 287 of the old Code which empowered the High Courts to make rules under the old section, has been omitted; probably in view of Ss. 120 to 131 by which High Courts have been empowered to make rules consistent with the provisions of the Code. By virtue of S. 157, the rules framed under the old Code are still to be considered as law. See also *Lal Mohun v. Nunu*, 17 C. 152.

The last para. of S. 287 has also been omitted and reproduced as a separate rule (r. 70).

"After notice."—Formerly in the mofussil the sale proclamation was usually drawn up without notice to the judgment-debtor and behind his back, so that he did not receive any intimation of its contents until it was fixed up in the Court-house or was published upon the property. The judgment-debtor had therefore some excuse for not putting forward any objection; *Rajah Ramessur v. Rai Sham*, 8 C. W. N. 257 (263). This defect has been remedied in the present Code, and a notice has to be served on the judgment-debtor before the sale proclamation is drawn up. The notice to the judgment-debtor should be issued after the decree-holder has filed the verified statement and the Sub-Registrar's Certificate. Non-compliance with Or. XXI, r. 66 and rr. 106 and 110 of the Allahabad High Court Rules held to be good ground for setting aside a sale.—*Ram Prasad v. Shiva Kumar*, 133 I. C. 529; 29 A. L. J. 849; A. I. R. 1932 All. 55. Where after service of notice the judgment-debtors did not appear and object, but allowed the properties to be sold, it is not open to them to subsequently raise objections to the sale-proclamation on the ground of misdescription; *Subbaraya v. Muthammal*, 22 I. C. 780 (12 M. 19 (P. C.)); and 38 M. 387; 21 I. C. 389; 25 M. L. J. 198 (folld.); *Mahadeo Singh v. Dhobi Singh*, 2 P. 916; (1923) P. 283; 4 P. L. T. 721; 74 I. C. 833; *Maharaj Bahadur Singh v. Sachindra*, 32 C. W. N. 309; A. I. R. 1928 Cal. 328. It is as much the duty of the judgment-debtor as of the decree-holder to see that the sale proclamation under Or. XXI, r. 66 is prepared correctly. If a judgment-debtor goes to sleep over his right he is well punished if a wrong sale proclamation is prepared and he has only to blame himself if he suffers any loss through such incorrect preparation.—*Hardani Lal v. Ram Nath*, 27 A. L. J. 619; 116 I. C. 448; A. I. R. 1929 All. 704. Where, however, an execution sale is wholly without jurisdiction the fact that the judgment-debtor failed to raise an objection when notice was issued to him is immaterial.—*Hari Saran v. Pyare Lal*, 134 I. C. 602; 8 O. W. N. 927; A. I. R. 1931 Oudh 398. Omission to issue or serve notice under this rule is a default within r. 57; *Namuna v. Roshan*, 15 C. W. N. 428.

Notice to the judgment-debtor only enables him to put his case before the Court, but if the decree-holder insists that a much smaller valuation should be inserted and the Court accepts his view, the decree-holder proceeds to

sale at his risk and its validity may be subsequently challenged by the judgment-debtor; *Pran Singh v. Janardan*, 14 C. L. J. 541.

Omission to issue notice is an irregularity under r. 90; *Bepin Behari v. Kanti*, 18 I. C. 715. Though a material irregularity, it must result in substantial injury before a Court-sale can be set aside under Or. XXI, r. 90; *Kanhya Lal v. Megh Raj*, A. I. R. 1927 Lah. 84; 99 I. C. 515.

If a judgment-debtor dies before the issue of notice, his legal representatives must be brought on record and if it is not done, the sale would be void—*Chandi Prasad v. Jamna*, 49 A. 830; 102 I. C. 239; A. I. R. 1928 All. 74.

Omission to serve a notice is more than a mere irregularity and renders the Court-sale void—*Ramaswamy v. Ma U Tha*, 38 I. C. 98; but see *Krishna v. Bahram*, 44 I. C. 252, where it has been held that notice under this rule is directory and not mandatory.

In proceedings taken in execution of a rent-decree no notice under r. 66 (2) is required before the sale-proclamation is drawn up, and the sale-proclamation should ordinarily issue at the same time as the property is attached under r. 54.—*Mt. Lala Kuer v. Mir Ali*, 10 P. 133; 136 I. C. 696; 12 P. L. J. 736; A. I. R. 1931 Pat. 267.

For form of Notice under sub-rule (2), see Appendix E, Form No. 28.

"Proclamation shall state time and place of sale."—The practice is to hold sales on certain fixed days of the month. These dates are known as sale dates. Sales are held on those days, and continued from day to day till finished.

The Court shall cause a proclamation of the intended sale to be made, giving the time and place of sale.—*Mohendro Narain v. Gopal Mondul*, 17 C. 769 (F. B.).

When the proclamation advertised the sale to take place at the Court-house, it is a material irregularity to hold the sale at the premises of some of the buildings advertised for sale.—*Duni Chand v. Atma Singh*, 132 P. R. 1906; 11 P. L. R. 1907.

A property advertised for sale was sold on the day fixed, but at an earlier hour than that stated in the proclamation. Held that there had been no sale within the meaning of the Code: proclamation of the time and place and the holding of it at such time and place, being conditions precedent to the sale being a sale under the Code.—*Basharutulla v. Uma Churn*, 16 C. 794. See also *Chedami Lal v. Amir Beg*, 7 A. 676; *Khodeja Bibee v. Ram Narain*, 12 W. R. 511; *Pokhraj Singh v. Gossain Munraj Pooree*, 12 W. R. 281; and *Kishen Prosunno v. Narduma Dossee*, 17 W. R. 339.

Where the sale-proclamation omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of 30 days required by r. 69—held that the non-compliance with the provisions was more than a mere irregularity.—*Jasoda v. Mathura*, 9 A. 511 (7 A. 289 referred to). See also *Maung Po Tha v. S. R. etc. Chettyar*, A. I. R. 1927 Rang. 84.

Under the Code it is intended that a sale of moveable property attached in execution of a decree should ordinarily be held in some place within

the jurisdiction of the Court ordering the sale.—*Lakshmi Bai v. Santapa Revapa*, 13 B. 22.

A sale held on a holiday is illegal; *Haro Jamadar v. Jadub*, 3 W. R. Mis. 24. But see, *Bisram v. Sahibunnissa*, 3 A. 333.

See notes under r. 90 of this order.

**Fresh proclamation.**—Where a sale is postponed indefinitely or to a fixed date, it is necessary, in the absence of any express arrangement between all the parties, that a fresh proclamation should be made, giving notice of the day to which the sale has been postponed.—*Goopee Nath v. Roy Luchmeeput*, 3 C. 542. 1 C. L. R. 349; *Okhoy Chunder v. Erskine & Co*, 3 W. R. Mis. 11; *Shoshee Mookhee v. Dworkanath*, 6 W. R. Mis. 84; *Jhoomuck Chowdhry v. Radha Pershad*, 25 W. R. 323.

Where subsequent to the proclamation a portion of the property was released to a third party, a fresh proclamation must be made; *Shib Prokash v. Sardar*, 3 C 544.

"Proclamation shall specify the property"—A judgment-debtor has the right to have the property to be sold described with reasonable accuracy.—*Rajah Ramessur Proshad v. Rai Shani Kissen*, 8 C W N. 257.

In an advertisement of sale the property was described as that of the widow, and the interest to be sold was described as that of the deceased debtor. Held that the purchaser at the sale acquired the property of the deceased debtor in the estate, and had a good title against the heir.—*Ishan Chunder v. Buksh Ali*, Marsh 614 W. R. Sp No 119; *Nuzzeerun v. Ameeerooddeen*, 24 W. R. 3; *Hulkhory Lall v. Sheo Churn*, 24 W. R. 109; *Abdul Kureem v. Jawn Ali*, 18 W R 56; *Satish Chunder v. Nilcomul*, 11 C. 15 and *Devji v. Sambhu*, 24 B 135.

Where a property is described at the time of an execution sale as the property of the debtors who were mere representatives of a deceased judgment-debtor, *prima facie* what is sold is the property of the deceased debtor.—*Lalla Seeta Ram v. Ram Buksh*, 24 W. R. 383.

Where a proclamation did not clearly state that the interest of the judgment-debtor was only one-third, held, that it was no misdescription; it was at the most a lacuna in the description not sufficient to entitle the auction-purchaser to infer that the judgment-debtors were the sole owners and had the entire title to the property or to have the sale set aside.—*Venkatraman v. Mahableshwar*, 134 I. C. 692: 33 Bom. L. R. 750; A. I. R. 1931 Bom. 367.

At a sale of an under-tenure for arrears of rent the growing crop passes to the purchaser, except where it has been specially excepted by the sale notification.—*Asatoolla v. Dwarka Nath*, 4 C. 814: 4 C. L. R. 95.

If there is any ambiguity in the sale-proclamation; the decree should be looked into to see what was actually sold; *Piarey Lal v. Ram Chondra*, 96 I. C. 771: A. I. R. 1926 AU. 730.

Where, on an execution sale, there is a discrepancy between the conditions in the notification of what is to be sold and the certificate of what has been sold, the conditions in the notification are to be taken as of a superior authority in dealing with the conflicting claims of innocent third

parties whose rights are affected by the variation.—*Uma Churn v. Gobind Chunder*, 1 C. L. R. 460; *Gowree v. Surut Chunder*, 22 W. R. 408. See, however, *Dwarka v. Aloke*, 9 C. 641.

Where the writ of attachment gave the wrong number of the premises, but the sale-proclamation contained the correct number and the sale was effected in pursuance thereof, *held*, that the sale was valid.—*Naresh Chandra v. Molla Ataul*, 57 C. 1206; 129 I. C. 779; A. I. R. 1931 Cal. 35.

Rule 66 prescribes the statements and information to be given by the proclama-tion of sale.—*Tassadduk Rasul v. Ahmad Hussain*, 20 I. A. 176; 21 C. 66 (P. C.)

Where in the sale of a certain share in a *mahal* which was described in the schedule, the share was attached and sold, but the Court issued a sale certificate in respect of a share in a different property; *held* that there was no power to sell the latter share since it was not a case of mere misdescription but of a mistake as to identity. That which is sold in a judicial sale can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers; *Thakur Barmha v. Jiban Ram*, 41 I. A. 38; 41 C. 590 (P. C.); 18 C. W. N. 313; 26 M. L. J. 89; 21 I. C. 936; 16 Bom. L. R. 156

An execution Court will not be justified in entering in the sale proclamation a description of property not justified either by the mortgage or the decree thereon and neither of which made any mention of the items in question.—*Abdul Rauf v. Rahim Bakhsh*, 110 I. C. 860; A. I. R. 1928 Oudh 491.

While it is preferable that the minor sons be impleaded in the suit itself with the father as manager of the joint family an application in execution to include their interests in the proclamation of sale in *darkhast* is not incompetent.—*Ramchandra v. Bhagwant*, 53 B. 777; 31 Bom. L. R. 1115; A. I. R. 1929 Bom. 465; 121 I. C. 435.

Duty of the Court to settle the sale proclamation itself.—It is the duty of the Court to settle the proclamation of sale itself. If it does not do it, but deposes a Commissioner to do it, the sale is invalid. The fact that the person seeking to set aside the sale was aware of the contents of the proclamation prepared by the Commissioner, is immaterial; *Appu v. Achuta Menon*, 49 M. 333; 94 I. C. 8; A. I. R. 1926 Mad. 755.

"The revenue assessed upon the estate or part of it"—The "part of an estate" means the *aliquot* part of an estate.—*Kally Prosonno v. Dino Nath*, 11 B. L. R. 56; 19 W. R. 434.

Where, on account of submersion of a *mahal*, it was neither attached nor advertised for sale, and the revenue assessed thereon was not referred to in the sale proceedings and the sale certificate contained no reference to it as the property sold, *held* that such a sale did not convey any right to the purchaser.—*Fida Husain v. Kutub Husain*, 7 A. 38 (5 A. 86 (F. B.) referred to).

An objection to the validity of a sale of revenue-paying land, that the revenue assessed had not been stated in the sale proclamation cannot be entertained for the first time in the Court of appeal.—*Macnaghten v. Mahabir*, 10 I. A. 25; 9 C. 656 (P. C.); 11 C. L. R. 494 (reversing 9 C. L. R. 184).

The sale proclamation should contain the statement as to the revenue assessed upon the estate and its omission is a material irregularity upon which the judgment-debtor can base an application for setting aside the sale if he could satisfy the other conditions required by the Code.—*Baliram v. Seth Narsingdass*, 75 I. C. 546 (P. C.): 45 M. L. J. 403: A. I. R. 1923 P. C. 93.

"Any incumbrance to which the property is liable."—Under this rule the Court will simply notify the incumbrance without deciding whether it is real or fictitious. The distinction between this rule and r. 63 pointed out.—*Shib Kunwar v. Sheo Prasad*, 23 A. 418: 3 A. L. J. 200. As to the difference between rr. 66 and 62, see notes to r. 62, *ante*.

Where in an execution proceeding, on an application of the mortgagee of the property required to be sold, the mortgage was, without any inquiry as to its genuineness, notified and the property was purchased by the decree-holder, held, that in a suit on that mortgage, the purchaser was not estopped from pleading that it was fictitious, unless there was on his part any declaration, act or omission debarring him from setting up the fictitiousness; *Jairaj Mal v. Radha Kishan*, 35 A. 257. 20 I. C. 182 (23 A. 418 followed).

Where it was merely proclaimed that a mortgage existed, the auction-purchaser cannot be obliged to discharge the incumbrance, if it appears that the document did not create any charge on the property purchased; *Ganesh Prasad v. Bisram*, 18 I. C. 461.

When a party to a suit having a charge or incumbrance on the property in suit ordered to be sold, fails to have it notified in the sale proclamation, he is estopped from subsequently setting up his lien against the auction-purchaser; *Manik Ram v. Ram Autar*, 27 I. C. 611 (22 B. 686 referred to).

Where the existence of certain incumbrances is notified, the purchaser is not estopped from showing the invalidity of the incumbrance; *Bhagwan v. Ahmad Jan*, 36 I. C. 732.

The absence of specification of the incumbrances coupled with the fact that the property is undervalued amounts to a material irregularity.—*Moti Lal v. Bhawani Kumari*, 6 C. W. N. 836.

It is the duty of the person applying for execution to disclose his own lien (which he must know of) in his application for sale, and the Court is to specify the same in the proclamation. A purchaser purchasing without notice of such incumbrance, purchases the property free of the mortgagee's lien.—*Ram Chandra v. Jairam*, 22 B. 686 (7 M. 107, and 12 B. 678, referred to). See also *Kasturi v. Venkatachalapathi*, 15 M. 412. See, however, *Dhondo v. Raoji*, 20 B. 290.

Where a decree-holder stated in his application under sub-rule (3) that the property to be sold was subject to a mortgage in his favour, but no mention of the mortgage was made in the sale-proclamation, held that the omission not being due to any fraud on his part, the decree-holder is not estopped against the auction-purchaser; 1 I. C. 763. But if he omitted to do so, he would be estopped from enforcing his mortgage; 46: 55 I. C. 189: 24 C. W. N. 269:

30 C. L. J. 496. But see *Dwarka v. Ufat*, 53 A. 631: 133 I. C. 803: 29 A. L. J. 398: A. I. R. 1931 All. 549, which held that if a subsequent mortgagee does not have his prior mortgage specifically mentioned in the sale-proclamation drawn up in execution of a decree passed for enforcement of a subsequent mortgage, it can be said that the prior mortgage is extinguished thereby or that the mortgagee's remedy is barred.

In a proclamation of sale in execution of a mortgage decree, it is most material that it should be known whether there is any incumbrance, prior or pious to the mortgage, on account of which the property is to be advertised for sale.—*Debendra Narain v. Ramtaran*, 30 C. 599, p. 606 (F. B.): 7 C. W. N. 766.

There is no objection to the sale in execution of a decree for sale on a mortgage "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person.—*Lalman v. Mohar Singh*, 29 A. 205: 3 A. L. J. 848: (1907) A. W. N. 18.

When property is sold subject to incumbrances specified in the sale-proclamation under this rule, the auction-purchaser purchases the property subject to these incumbrances: and if in a subsequent suit or proceeding, the specified incumbrances are declared invalid, the auction-purchaser cannot hold the property without making good the amount of the incumbrances. The decree-holder is also estopped from denying the truth of the representations made by him and must pay to the judgment-debtor the amount of the incumbrances represented by him to be subsisting.—*Inayat Singh v. Izzatunnissa Begam*, 27 A. 97 (F. B.) (reversed in *Izzatunnisa v. Kunwar Pertab*, 36 I. A. 203: 31 A. 583 (F. C.): 13 C. W. N. 1143: 10 C. L. J. 313: 3 I. C. 793; distinguished in *Shib Kunwar v. Sheo Prasad*, 28 A. 418).

Claims admitted by parties or established by a decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under this section (rule) only, and have not been made the subject of an order under this section (rule).—*Shantappa v. Subrao*, 18 B. 175 (F. B.).

Where a final decree contained no exemption regarding the occupancy rights of the plaintiff in the land sold, the validity of a sale held in pursuance of the decree would not be affected even by a subsequent correction of the decree.—*Chiraunji Lal v. Ishwar Das*, 123 I. C. 755: A. I. R. 1930 All. 578.

An arrear of rent due in respect of the property sought to be sold is to be regarded as an incumbrance in which the property is liable, and the omission to notify the arrears of rent due at the date of the issue of the proclamation has the effect of destroying the lien which the decree-holder has upon the tenure.—*Giribala Debta v. Rani Mina Kumari*, 5 C. W. N. 497 (10 C. 609, and 15 M. 412, referred to).

Where the taxes and other payments to which the land was subject was described as Rs. 50 in the proclamation, whereas really it ought to have been Rs. 53-8-2. Held, that the variation is so small that it could not have produced any serious injury to the judgment-debtor.—*Ambi Aiyar v. Sundaresa*, 110 I. C. 779: A. I. R. 1928 Mad. 823.

If a mortgage is merely notified and the property is not sold subject to the mortgage, the decree-holder or the purchaser is not estopped from questioning its validity.—*Roshan v. Lallu*, 44 A. 714: 68 I. C. 790: A. I. R. 1922 All. 443. But if the decree-holder fails to notify his own mortgage on the property, he is estopped thereafter to set up the mortgage against the auction-purchaser.—*Maung Kyin v. Ma Pwa*, 64 I. C. 953. If the mortgage turns out to be invalid, the benefit is taken by the purchaser and the judgment-debtor cannot claim refund of the amount alleged to have been due on the mortgage and the purchaser is free to contest the legality or validity of the mortgage when he is attacked by the mortgagee.—*Krishna Xisor v. Nagendrabala*, 34 C. L. J. 333.

**The amount to be recovered—Interest.**—The Court is entitled to specify in the sale-proclamation, and direct execution for, not only the sum due under the decree and interest to the date of the application for execution but also the further interest due from the date of the application to the date of the actual sale, though the latter is not expressly included in the application.—*Basanta v. Baikuntha*, 36 C. W. N. 404.

"Every other thing which the Court considers material," etc.—The proclamation shall specify as fairly and accurately as possible the property to be sold, the revenue assessed upon it, the incumbrances and every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property the Court is selling and he is purchasing.—*Ghulam Shahbir v. Dwarka*, 18 A. 163 (165).

In ascertaining the value, only the rents realizable from the tenants and not the *abwabs* should be taken into account.—*Shon Bhusan v. Ahmed Hossein*, 7 C. W. N. 439.

An arrear of rent due in respect of the property to be sold is to be regarded as one of the matters material for the purchaser to know.—*Giribala Debta v. Rani Mina Kumari*, 5 C. W. N. 497.

If the execution Court should have reason to believe that the property which was ordered to be sold, was an occupancy holding, it should enter the fact in the sale-proclamation as a warning to an intending purchaser that he might take nothing by his purchase.—*Basdeo Prasad v. Juthan Ram*, 27 A. 684 (F. B.): 2 A. L. J. 401: (1905) A. W. N. 138. There is no duty on the executing Court to insert in the sale-proclamation that the land to be sold belongs to an agricultural tribe.—*Dhannu Ram v. Umar*, 110 I. C. 337. It is a material circumstance for the bidders to know and one that can properly find a place in the sale-proclamation that the property to be sold in execution is the subject-matter of a pending suit by a defeated claimant (41 M. 985 dissented from).—*Venkataramagavamma v. Singarayya*, 34 L. W. 708: (1931) M. W. N. 1162: 61 M. L. J. 683.

Clause (c) of this section covers cases of puisne as well as prior incumbrances.—*Hari Kishen v. Gisborne & Co.*, 9 C. W. N. ccc (300).

**Value of the property.**—The rule does not say that the sale-proclamation shall specify the value of the property. Under the law it is not obligatory to put down in the sale-proclamation the value of the property.—*Mohammad Said Khan v. Mohammad Abdus Sami*, 138 I. C. 612: A. I. R. 1932



All. 664. It lays down that it shall state everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. The value of the property is no doubt a material fact for the purchaser to know, and a mis-statement or under-valuation may lead to serious consequences. Gross or deliberate under-valuation has been held to be a material irregularity. The rule therefore in effect seems to require that the value must be stated. See also proviso to r. 17 of this order. It has been held that the exact value of the property to be sold must be stated in the sale-proclamation as fairly and accurately as possible, inasmuch as it is a material fact for the purchaser to know and an under-statement of the value is a material irregularity; *Saadatmand Khan v. Phul Kuar*, 25 I. A. 146: 20 A. 412 (P. C.): 2 C. W. N. 550 (followed in *Sivadurga v. Rajmohan*, 15 C. W. N. 577; *Pran Singh v. Janardan*, 14 C. L. J. 541; and in *Sivasami v. Ratnasami*, 23 M. 568; relied upon in *Moti Lal v. Bhawani*, 6 C. W. N. 836, and in *Rajah Ramessur Proshad v. Rai Sham Krissen*, 8 C. W. N. 257). See also *Madarsah v. Palaniappa*, 23 M. 628, in which it has been held that the omission to state the Government tax payable is a material irregularity. In *Jashimuddin v. Manmohini*, A I R. 1922 Cal. 93: 70 I. C. 308, it has been held that the approximate value of land should be stated in the sale-proclamation but its omission is an irregularity which does not necessarily vitiate the sale unless it has a material effect upon the number of bidders and upon the price. See also *Madanlal v. Ripusudan*, 124 I. C. 250: A. I. R. 1930 Nag. 191. The cases have been explained in *Kashu Pershad v. Jamuna*, 31 C. 922: 8 C. W. N. 264, holding that the law does not require a Court to make an investigation on the question of valuation. See also *Thiruvengadaswamy v. Govindaswamy*, 51 M. 655: 27 L. W. 577: 109 I. C. 698: A. I. R. 1928 Mad. 503: 55 M. L. J. 363, where it has been held that the Court itself is under no obligation whatever to fix in the proclamation of sale its own valuation of the property to be sold (2 P. L. J. 130 and 4 P. L. J. 37 *disstd.*). But see *Lachiram v. Rameswar*, 127 I. C. 257: 52 C. L. J. 145: A. I. R. 1930 Cal. 781. In *Saurendra Mohan v. Hurrik Chand*, 12 C. W. N. 542, it has been held that it cannot be laid down generally that in no case should any enquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale proclamation (31 C. 922: 8 C. W. N. 264 commented on; doubted in 14 C. W. N. 40-n.). The Court must make an enquiry as to the value of the property where the judgment-debtor objects; *Lachman v. Ganga*, 11 C. L. J. 63-n. Before inserting the value of the property in the sale-proclamation it is desirable that the Court should hold an enquiry as regards the value. The enquiry need not be an elaborate one but there should be an enquiry if the Court finds that the value mentioned by the parties is not correct. *Semble*: the practice of evading responsibility which rests on the Court to fix the value should be condemned.—*Lachiram v. Rameswar*, 127 I. C. 257: 52 C. L. J. 145: A. I. R. 1930 Cal. 781. Except in exceptional cases where it is not possible to ascertain the value or where in the circumstances of the case the value need not be ascertained, the Court is bound to put a fair and accurate value in the proclamation. Where the valuation put by the parties was not satisfactory and it appeared that the approximate valuation could be otherwise ascertained, it was held that the Court should have determined the valuation by summary enquiry and inserted the same in the sale-proclamation (51 M. 655 disapproved).—*Pashupati Nath v. Bank of Behar*, 35 C. W. N. 907. It is only in exceptional cases where it would be a difficult, if not

impossible, task to estimate the value of the property concerned, that the Court would be justified in merely stating the two values given by the parties without giving its own estimate.—*Basanta v. Sylhet Loan Co.*, 36 C. W. N. 347. The enquiry under this rule is intended to be of a summary character; *Pran Singh v. Janardan*, 14 C. L. J. 541. Gross or deliberate under-valuation is a material irregularity; *Tekait Krishan v. Moti Chand*, 40 I. A. 140: 40 C. 635 (P. C.): 17 C. W. N. 637: 19 I. C. 296; *Sivadurga v. Rajmohan*, 15 C. W. N. 577. Where the gross under-valuation of properties in the sale-proclamation has the effect of deterring intending purchasers from bidding at the sale and offering a reasonable value, the sale should be set aside.—*Ambika v. Manikganj Loan Office*, 33 C. W. N. 845. The value of the property must be stated as fairly and accurately as possible. The Court ought not to enter in the sale-proclamation a statement that the property to be sold is valued by one person at a particular sum and by another at a larger sum; *Raghunath v. Hazari*, 37 I. C. 872 (F. B.): 2 P. L. J. 130. But see *Bejoy Singh Dudhuria v. Ashutosh*, 28 C. W. N. 552, where it has been held that a Court is justified in stating the valuation given by both parties instead of attempting itself to value the property when the property was one that it was most difficult to value accurately. See also *Debdendranath v. Radhakissen*, 58 C. 577: 132 I. C. 687: 35 C. W. N. 142: A. I. R. 1931 Cal. 520. If there is a wide difference between the values given by the two parties, the valuation as given by the judgment-debtor should also be stated in the sale-proclamation; *Basanta v. Baikuntha*, A. I. R. 1926 Cal. 610: 91 I. C. 819.

The insertion of any valuation in the sale-proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and is therefore wrong. A sale held under such circumstances can be set aside; *Damrupat Singh v. Rameswar Singh*, A. I. R. 1923 Pat. 445: (1923) P. 203.

The omission to note the value of the property in the proclamation of sale is a mere irregularity which does not vitiate the sale.—*Muhammad Abdulla v. Jamiat Rai*, 121 I. C. 369: A. I. R. 1930 Lab. 685; unless it is under the circumstances a material irregularity.—*Daulat v. Rahisa*, 53 C. 813: 131 I. C. 853. 53 C. L. J. 575: 35 C. W. N. 75: A. I. R. 1931 Cal. 490.

**Effect of an order under this rule.**—This rule imposes upon the Court the duty of stating as fairly and accurately as possible any encumbrances to which the property is liable, with any other things which it considers material for the purchasers to know in order to judge of the nature and value of the property. But an order passed by the Court in the course of such an enquiry is not conclusive as between the decree-holder or purchaser on the one hand and the holder of the encumbrance on the other; *Bhagwan Das v. Ahmad Jan*, 36 I. C. 732.

**Sub-rule (3).**—Application to be accompanied by a verified statement.—This rule has given effect to the practice that prevailed in the Madras Presidency and embodies the law laid down in *Srimati Giribala v. Srimati Rani Mina Kumari*, 5 C. W. N. 497 (502). An application for an order of sale accompanied by a duly verified statement required by sub-rule (3) is an absolute necessity and a condition precedent to the passing of an order for sale.—*Sunderabai v. Bapuna*, 116 I. C. 65: A. I. R. 1929 Nag. 305.

The omission in an application in execution for attachment of immoveable property to verify the inventory of the property sought to be attached is an irregularity only and does not vitiate the application.—*Nasirunnissa v. Ghafuruddin*, 28 A. 244 : (1905) A. W. N. 263 (22 A. 55 followed); *Vaidya v. Abdul Samad*, A. I. R. 1928 Nag 14 : 105 I. C. 335, the execution application for sale on a final mortgage decree cannot be said to be not in accordance with law only because it was not accompanied by the affidavit required by Or. XXI, r. 66 (3) and the certificate of the Sub-Registrar as regards the prior encumbrances. Such certificate and affidavit should be filed at a subsequent stage from the application for execution under Or. XXI, r. 11, and when such application is filed the Court should deal with it under Or. XXI, r. 17.—*Dambar Lal v. Chand Mal*, 139 I. C. 201 : 30 A. L. J. 578 : A. I. R. 1932 All. 484.

**Sub-rule (4)—Court may summon any person.**—On this point *Prinsep, J.*, points out the duty of the lower Courts and gives instructions for their guidance.—*Debendra Naran v. Ramtaran*, 30 C. 599 (607) (F. B.) : 7 C. W. N. 766 The enquiry under this rule is intended to be of a summary character; *Pran Singh v. Janardan*, 14 C. L. J. 541.

A claim set up in an investigation under this rule cannot be treated as a claim under r. 58, the latter having reference to claims to property under attachment.—*Bhiku Bal v. Khemchand*, 14 B. 369.

**Appeal.**—It has been held by the Calcutta High Court that an order under this rule determining the value of immoveable property is merely interlocutory and is not appealable as a decree; *Deoki Nandan v. Bansu*, 16 C. W. N. 124 : 14 C. L. J. 35 (approving *Sivagami v. Subrahmaniam*, 27 M. 259 (F. B.)); *Panch Dwar v. Mani Raut*, 16 C. W. N. 970; *Mahammad Eahasan v. Tara Prosanna*, 32 I. C. 548; *Sashi Kanta v. Fooljan Bewa*, 96 I. C. 567 : A. I. R. 1926 Cal. 1184. Though an order merely fixing the value of a property is not open to appeal but an order under r. 66 may in certain circumstances also amount to an order under S. 47, and in such cases it is appealable; *Devendra v. Kailash*, 29 C. W. N. 556 : 80 I. C. 861 : A. I. R. 1925 Cal. 318; *Basanta v. Baikuntha*, A. I. R. 1926 Cal. 610 : 91 I. C. 819; *Alimuddin v. Gobind Prasad*, A. I. R. 1927 : All. 208 : 99 I. C. 455. The Madras High Court, in *Sivagami v. Subrahmaniam*, 27 M. 259 (F. B.) and in *Ramanathan v. Venkatachelum*, 44 M. L. J. 599 : 72 I. C. 836 : A. I. R. 1923 Mad. 619, has held that an order under this rule determining the value of the property to be sold, the place where the sale is to take place, the lots in which it is to be sold and the amount for the recovery of which the sale is to take place, is not a judicial but an administrative order, and it does not therefore come within S. 47 and is not appealable. The same view has also been taken in *Lanka v. Lanka*, 46 M. L. J. 192 : 78 I. C. 829 : A. I. R. 1924 Mad. 527, that no appeal lies from an order directing the order in which the property should be sold. It has been held in some Madras cases that a decision as to the order in which the properties are to be put up for sale, if it affects the rights of the co-defendants, *inter se*, as for example where the interests of the owners of the items of the mortgaged properties will be seriously affected by the order, comes under S. 47 and is therefore appealable.—*Narasimha v. Subbarayudu*, 51 M. L. J. 135; *Vedaviasa v. Madura Hindu Labha*, 45 M. L. J. 478. See also *Meenakshisundaram v. Chokkalinga*, A. I. R. 1929 Mad. 506 : 56 M. L. J. 624 : 120 I. C. 849. The Allahabad High Court in *Ayudhia*.

*Prasad v. Gopi Nath*, 39 A. 415: 39 I. C. 578, also held that an order under this rule determining the value of property, is not appealable under S. 47, as it is not a judicial order. See also *Nathu Lal v. Yashodah*, 134 I. C. 833: A. I. R. 1932 All. 136: 29 A. L. J. 1084; *Muhammad Zakaria v. Kishan*, 48 A. 260: 92 I. C. 644: A. I. R. 1926 All. 268. The Patna High Court has also held in a recent case that an order of the Court determining any of the particulars to be stated in the sale-proclamation, is not a final order, and is not therefore appealable; *Mohit Narain v. Thakan*, 4 P. 731 (S. B.): 88 I. C. 332: A. I. R. 1925 Pat. 500. The same High Court held in two earlier cases that an order of the Court determining the value of the property was merely interlocutory and therefore not appealable; *Deokinandan v. Raja Dhakeswar*, 2 P. L. J. 13; *Saurendra v. Mritunjay*, 5 P. L. J. 270: 56 I. C. 452: (1920) P. 227. The Bombay High Court has also held the same.—*Krishnarao v. Krishnarao*, 52 B. 444: 111 I. C. 692: A. I. R. 1928 Bom. 245: 30 Bom. L. R. 679. See also *Mt. Indarani v. Bimla Prasad*, 6 O. W. N. 1055.

An order fixing the price of the property to be sold does not conclusively determine the right of parties and is hence not appealable as a decree under S. 2, C. P. Code; nor is such an order an appealable one.—*Ramanathan v. Somasundara*, 37 I. C. 897. But see *contra* in *Kanhsa Lal v. The Bank of Upper India Ltd.*, 49 I. C. 539, where it has been held that the order of the Court is a judicial order and hence appealable. The weight of authority however is against the latter view; see *Bejoy v. Dharendra*, 47 I. C. 512; *Deokinandan v. Raja Dhakeswar*, 2 P. L. J. 13; *Giridhari v. Altaf*, 46 I. C. 564; *N.O. Chatterji v. R. M. K. Karpan*, 36 I. C. 402; *Ajudhia Prasad v. Gopi Nath*, 39 A. 415: 39 I. C. 578; *Braja Sundar v. Sivarajan*, 59 I. C. 282; *Avudaimayagappa v. Sundaranandam*, 76 I. C. 173; *Rukmani v. Palaniappa*, (1928) M. W. N. 569: A. I. R. 1928 Mad. 1169: 114 I. C. 652.

Where after notice under this rule, the judgment-debtor put forward certain objections, which were summarily rejected, held that the decision was under S. 47 and appealable; (*per* Walsh, J.) *Shiam Lal v. Roshan*, 35 I. C. 230: 14 A. L. J. 363.

Section 298, C. P. Code, 1892, which was to the effect that "no Judge, etc., shall be answerable for an error in the proclamation, unless it has been committed dishonestly" has been omitted from the present Code. "The committee are of opinion that, having regard to the provisions of Act XVIII of 1850, the section may safely be omitted."—*Report of the Special Committee*.

Revision.—An order under this rule can be interfered with by the High Court in Revision under S. 107 of the Government of India Act, if not under S. 115 of the C. P. Code; *Raghunath v. Hazari*, 37 I. C. 872 (F. B.): 2 P. L. J. 130.

**67.** (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

[S. 289.]

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

[New.]

## COMMENTARY.

**Alterations.**—Sub-rule 3 is new. It has been framed to meet the conflicting decisions reported in 11 C. 74, 12 B. 368 and 12 C. W. N. 757, noted below.

**"Proclamation shall be made."**—See notes to rule 54 under the heading "Order shall be proclaimed."

Publication of a sale-proclamation upon the decree-holder's property at a distance of half a mile from the judgment-debtor's property, is a material irregularity in the publication of the sale.—*Jamini Mohan v. Chandra Kumar*, 6 C. W. N. 44.

Where it appeared that the sale notification had not been fixed up in the Collector's office as required by this section (i. e., rule), that no affidavit as to search having been made, and to incommbrances as required by r. 10, place on and not after the 30th day of the month, it also appeared that

the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities; held that there was no ground for setting aside the sale.—*Bandy Ali v. Madhub Chunder*, 8 C. 932.

A sale of revenue-paying land is not, *ipso facto*, void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by this section.—*Nana Kumar v. Golam Chunder*, 18 C. 422 (F. B.). (8 C. 932; 11 C. 74 and 658, referred to).

**Advertisement.**—It is right that the Court should permit any advertisement reasonably required which might have the effect of giving notice to all possible purchasers; *Rai Monindra v. Luchmeeswar*, 1 C. W. N. 415 (155). If an advertisement in the Calcutta Gazette describing the property differed from that in the schedule of attachment, it could not be relied on to validate the sale of the property which was not the property to which the attachment related; *Thakur Barmha v. Jiban Ram*, 41 I. A. 38; 41 C. 590 (P. C.); 18 C. W. N. 313; 26 M. L. J. 89; 21 I. C. 936.

**Sub-rule (3)—Division of property into lots.**—It was held under the old Code that when distinct properties are proclaimed for sale in one execution there should be a separate proclamation on each of them; *Tripura Sundari v. Durga Churn*, 11 C. 74. See also *Moulvi Abdul Kashem v. Benode*, 12 C. W. N. 757. It has been held in Bombay that where the property is divided into a number of small lots as a means of obtaining a better aggregate price, the law does not require that a separate proclamation should be made on each lot.—*Pedro v. Jalbhoy*, 12 B. 368. Sub-rule (3), which is new, aims at settling the difference of opinion which hitherto existed, and adopts in substance the view in 12 B. 368. It should be noted however that the rule speaks of proclamation *for* and not proclamation *on*.

If the property to be sold consists of several villages which are all close together it is not necessary to make proclamation in every village.—*Maharaj Bahadur v. P. C. Lal*, 6 P. 533 : 105 I. C. 639 : A. I. R. 1928 Pat. 25.

**68.** Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale.

[S. 290.]

### COMMENTARY.

**Proviso to rule 43.**—The proviso to rule 43 refers to properties which are subject to speedy and natural decay and to cases where the expense of keeping them is likely to exceed its value.

There is no rule enjoining any particular period that should elapse since the publication of the proclamation in a newspaper which a Court may direct under Or. XXI, r. 67, as there is in Or. XXI, r. 68 about the period which should elapse from the date on which the proclamation is fixed in the Court-house.—*Galstaun v. Syed Mahamad Hussain*, 36 C. W. N. 242.

**Sale in contravention of 30 days rule.**—The decisions are not unanimous as to whether a sale held in contravention of the rule is an illegality making the sale void or a mere irregularity. In the following cases the view has been taken that such a sale is an illegality vitiating the sale and is something more than a material irregularity to which r. 90 refers; *Bakhshi Nand v. Malak Chand*, 7 A. 289. See also *Jasoda v. Mathura*, 9 A. 511; *Sadhusaran v. Panchdeo*, 14 C. 1; *Ganga Prasad v. Jag Lal*, 11 A. 333; *Basharatulla v. Uma Churn*, 16 C. 791; and *Mohendro Narain v. Gopal Mondul*, 17 C. 769 (F. B.). In another set of cases it has been held that it is a material irregularity but its effect is not to make the sale a nullity without proof of substantial injury; *Tassaduk v. Ahmad Hussain*, 20 I. A. 176 : 21 C. 66 (P. C.); *Kokil Singh v. Edal*, 31 C. 385. See also notes to r. 90.

**Waiver of irregularities**—As to this, see notes to r. 90.

**69.** (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[S. 291.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 291, C. P. Code, 1882, with some modifications. The words "under this chapter" which occurred after "adjourn any sale," have been omitted. By the above omission this rule has been clearly made applicable to sales of mortgaged properties. Again the words "*thereupon the defendant's right to redeem and the security shall both be extinguished*," which occurred at the end of S. 89 of the T.P. Act (IV of 1882), have been omitted from rule 5 of Or. XXXIV (which corresponds to S. 89) in order to make this rule applicable to all sales of immoveable property. In this connection reference may be made to the Full Bench case reported in *Bibijan Bibi v. Sachi Bewah*, 31 C. 863 (F.B.) : 8 C. W. N. 694, which clearly explains the object of the omission. The words "other than a sale by the Collector," which occurred in the old section, have also been omitted on account of rule 70 which covers the exception.

**"Court."**—In execution of a decree passed by a Sub-Judge a sale was held by the Nazir of the District Judge : *held* that the District Judge had no jurisdiction to pass any order under this rule. — *Nobokishore v. Protap Chunder* 1. O. L. R. 534. An execution case was pending before a Sub-Judge, who postponed the sale for eight months on a letter from the District Judge : *held* it was entirely irregular, *Kali Charan v. Debendra*, 10 C. L. J. 456.

Unless the order of the Court is communicated to the accredited agent to stay his hands, he is bound to sell the property in execution and has a perfect right to do so. Where a sale, therefore, has taken place without communication of the order of stay, the execution sale is good and not a nullity (following 50 A. 41 and not following 12 A. 96). — *Lakshmi Chand v. Phul Chand*, 125 I. C. 53 : 11 L. L. J. 457 : A. I. R. 1930 Lab. 17.

**Any sale.**—This rule applies to sales under mortgage-decrees. See notes above under the heading, "Alterations."

**Adjournment after partial sale.**—The Court may adjourn the sale after the sale of the first two lots ; *Raja of Kalahasti v. Sri Raja Venkataramiah*, (1914) M. W. N. 873 : 26 I. C. 273.

**Discretion.**—Where a Judge is unable to attend the Court on account of illness, he is competent to postpone the sale. — *Megh Lall v. Shib Pershad*, 7 C. 34 : 8 C. L. R. 369.

The adjournment of a sale from time to time without sufficient ground is nothing more than a mere irregularity, and does not vitiate the sale—*Venkata v. Sama*, 14 M. 227. To adjourn an execution sale from time to time beyond the period of seven days, is not anything more than an irregularity—*Ramiah Thevan v. Athomanatha*, 117 I. C. 727 : A. I. R. 1929 Mad. 624.

Where an execution-sale is not conducted within the precincts of the Court-house the officer conducting it has a discretion to adjourn the sale to the next day.—*Babu Singh v. Gurbaksh Singh*, 107 I. C. 274 : A. I. R. 1928 Lah. 249.

A statutory duty is cast on the officer conducting the sale, that in the event of his adjourning the sale he must record his reasons for such adjournment.—*Gulab v. Raghurib*, 140 I. C. 499 : 30 A. L. J. 357 : A. I. R. 1932 All. 369.

Adjournment by bailiff—without the Court's permission is a mere irregularity, *Vaduganathan v. Foy*, 20 I. C. 192 : 6 Bom. L. T. 65.

Sale to be adjourned to a specified day and hour.—Where property was ordered to be sold at a fixed date but no hour had been fixed and it was sold at a very inadequate price, held that there had been a material irregularity causing substantial injury.—*Surno Moyee v. Dakhina Ranjan*, 24 C. 291 (21 C. 66 (P. C.), explained); *Jamini Mohan v. Chandra Kumar*, 6 C. W. N. 44; *Babu Ram v. Imanullah*, 49 A. 402 : 99 I. C. 926 : A. I. R. 1927 All. 241. In *Venkatasubbaraya v. Zamindar of Karvetinagar*, 20 M. 159, it has been held that, when a sale is adjourned under this rule, the provisions mentioned must be followed with exactitude. The sale should be adjourned to a specified day and hour and omission to specify the hour of sale is a material irregularity.—*Mahabir Pershad v. Dhanukdhari*, 31 C. 815 : 8 C. W. N. 686 (affirmed in 34 C. 709 (P. C.)) : 11 C. W. N. 739 : 6 C. L. J. 11 : 17 M. L. J. 353 : 9 Bom. L. R. 651; see also *Bhikari v. Rani Surja Mani*, 6 C. W. N. 48 (24 C. 291; 6 C. W. N. 44; 20 M. 159, *reft. to*); *Abdul Rauf v. Mt. Qamrunnissa*, 28 A. L. J. 1062 : 124 I. C. 721 : A. I. R. 1930 All. 542. When a sale is adjourned, but no day is specified to which it is adjourned, the sale is void; *Motahar v. Mohammad*, 40 C. L. J. 311 : 84 I. C. 700 : A. I. R. 1925 Cal. 201. When the sale was fixed on the 13th but was held on the 20th owing to the absence of the Judge, there was no contravention of the provisions of the rule. Even if there is any irregularity, the sale cannot be set aside without proof of substantial injury; *Rang Lal v. Ravaneshwar*, 38 I. A. 200 : 16 C. W. N. 1 (P. C.) : 14 C. L. J. 334 : 39 C. 26 : 12 I. C. 174 : 13 Bom. L. R. 823, but see *Hari Sadhan v. Shib Gopal*, 35 C. L. J. 140, where it was held that when a sale is adjourned to a certain date, but is held on a different date, the case is one of material irregularity in conducting the sale. Where a sale fixed at a certain hour on a certain date is adjourned, it is a reasonable inference to make that the sale is adjourned to the same hour on the new date, but it is better that the Courts strictly conform to the provisions of the section (i.e., rule)—*Ambi Aiyar v. Sundaresa Ayyar*, 110 I. C. 779 : A. I. R. 1929 Mad. 823.

A sale of land was, owing to the absence of bidders on the sale day, adjourned and held on the next day.—Held, that the sale was invalid, *Palani v. Sivalinga*, 8 M. 6.



It is the practice to place all properties intended for sale on a list and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property which is the consequence of such procedure is not an adjournment within this rule; *Lal Mohan v. Nunu*, 17 C. 152. A sale may thus be conducted from day to day for a period longer than seven days without any illegality or irregularity; *Pir Mohamad v. Moyandi*, 8 I. C. 564.

**Power to adjourn sale of mortgaged property.**—This rule will apply to a sale held in virtue of an order absolute for sale, passed under S. 89, T. P. Act (now Or. XXXIV, r. 5), although no power is given under that Act for postponement; *Raja Ram v. Chunni Lal*, 19 A. 205 (followed in *Misri Lal v. Mitthu Lal*, 28 A. 28 : (1905) A. W. N. 168). See also *Harjas Rai v. Rameshar*, 20 A. 354, where it has been held that this section (rule) must be taken to have modified S. 89 of Act IV of 1882, when the debt and costs are tendered to the officer conducting the sale, or when the amount of such debt and costs has been paid into Court that ordered the sale. See also *Vallabha Valiya v. Vedapurattu* 19 M. 40 (F. B.), p. 48; and *Bibijan v. Sachi Bewah*, 31 C. 863 (F. B.) : 8 C. W. N. 684 (25 M. 244; 25 B. 104; 19 A. 205; and 31 C. 373 followed). A Court has power under this rule to adjourn the sale of mortgaged property.—*Shyamkishan v. Sundar Koer*, 31 C. 373; *Bepin Behary v. Jotindra*, 14 C. W. N. 1019.

See notes under Order XXXIV, r. 5, and the cases noted thereunder.

**Issue of fresh proclamation when necessary.**—Where a sale in execution is postponed, it is necessary, in the absence of express agreement between the parties, to issue a fresh proclamation.—*Goopee Nath v. Roy IuchmEEPut*, 3 C. 542; 1 C. L. R. 349 (3 C. 544 referred to) (followed in *Kalytara v. Ramcoomar*, 7 C. 466; and explained in *Bonomali v. Woomesh*, 7 C. 730).

Where there was an adjournment of the sale, but the property was kept on hammer throughout from the 16th January to the 23th January in expectation of higher bids and on none of these dates did the bidding start afresh from the beginning, but only an attempt was made to obtain some higher bid; held that it was a continuous sale and the provisions of sub-rule (2) of r. 69, did not apply; *Murlidhar v. Nawab Saiyid Muhammad*, 6 P. 432: A. I. R. 1927 Pat. 312 : 104 I. C. 215.

When there is a series of short postponements of less than seven days each which, taken together in the aggregate amount to more than seven days, a fresh proclamation is necessary; *Jamini Mohan v. Chandra*, 6 C. W. N. 44 (11 C. 658; 24 C. 291 referred to). To adjourn an execution sale from time to time beyond the period of seven days is not anything more than an irregularity.—*Ramiah Thevan v. Athomanatha*, 117 I. C. 727 : A. I. R. 1929 Mad. 624.

When the stay of proceedings is removed, a fresh proclamation ought to be issued. If not issued again the judgment-debtor's remedy is to object and not to impeach the sale by a regular application; 34 I. A. 37 : 11 C. W. N. 393 (P. C.) : 5 J. 112 : 9 Bom. L. R. 83.

An omission to issue a fresh sale-proclamation after adjournment amounts to a material irregularity; *Bagal Chunder v. Rameshkur*, 18 C. 496; *Mati v. Pirthipal*, 25 I. C. 17; *Kashif Husain v. Ganga Bakhsh*; 2 Luck 490; 100 I. C. 787; A. I. R. 1928 Oudh 98.

A property may be kept under hammer for several days without an adjournment and a fresh proclamation is not necessary.—*Murlidhar v. Nawab Saiyid Muhammad* 6 P. 432; 104 I. C. 215; A. I. R. 1927 Pat. 312.

**Waiver.**—As to waiver; see notes to r. 90.

"Debts and costs."—These words in Cl. (3) could not be interpreted to mean the balance of the decree-debt and costs, which would remain, if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase money) were taken as completed by treating the whole of the purchase-money as actually paid up; *Raja of Kalahasti v. Sri Raja Venkataramiah*, (1914) M. W. N. 873; 26 I. C. 273.

**Tender**—An auction-purchaser of the properties is a representative of the judgment-debtor and he can tender the decretal amount, when the property is going to be sold in execution of a mortgage-decree.—*Radha Kishun v. Hem Chandra*, 11 C. W. N. 495 (26 C. 966; 4 C. W. N. 317 followed).

**Petition for postponement**—A petition for time to pay the decretal amount, signed by the judgment-debtor's pleader, constitutes sufficient acknowledgment of debt.—*Ram Coomar v. Jakur Ali*, 8 C. 716 (3 A. 247 followed) (followed in *Toree Mahomed v. Mabood*, 9 C. 730). See also *Norendra Nath v. Bhupendra Narain*, 23 C. 374, and *Trimbak v. Kashinath*, 22 B. 722.

**Withdrawal of bid.**—It is competent to a bidder at a Court sale to withdraw his bid. An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted by words or conduct; and a bidding at an auction is a mere offer which may be retracted before the hammer is down; *Agra Bank v. Hamlin*, 14 M. 235.

A sale is complete when it is knocked down to the bidder by the *Nazir*; *Rajendra v. Upendra*, 19 C. W. N. 633; 21 C. L. J. 174.

Where the decree-holder's bid was accepted but on his refusal to deposit the usual 25 p. c. an attempt was made to continue the sale, and no further bids being obtained, the auctioneer at the request of the parties closed the sale saying that if the Court so ordered, the sale would be held on a future day; held, that there was no adjournment of sale within the meaning of this rule and therefore it could not be contended that there was no sale.—*Fateh Muhammad v. Chuhan Mal*, A. I. R. 1928 Lah. 699; 115 I. C. 541.

**70.** Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

[S. 287, LAST PARA.]

## COMMENTARY.

**Applicability.**—As to execution of decrees by the Collector, see Ss. 68 to 73, Sch. III, and notes.

The Revenue Courts are Courts of civil jurisdiction within the meaning of the C. P. Code, in that their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a Court of civil jurisdiction.—*Ram Lochan v. Kumar Newaz*, 9 C. L. J. 125 (16 A. 496 *dissented from*; 9 C. 295 (P. C.), and 5 A. 406 *referred to*).

Where the sale was adjourned *sine die* but the same was continued the next day without any fresh proclamation, held that there was a mere irregularity in the procedure and that the sale was not vitiated.—*Kamakhya v. Shyam Lal*, 4 Luck. 635; 6 O. W. N. 226; 117 I. C. 471 · A. I. R. 1929 Oudh 235.

**71.** Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money. [S. 293.]

### COMMENTARY.

**Alteration.**—The words "or to the Collector or subordinate of the Collector as the case may be" have been added.

**Application of the rule**—The provisions of this rule extend to all sales, whether of moveable or of immoveable property, and also to re-sales made under rr 81, 85 and 86.—*Ramdhani v. Rajrani*, 7 C. 337; 9 C. L. R. 23 (*relied on in Rajendra v. Ram Charan*, 2 C. W. N. 411).

But the re-sale should only cover the property sold at the prior sale, and any substantial difference of description at the sale and re-sale in any of the matters required by r. 66 will disentitle the decree-holder to recover the deficiency of price under this rule; *Bajinath v. Moheep*, 16 C. 535; *Gangadas v. Bai Suraj*, 36 B. 329. "The reasonable construction to place on r. 71 is that the re-sale should be within a reasonable time after the first sale, and the property re-sold should be substantially the same, and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things, having regard either to the nature of the property, or the transactions in respect thereof having legal force at the date of sale, or was brought about by the first purchaser's default."—*Venkatachellamayya v. Nilakanta*, 41 M. 474; 43 I. C. 635 affirmed on appeal to the Privy Council in *Nilakanta v. Venkatachallam*, 48 M. L. J. 335 (P. C.); 86 I. C. 378; A. I. R. 1925 P. C. 61; 27 Bom. L. R. 806; 30 C. W. N. 268.

No deficiency of price can be claimed from the defaulting purchaser unless his bid has been finally accepted by the Court.—*Punjab National Bank Ltd. v. Sundar Singh*, 118 I. C. 901; A. I. R. 1929 Lah. 673.

**Defaulting purchaser liable for deficiency of price.**—A purchaser failing to pay the deposit of 25 per cent. as directed by r. 84 is a defaulting purchaser and liable to make good any deficiency of price which may happen on a re-sale and all expenses attending the same.—*Jachherbai v. Haribhai*, 5 B. 575; *Sita Ram v. Janki Ram*, 44 A. 266 (F. B.); 65 I. C. 813; A. I. R. 1922 All. 200. So also is a decree-holder purchaser when he fails to pay the poundage fee as laid down in the High Court Rules and Circular Orders.—*Madhu Sudan v. Purna*, 9 C. L. J. 115.

Before the defaulting purchaser can be made liable it must appear that the property which is the subject of the two sales is the same in every respect, and any substantial difference of description of a sale and re-sale will disentitle the decree-holder to recover the deficiency of price.—*Bajinath Sahai v. Moheep*, 16 C. 535. See also *Kali Kishore v. Guru Prosad*, 25 C. 99; 2 C. W. N. 408.

Where the first sale was irregular and void, the decree-holder is not entitled to claim against the first purchaser, compensation for the loss on the second sale.—*Amir Begum v. The Bank of Upper India Ltd.*, 30 A. 273; 5 A. L. J. 336 (5 A. 316 followed). Where on a re-sale on failure to deposit the balance of purchase-money there was a large deficiency, and it was found that the descriptions in both proclamations were inaccurate, the defaulting purchaser was not liable, *Gangadas v. Bai Suraj*, 14 Bom. L. R. 250; 14 I. C. 777.

A party purchasing in the character of an agent cannot be made liable for the deficiency, and in such a case proceedings must be taken upon the contract against the principal.—*Huree Ram v. Hur Pershad*, 20 W. R. 80. But see *Gangabattulla Kanthamma v. Manchiraju*, 78 I. C. 296; A. I. R. 1924 Mad. 476; 46 M. L. J. 134, where it has been held that a person who bids at a Court auction without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by his action in not completing the sale by depositing 25 per cent. of the purchase-money.

The decree-holder having purchased property through his agent repudiated the bid, and did not pay the deposit, and the property was re-sold on the following day, held that the judgment-debtor was entitled to recover deficiency of price from the decree-holder.—*Vallabhan v. Pangunni*, 12 M. 454.

**Sale of property by Receiver in insolvency—Failure of deposit of one-fourth of price—Re-sale—Deficiency of price—Purchaser ordered to make good the deficiency;** *Cheda Lal v. Lachman*, 39 A. 267; 15 A. L. J. 253 (36 A. 9 followed).

Where the decree-holder was guilty of fraud in that the sale-proclamation did not show the encumbrance in which the property was subject and the purchaser was misled thereby and after coming to know of it after depositing 25 per cent. of the purchase-money, refused to pay the balance and subsequently the decree-holder himself purchased the property at the re-sale, held, that under these circumstances the decree-holder could not apply for recovery of the deficiency of price.—*Bajranji Lal v. Ram Harakh*, 4 Luck. 684; 6 C. W. N. 407; 118 I. C. 833; A. I. R. 1929 Oudh 294.

added. The addition is in adoption of the principles laid down in 6 B. 570, 11 M. 356 and 5 M. 123, noted below.

"Holder of a decree."—An assignee of a decree under an oral assignment has no *locus standi* at all to apply for an execution of a decree, and it is not necessary for such an assignee to obtain leave to bid at a sale held in execution of a decree. An auction-purchaser is not a decree-holder within the meaning of this rule.—*Dakshina Mohan v. Basumati Debi*, 4 C. W. N. 474.

Permission of Court.—The holder of a decree is absolutely bound to have express permission from the Court before he can purchase the property; and whether the objection is taken and pressed or otherwise, a sale to him is invalid, unless he has got explicit permission.—*Rukhinee Bullubh v. Brojo Nath*, 5 C. 308. He ought not to be allowed to bid and purchase at a sale in execution of his decree, without an order of Court previously obtained upon notice to the judgment-debtor.—*Bandhu Roy v. Hanuman Singh*, 3 B. L. R. 320; 14 W. R. 406-note.

The Court can impose any condition it thinks fit on the permission granted to the decree-holder, viz., that his lowest bid should be the amount of the decree. Such order is valid and enforceable; *Raj Kuar v. Chunnoo*, 15 I. C. 898 (5 C. W. N. 265 followed). Where the permission is given on condition that he should purchase it in full satisfaction of the decree, the decree-holder must pay poundage as part of the costs of the execution of the decree.—*Mt. Purnama Devi v. Ram Prasad*, 27 A. L. J. 243; 118 I. C. 378; A. I. R. 1929 All. 266.

When a mortgagee decree-holder purchased the equity of redemption in contravention of the provisions of S. 99, T. P. Act, it should not be presumed under S. 114 of the Evidence Act, in the absence of evidence, that the Court granted leave to bid.—*Uttam v. Rajkrishna*, 47 C. 377 (F. B.); 24 C. W. N. 229; 31 C. L. J. 98.

Where the decree-holder filed a petition before the executing Court asking for permission to bid, but no order was passed on his petition and he was allowed to bid throughout the course of the sale; held that it can be taken that the Court gave permission to the decree-holder to bid; *Murkidhar v. Nawab Saiyid*, 6 P. 432; A. I. R. 1927 Pat. 312; 104 I. C. 215.

"Where a decree-holder purchases with permission."—When permission is given to a decree-holder to bid, he is bound to exercise the most scrupulous fairness; and if he or his agent dissuades others from purchasing, that of itself is a sufficient ground why the purchase should be set aside. Where a decree-holder was joint in family with the manager of an infant defendant and the defendant's property was to be sold in execution of the decree, held that the decree-holder ought not to be granted leave to purchase at the sale.—*Woopendro Nath v. Brojendronath*, 7 C. 346; 9 C. L. R. 263 (disapproved in *Mahomed Meera v. Savvasi*, 27 I. A. 17; 23 M. 227 (P. C.)); 4 C. W. N. 228; 2 Bom. L. R. 640).

Leave to bid puts the decree-holder in the same position as any other purchaser; *Mahomed Meera v. Savvasi*, 27 I. A. 17; 4 C. W. N. 228 (P. C.); 23 M. 227; 2 Bom. L. R. 640.

Where the leave to bid is obtained by the decree-holder by misrepresentation, the Court may refuse to confirm the sale; *Must. Janakbati v. Maharajadhiraj Rameshwar*, 1 P. 235: 69 I. C. 872: A. I. R 1922 Pat. 511.

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid becomes the purchaser, does not stand in a fiduciary position towards his mortgagor; therefore he is at liberty to take out further execution of any balance of the decree, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.—*Sheonath Doss v. Janki Prosad*, 16 C. 132 (11 C. 718 distinguished). See also *Mahabir Persad v. Macnaghten*, 16 I. A. 107: 16 C. 692 (P. C.); *Dakshina Mohan v. Basumati*, 4 C. W. N. 474; *Krishnasami Ayyar v. Janakiammal*, 18 M. 153; and *Gunga Persad v. Jawahir Singh*, 19 C. 4, where it has been held that the position of a mortgagee who has purchased the mortgaged property after obtaining leave to bid is like that of an independent purchaser, and he is only bound to give credit to the mortgagor for the actual amount of his bid.

In granting permission, the Court may attach conditions, and if the decree-holder purchases without fulfilling the conditions *in toto*, the Court has power to refuse to confirm the sale.—*Must. Janakbati v. Maharajadhiraj Rameshwar*, 1 P. 235 69 I. C. 872: A. I. R 1922 Pat. 511.

•• The amounts may be set off subject to S. 73.—If a decree-holder gets the permission without any qualification then the amount due on the mortgage may be set off. But it may be one of the terms on which the permission to bid is granted, that there should not be the right of set-off.—*Hazarimal v. Namdev*, 32 B. 379 10 Bom. L. R. 296. Whenever a decree-holder applies for a rateable distribution under S. 73 the Court is not competent to pass an order under Or. XXI, r 72 (2). In such a case the purchase-money for which the property was purchased must be regarded as assets realised by the executing Court.—*Rajani Kanta v. Surendra*, 129 I. C. 776: A. I. R 1930 Cal. 761: 52 C. L. J. 19.

This rule must be taken as subject to the provision of S. 73, so that the decree-holder, who has been permitted to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with the other competing decree-holder, and will not be allowed to set off the purchase-money against the amount due to him on his decree.—*Shrinivas v. Radhabai*, 6 B. 570.

Where permission has been granted by a Court to set-off the decretal amount against the purchase-money, another Court of a superior grade before whom execution against the same property is pending has no power under S. 63 to cancel the permission.—*Shidappa v. Gurusangaya*, 55 B. 473: 133 I. C. 817: 133 Bom. L. R. 537: A. I. R. 1931 Bom. 350. An order for set-off can be made under this rule only after the sale has taken place. An order granting such permission even before the sale takes place is futile and misleading.—*Navajbhaudu v. Jotaram*, 133 I. C. 737: 33 Bom. L. R. 503: A. I. R. 1931 Bom. 252.

This rule must be read with S. 73, and to give effect to both, the receipt to be given by the decree-holder, who has obtained leave to bid and has purchased the property, can only be accepted for so much of the judgment-debt as the assets applicable in its discharge may suffice to satisfy.—*Viraragava v. Varada*, 5 M. 123.

added. The addition is in adoption of the principles laid down in 6 B. 570, 11 M. 356 and 5 M. 123, noted below.

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This rule must be taken as subject to the provision of S. 73, so that the decree-holder, who has been permitted to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with the other competing decree-holder, and will not be allowed to set off the purchase-money against the amount due to him on his decree.—*Shrinivas v. Radhabai*, 6 B. 570

Where permission has been granted by a Court to set-off the decretal amount against the purchase-money, another Court of a superior grade before whom execution against the same property is pending has no power under S. 63 to cancel the permission.—*Shidappa v. Gurusanjaya*, 55 B. 473: 133 I. C. 817: 133 Bom. L. R. 537: A. I. R. 1931 Bom. 350. An order for set-off can be made under this rule only after the sale has taken place. An order granting such permission even before the sale takes place is futile and misleading.—*Navajbhavdu v. Jotaram*, 133 I. C. 737: 33 Bom. L. R. 503: A. I. R. 1931 Bom. 252.

This rule must be read with S. 73, and to give effect to both, the receipt to be given by the decree-holder, who has obtained leave to bid and has purchased the property, can only be accepted for so much of the judgment-debt as the assets applicable to its discharge may suffice to satisfy.—*Viraragava v. Varada*, 5 M. 123.



Permission given to a judgment-creditor to set-off the amount of purchase-money against the debt under his decree must be taken to be granted subject to the provisions of S. 73 and he may be compelled to refund the rateable amount by process in execution.—*Madden v. Chappani*, 11 M. 356.

*Held* that the fact of the set-off being allowed in exercise of the power given in this section instead of actual payment into Court did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors.—*Taponidj Hordanund v. Mathura Lal*, 12 C. 499.

If there are no other decree-holders entitled to claim rateable distribution under S. 73 either at the time of the sale or within 15 days thereafter, then the order to set-off completely works out as a payment on the date of the sale in cases where the amount of bid is less or equivalent to the amount of the decree, or 15 days after the date of the sale where the amount of bid is more than the amount of the decree as the case may be. Decree-holders coming long after cannot claim the benefit of S. 73 by applying to the Court asking the decree-holder to deposit the amount and then describing it as "receipt of assets" and praying for rateable distribution out of it.—*Ramaraju v. Lakshminah*, (1930) M. W. N. 568 : 130 I. C. 458 : A. I. R. 1931 Mad. 103.

The Patna High Court has, however, held that when another decree-holder applied for rateable distribution before the confirmation of sale to the first decree-holder, the Court had jurisdiction to order refund of the purchase-money which had been set-off and the order could be enforced by summary execution (*following* 11 M. 356; 49 I. C. 715).—*Bindeswari v. Kirtyanand*, 10 P. 830 : 133 I. C. 166 : 12 P. L. J. 477 : A. I. R. 1931 Pat. 359; *Ganga Ram v. Mukhtaram*, 134 I. C. 616 : 12 P. L. J. 639 : A. I. R. 1931 Pat. 405.

"By himself or through another person."—A purchase by the decree-holder's undivided son is presumably with joint funds and as such is the purchase of the decree-holder.—*Narayan v. Anaji*, 5 B. 130.

"The Court may, if it thinks fit, set aside the sale."—A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void; it is a good sale, unless and until set aside by the Court under the provisions of this rule.—*Javherbai v. Haribhai*, 5 B. 575; *Ganesh v. Gopal*, 41 B. 357 : 39 I. C. 3; *Paramasiva v. Krishna*, 14 M. 498; *Narayan v. Anaji*, 5 B. 130. In *Rai Radha Krishna v. Bisheshar*, 49 I. A. 312 : 1 P. 733 (P. C.) : 27 C. W. N. 294 : A. I. R. 1922 P. C. 336 : 67 I. C. 914, their Lordships of the Judicial Committee observed : "Upon the construction of this section it is evident that a purchase by a decree-holder is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder, who had been forced up in the same bidding to give a large sum of money, could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause being shown." Even if the decree-holder purchases

after refusal by the Court to grant permission, the sale is not a nullity nor void, but can be avoided by appropriate proceedings. Where a decree-holder purchases *benami* without the permission of the Court, it can be set aside even after confirmation of sale under rule 92; *Thathu v. Kondu*, 32 M. 243; 11 C. 231, *Chintamanrao v. Vithabai*, 11 B. 588; *Gopal v. Ram Lal*, 21 C. 554.

It is discretionary with the High Court to set aside an execution-sale at which the decree-holder has bid and purchased without first obtaining permission; and the Court will not interfere with the sale unless it can be shown that the judgment-debtor has suffered substantial injury arising from such irregularity.—*Mathura Das v. Nathuni Lal*, 11 C. 731 (referred to in *Gopal Chander v. Ram Lal*, 21 C. 554).

A decree-holder asked for, but was refused leave to bid at the sale, but notwithstanding such refusal, purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser, brought a suit for possession of the property. Held that the plaintiff had been guilty of an abuse of the process of the Court in buying the property *benami*, and that the sale therefore ought not to be enforced.—*Mahomed Gazeer v. Ram Lal*, 10 C. 757 (referred to in *Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265).

**Decree-holder purchasing without permission.**—The purchasing of the property by the decree-holder without permission is not void until it is set aside in the manner provided by sub-rule (3).—See *Ram Chandra v. Gajanan*, 44 B. 352; *Saradindu v. Gosta*, 27 C. W. N. 208; 37 C. L. J. 403; 75 I. C. 196. See also notes under rule 90, *post*, under heading "Effect of purchase by decree-holder without permission."

**Suit to set aside a purchase made without permission is barred by S. 47.**—A suit by the judgment-debtor against the decree-holder to have the sale set aside, on the ground that the purchase was made by him without the leave of the Court, is barred by S. 47.—*Sakharam*, 22 A. I. R. 1923 Lah.

fraud, and the property was purchased by a person who was not a party.—*Sakharam v. Damodar*, 9 B. 468; likewise, when the sale was brought about secretly and the purchasers were *benamdars* of the decree-holder.—*Durga v. Balwant Singh*, 23 A. 478 See also *Viraraghava v. Venkata*, 16 M. 287

A suit to set aside the sale must be brought within one year from the confirmation of the sale under Art. 12-A, Sch. I, Limitation Act.—*Chinnakannu v. Paramasiva*, A. I. R. 1927 Mad. 1135; 101 I. C. 89.

**Appeal.**—No appeal lies from an order passed under this section refusing to bid at a sale in execution of his decree. 3 C. 174; *Kn Tha Hnyin v. Ma Hnin*, 15

14 C. L. J. 241; 38 I. A. 126; 11 I. C. 545. But under Or. XLIII, r. 1 (j), an appeal lies from an order setting aside or refusing to set aside a sale under this rule.

There is no special appeal from an order refusing to set aside a sale, unless such order is made under Ss. 294, 312 or 313, C. P. Code, 1882.—*Durga Sundari v. Gorinda Chandra*, 10 C. 368. In *Bhagbut Lal v. Narku*

*Roy*, 21 C. 789, it has been held that no second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under this section:

**Limitation and step-in-aid of execution.**—An application by the decree-holder for leave to bid at the sale in execution of his decree is a "step-in-aid of execution" within the meaning of Art. 182 of the Limitation Act.—*Vinayakrao Gopal v. Vinayak Krishna*, 21 B. 331; *Bansi v. Sikree Mal*, 13 A. 211 and *Dalel Singh v. Umrao Singh*, 22 A. 399. *Contra* in *Raghunundun v. Kallydut*, 23 C. 690; and *Ananda Mohan v. Hara Sundari*, 23 C. 196.

**Rule 72-A.**—Order XXI, r. 72-A is not applicable to proceedings on the Original Side of the Bombay High Court. Where a mortgagee decree-holder obtained leave to bid and after purchasing the property himself and appropriating the sale-proceeds towards his debt, applied for a personal decree against the mortgagor for the balance of the debt, *held*, (1) that r. 72-A did not apply so as to prevent such a decree being passed and that the case was governed by the Original Side Rules; (2) that assuming the rule did apply there was nothing in the Court's order granting leave to bid or in the certificate of sale to indicate that the entire debt was to be wiped off by such sale and that consequently the mortgagee was entitled to a personal decree.—*Vrajlal v. Venkataswami*, 52 B. 459; 30 Bom. L. R. 402; 108 I. C. 794; A. I. R. 1928 Bom. 123.

**73.** No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold. [S. 292.]

Restriction on bidding or purchase by officers.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 292, C. P. Code, 1882., with some verbal alterations. The words "or other person" have been added after the word "officer"; and the words "at such sale" which occurred in the last sentence of the old section, after the words "the property sold," have been omitted, as unnecessary.

**"No officer or other person."**—Pleaders of parties to a suit are not debarred by this rule from purchasing property sold in execution of a decree.—*Alagirisami v. Ramanathan*, 10 M. 111; but when a pleader acted improperly a sale to him was set aside; *Subbarayudu v. Kotayya*, 15 M. 389 and *Aghore Nath v. Ram Churn*, 23 C. 805. A pleader who actually conducts an execution case must be looked upon as an officer of the Court or as a person who has a duty to perform in connection with the sale and is, therefore, disentitled under this rule from bidding, acquiring, or attempting to acquire, either directly or indirectly any interest in the property sold. If he does so, the sale is invalid.—*Sundarabai v. Bapuna*, 116 I. C. 65; A. I. R. 1929 Nag. 305. Where the decree-holder's pleader purchased the property in Court-sale, *held*, that his conduct might be a violation of certain rules such as r. 275 of the Oudh Civil Digest but that the sale was not rendered void on that ground. *Held* also, that r. 73 of Or. XXI had no application to such a case.—*Kamakhyia v. Shyam Lal*, 4 Luck. 635; 6 O. W. N. 226; 117 I. C. 471; A. I. R. 1929 Oudh 235. A pleader's clerk is not precluded from

hidding.—*Shiam Lal v. Girraj Kishore*, 49 A. 292 : 99 I. C. 443 : A. I. R. 1927 All. 76.

If at an execution sale the property is purchased by the decree-holder  
Or. XL, r. 1, O. P. C., without  
is void.—*Jiteswari v. Sudha  
Nugent*, (1908) 1 Ch. 546).

When a public officer purchases land *benami*, his representatives are debarred from claiming the benefit of the purchase.—*Sheo Narain v. Mata Prasad*, 27 A. 73 (22 A. 220 approved).

*Benami* purchase by a Government officer prohibited from acquiring land.—Suit for declaration of title against *benamdar* maintainable.—*Lobo v. Brito*, 21 M. 231.

Transfer of Property Act, S. 136.—Section 136 of the Transfer of Property Act (IV of 1882) provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions.—*Singarachari v. Sivabai*, 11 M. 498. See also *Rathnasami v. Subramanya*, 11 M. 56.

#### SALE OF MOVEABLE PROPERTY.

**74.** (1) Where the property to be sold is agricultural  
Sale of agricul- produce, the sale shall be held,—  
tural produce.

- (a) if such produce is a growing crop,  
on or near the land on which such crop has  
grown, or,  
(b) if such produce has been cut or gathered, at or near  
the threshing-floor or place for treading out grain  
or the like or fodder-stack on or in which it is  
deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and  
(b) the owner of the produce or a person authorised to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce. [New.]

#### COMMENTARY.

Addition.—This rule is new. There was no similar provision in the old Code.

**75. (1)** Where the property to be sold and the crop from its nature stored but has not yet been the sale shall be so fixed as to be made ready for storing before such day, and the sale shall not be held until the crop is cut or gathered and is ready for storing.

Special provisions relating to growing crops.

(2) Where the crop from its nature being stored, it may be sold before it is cut the purchaser shall be entitled to enter on the land all that is necessary for the purpose of tending and gathering it.

#### COMMENTARY.

**Addition.**—This rule is new ; but its provisions are contained in Ss. 129 and 131 of the Bengal Tenancy Act (VIII of 1886).

**Growing crops.**—The definition of the term "growing crops" is given in S. 2 (13).—See notes under that section. Under this rule growing crops were held to be immoveable property.—See notes.

**76.** Where the property to be sold is a share in a company or a share in a corporation, the court may, instead of directing the sale to be made by public auction, authorize the sale to be made by instrument or share through the company or corporation.

Negotiable instruments and shares in corporations.

#### COMMENTARY.

**Alterations.**—This rule corresponds to S. 296, but with verbal changes. The word "company" which occurred in the original has been omitted, and the word "corporation" has been omitted.

**Applicability.**—This rule comes within the exception beginning of r. 65 of this Order.

The sale of Government promissory notes through public auction is not obligatory.—*Luchmeeput*.

**77. (1)** Where moveable property is to be sold by public auction the price of each lot shall be fixed at the time of sale or as soon after the sale as possible by other person holding the

Sale by public auction.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner. [New.]

### COMMENTARY.

**Alterations.**—Sub-rules 1 and 2 correspond to S 297, C. P. Code, 1882, with some verbal changes. The word "*re-sold*" had been substituted for the word "*sold*" which occurred in the old Code.

Sub-rule (3) is new. It gives a right of pre-emption to the co-owner. It is similar to rule 88 of this Order.—*See* notes under rule 88.

"On payment of the purchase-money."—The provisions of this rule give the officer conducting a sale of moveable property a discretion to allow the purchase-money to be paid at a reasonable time after the sale has been made.—*Fareed Alum v Sheo Charun*, 4 N. W. P. H. C. R. 37.

The provisions of Or. XXI, r. 71, making a defaulting purchaser at a sale liable for any deficiency on a re-sale, apply to a re-sale held under this rule.—*Ramdhani v. Rajrani Koer*, 7 C. 337. 9 C. L. R. 23.

In the case of moveable property, the sale on payment of the purchase-money becomes absolute at once, but the sale can be set aside by a regular suit.—*Framji Besanji v. Hormasji*, 2 B. 258 (266)

**78.** No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. [S. 298.]

Irregularity not to vitiate sale, but any person injured may sue.

### COMMENTARY.

**No alteration.**—This section exactly corresponds to S. 298, C. P. Code, 1882.

**Moveable property.**—A money-decree is not moveable property within the meaning of this rule; *Maung Lun Bye v. Maung Po Nyun*, 1 R. 360: 76 I. C. 679: A. I. R. 1924 Rang. 21.

**Irregularity.**—There is no provision in the Code that sales of moveable properties shall in no case be set aside; but this section only provides that no irregularity in the sale of moveable properties under an execution shall vitiate the sale.—*Framji Besanji v. Hormasji*, 2 B. 258 (p. 266).

This section prohibits the setting aside of a sale of moveable property on the ground of irregularity in the publishing or conducting of it.—*Bajjnath*

v. *Benoyendra*, 6 C. W. N. 5. A sale of moveable property be automatically.—*Dharm Singh v. Firm of Ram Bheja*, 115 P. L. R. 421; *Ranji Lal v. Firm of Ramchand*, 119 I. C. 285.

A Judge is not required by law to give notice, at the time of the amount of the decree to be sold, and his omission to do constitute an irregularity in the sale entitling the plaintiff to sue under this section.—*Kassee Nauth v. Hulodhur*, 2 W. R. 60.

The law does not make any provision for the service of a sale on the judgment-debtor in person, or in the village in which the sale is made, and omission to do so is not an irregularity in affixing the sale.—*Romesh Chunder v. Jadob Chunder*, 6 W. R. Civ. Ref. 14.

Overstating the amount really due is not an irregularity which vitiates the sale.—*Chuttersing v. Dhurum*, 1 N. W. P. 1. But proclamation warrants a title, the injured person may sue to set aside the sale.—*Framji Bosanji v. Hormasji*, 2 B. 258.

A debt due to the judgment-debtor by a third party was not a ground for setting aside the sale, if the judgment-debtor died after issue of proclamation and before application to set aside the sale, held that the sale was valid notwithstanding omission to bring the legal representative of the judgment-debtor on record and should be set aside.—*Groves v. Administrator-General*, 22 M. 119.

A sale in execution of a decree transfers to the purchaser more than the rights and interests of the judgment-debtor at the time of the sale; therefore, the sale of the moveable property held by a third party in execution of a decree, is not a mere irregularity, but a nullity, and the owner of the property so sold is entitled to sue for its restoration or damages.—*Sham Sunder v. Raheen*, N. W. P. H. C. R. 252; *Mohanund v. Akial Mehalidar*, 9 W. R. 1.

In a sale of moveable property in execution of a decree, the warranty of title whatsoever; all that is sold is the right, title and interest of the judgment-debtor, and the real owner, if not the judgment-debtor, may bring a suit, to recover the moveable property or its value, against the judgment-debtor.—*Maung Pa v. Abdul Ganni*, 4 R. 202; A. I. R. 1926 1 97 I. C. 1029.

**Appeal.**—No appeal lies against an order confirming a sale of moveable or immovable properties.—*Dharm Singh v. Ram Bheja*, 115 30 P. L. R. 421.

**79. (1)** Where the property sold is moveable, and of which actual seizure has been made, the property shall be delivered to the purchaser. [

Delivery of moveable property, debts and shares.

(2) Where the property sold is immovable property in the possession of some other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser. [

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser. [S. 301.]

### COMMENTARY.

**Alterations.**—This rule embodies the provisions contained in Ss. 299, 300 and 301 of the C. P. Code, 1882 with some modifications.

In sub-rule (2), the words "in the possession of some person other than the judgment-debtors," have been substituted for the words "to which the judgment-debtor is entitled, subject to the possession of some other person," which occurred in S. 300 of the old Code.

Sub-rule (3) is almost similar to S. 301 of the C. P. Code, 1882, with some verbal changes only.

**Forms.**—For Forms of notices under this rule, see Appendix E, Forms 32, 33 and 34.

**Delivery shall be made by written order.**—In *Debendrakumar Mandal v. Ruplal Das*, 12 C. 546, it was held that no question having been raised as to the service of the order required by Cl. (3) the presumption is that this order was served.

The purchaser of an usufructuary mortgage-debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale certificate. He cannot apply for delivery of possession under r. 95 of Or. XXI, the mode of delivery contemplated in such a case being that prescribed by Or. XXI, r. 79 (3).—*Sinna Pillai v. Karuppatti*, (1932) M. W. N. 282 : A. I. R. 1932 Mad. 283.

**80. (1)** Where the execution of a document or the endorsement of the party in whose name a

Transfer of negotiable instruments and shares.

negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.



(2) Such execution or endorsement may be in the following form, namely:—

“A. B. by C. D., Judge of the Court of (or as the case may be), in a suit by E. F. against A. B.”

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself. [S. 302.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 302 of the C. P. Code, with some additions and alterations.

The important alterations are the additions of the word “or such officer as he may appoint in this behalf”; and of the words “such execution or endorsement shall have the same effect as an execution or endorsement by the party,” in sub-rule (1). The other changes introduced in this rule are of a verbal character.

As to execution of a deed of transfer of shares by the Court to the purchaser, see *Toolsee Das v. E. I. Ry. Co.*, 2 Ind. Jur. N. S. 133.

The rule is merely permissive and not obligatory, the whole rule is to the effect that if a particular result is desired the procedure prescribed should be followed. When a share of a company is sold in a Court-auction it is not necessary that the Court should execute a transfer before the purchaser can be entitled to such share.—*Mohideen v. Tinnevely*, (1928) M. W. N. 442 : 111 I. C. 225 : A. I. R. 1928 Mad. 571.

**81.** In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly. [S. 303.]

### COMMENTARY.

**No alteration.**—This rule exactly corresponds to S. 303 of the C. P. Code, 1882.

**Scope**—Under the Civil Procedure Code it is intended that the sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons must be shown for directing otherwise.—*Lakshmibai v. Santapa Retapa*, 13 B. 22.

### SALE OF IMMOVEABLE PROPERTY.

What Courts may order sales.

**82.** Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes. [S. 304.]

## COMMENTARY.

**No alteration.**—This rule exactly corresponds to S. 304, C. P. Code, 1882.

**Immoveable property.**—For the meaning of the words "*immoveable property*," see notes under S. 16.

**Court of Small Causes.**—Where a Court of Small Causes sells immoveable property, the purchaser acquires no title.—*Nattoo Meah v. Nund Rane*, 17 W. R. 309.

**83.** (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

Postponement of sale to enable judgment-debtor to raise amount of decree

(2) In such case the Court shall grant a certificate to the judgment-debtor authorising him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

[S. 305.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 305, C. P. Code, 1882. with some important additions and alterations.

In sub-rule (1), the words "*on such terms*" have been added after the words "order for sale."

In the first proviso, the words "*but save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72,*" have been added.

Clause (3) is new. It has been added adopting the principles laid down in 3 C. 335; 1 C. L. R. 295 and 31 C. 373. On this point there was a difference of opinion between the Calcutta and Bombay High Courts, the latter holding that Or. XXI, r. 83 was applicable to all sales of immoveable property including sales under the T. P. Act (IV of 1882). See 25 B. 104 and 26 B. 379. This sub-rule (3) has set at rest the above conflicting rulings by adopting the principle laid down in the above Calcutta case and it has overriden the Bombay rulings which are noted below.

**Scope of the rule.**—Order XXI, r. 83 contemplates a mortgage or lease or private sale only where "the amount of the decree can be thus provided for." A Court executing a decree can neither grant a certificate under this section nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full.—*Gurusami v. Venkatasami*, 14 M. 277. There should be a reasonable probability of the debt being discharged by the profits of the estate within a reasonably short period.—*Suhuj Narain v. Ram Pershad*, 21 W. R. 146.

**Sale of immoveable property.**—This section does not apply to a decree on a mortgage when the decree declares that a certain property is to be sold in satisfaction of the mortgage-debt.—*Wonda Khanum v. Rajroop Koer*, 3 C. 335; 1 C. L. R. 295. See also *Shyam Kishen v. Sundar Koer*, 31 C. 373; *Kora Lal v. Punjab National Bank*, 5 L. L. J. 67. But in *Krishnaji v. Mahadev*, 25 B. 104, it was held that this rule applied to all sales of immoveable property including sales held under the Transfer of Property Act (IV of 1882). See also *Danappa v. Yamnappa*, 26 B. 379; 4 Bom. L. R. 61.

But properties directed to be sold in execution of a decree for the enforcement of a mortgage or charge have now been excluded from the operation of this rule by Cl. (3) of this rule which has adopted the principle laid down in the above Calcutta cases.

"The amount of the decree may be raised."—No sale should be postponed and no certificate should be granted under sub-rule (2) unless the whole amount due on the decree can be raised by mortgage, lease or sale; *Gurusami v. Venkatasami*, 14 M. 277.

"May postpone the sale"—Postponement is a matter of discretion for the Court.—*Bishenmun v. Land Mortgage Bank*, 12 I. A. 7; 11 C. 244 (P. C.). It should exercise a reasonable discretion and should not postpone the sale unless a fair case is made out by the judgment-debtor.—*Kishen Coomaree v. Golab Coomaree*, 15 W. R. 477.

A Judge is not bound to allow a judgment-debtor a year's time to pay his decree, without the debtor assigning some good or sufficient reason for the delay, e.g., that the money due to the judgment-creditor could be raised equally well in some other way than by immediate sale, and that the creditor would not by that arrangement be put to loss.—*Ram Ruttan v. Land Mortgage Bank*, 17 W. R. 193.

A Court can postpone the sale for a reasonable period, if by sale, mortgage, or otherwise, the debt can be cleared off in six months.—*Mohini Mohun v. Ram Kant*, 15 W. R. 322. See also *Rednum v. Mahomed Amin Khan*, 5 M. H. O. R. 272; *Suhuj Narain v. Ram Pershad*, 21 W. R. 146; *Fuazooddeen v. Giraudh Singh*, 2 N. W. P. H. C. R. 1.

Where an application under this rule was refused and the sale took place, an application to set aside the sale is maintainable under S. 47 and r. 90.—*Enamuddin v. Abdul*, 5 I. C. 489.

"Authorizing him."—In authorizing a private sale under this rule, a Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interest of others in the property.—*Danappa v. Yamanappa*, 26 B. 379 : 4 Bom. L. R. 61.

"Notwithstanding anything contained in S. 64."—This is an enabling rule and qualifies the provisions contained in S. 64 ; on compliance with the conditions of this rule, a private alienation, notwithstanding S. 64, becomes absolute, not only against the claim of the decree-holder but against all claims enforceable under the attachment.—*Shivlingappa v. Chinnabappa*, 30 B. 337.

Confirmation of sale.—Decree of different Courts against same judgment-debtor.—Leave given by both Courts to the judgment-debtor to raise the amount by private sale under this rule. Confirmation of such sale by one Court. Held that as both the Courts had concurrent jurisdiction to confirm the sale, the confirmation by one Court was sufficient for the validity of the sale, and that application to another Court for confirmation was superfluous.—*Andannan v. Bhimrao*, 19 B. 539.

A private sale, by a judgment-debtor with the permission of the Court obtained under this rule but which had not been confirmed by the Court, did not convey to the vendor such title in the property as to entitle him to maintain a suit for possession of the property against another vendee.—*Srilal v. Bhillab Shankar*, 1882 A. W. N. 243.

Alienation by guardian of minor.—A mortgage by a minor's certificated guardian with the sanction of the Subordinate Judge under this rule, without the previous sanction of the District Court under Ss. 29 and 30 of the Guardian and Wards Act (VIII of 1890), is invalid.—*Dattaram v. Gungaram*, 23 B. 287.

A permission under this rule is not sufficient for a guardian who must have the sanction of the District Judge in spite of such permission.—*Sarju v. District Judge of Benares*, 31 A. 378 : 6 A. L. J. 491 : 2 I. C. 355. See also *Dwijendra v. Monorama*, 49 C. 911 : 36 C. L. J. 326 : A. I. R. 1922 Cal. 150.

Appeal.—No appeal lies against an order refusing to postpone a sale under this rule, but the party aggrieved may apply for revision of the order under S. 115, and the High Court may in a proper case quash the order ; *N. K. & Co. Chetty Firm v. Subraya*, 3 R. 132 : 89 I. C. 300. A. I. R. 1925 Rang. 271. No appeal lies against an order passed under this rule.—*Lachman v. Sunder*, 103 I. C. 524.

**84. (1)** On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be re-sold.

[S. 306.]

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule. [New.]

### COMMENTARY.

**Alterations.**—Sub-rule (1) of this rule corresponds to S. 306, C. P. Code, 1882, with some modifications.

The words "under this chapter" which occurred in the old section after the words "immoveable property" have been omitted; the words "or other person" have been added after the words "to the officer"; and the word "re-sold" has been substituted for the words "he put up again and sold" which occurred in the old section.

Sub-rule (2) is new, and it has been added to meet the case of *Gopal Singh v. Roy Bunwaree Lall*, 5 C. L. R. 181, where it was held that a decree-holder buying with permission and desiring to set-off his purchase-money against the amount of the decree is not exempt from the necessity of making a deposit of 25 per cent. Under this sub-rule (2), the Court may dispense with the requirements of sub-rule (1), where the decree-holder obtains permission to bid under r. 72.

In rr. 77 and 84 express reference has been made to a *re-sale* so as to make it clear that the default mentioned in those rules will attract the consequence indicated in r. 71. In this connection reference may be made to *Ramdhani v. Rajrani*, 7 C. 337: 9 C. L. R. 23.—*See the Report of the Special Committee.*

"Declared to be the purchaser."—An execution sale is not complete until the presiding officer has accepted the bid and declared the purchaser.—*Jai Bahadar v. Matukdhari*, 2 P. 548: 76 I. C. 113: A. I. R. 1923 Pat. 525. So a person who has not been so declared by the Court, but whose bid has been accepted by the fall of the hammer and who fails to deposit 25 per cent. of the purchase-money, cannot be made liable for the difference in price when the property is sold immediately after. Till then the bidder can revoke the offer and the Court may refuse to accept the highest bid which is merely a conditional offer.—*Afazuddin v. Howell*, 6 R. 609: 114 I. C. 522: A. I. R. 1929 Rang. 12. *See also Punjab National Bank v. Sundar Singh*, 118 I. C. 901: A. I. R. 1929 Lah. 673. But 6 R. 409 has been overruled by the Full Bench decision in *Mahomed Yacoob v. P. L. R. M. Firm*, 9 R. 608: 135 I. C. 651: A. I. R. 1932 Rang. 17, which has held that as soon as the bid of the highest bidder is accepted by the officer conducting the sale, the sale is effected and the purchaser has no right to withdraw his bid.

"In default of such deposit."—The officer conducting the sale cannot insist upon a deposit being made before acceptance of a bidding; but if it appears that persons without means have been put forward to make sham biddings and to fraudulently frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid.—*Rajah Muhesh Narain v. Kishanund*, 9 M. I. A. 328.

**Failure to deposit, whether a "material irregularity."**—It was held by the Allahabad High Court in *Intizam Ali v. Narain Singh*, 5 A. 316: that if a deposit of 25 per cent. is not made immediately the sale is

altogether void. This was followed in *Amir Begam v. The Bank of Upper India*, 30 A. 273, but a Full Bench of the Allahabad High Court has held that these rulings are no longer applicable to the law as defined in the present Code.—*Sita Ram v. Janaki Ram*, 44 A. 266 (F. B.) : 65 I. C. 813 : A. I. R. 1922 All. 200. The High Court of Calcutta has held that failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make the deposit of 25 per cent. immediately under this rule, constitutes only a "material irregularity" in conducting the sale, which would render the sale voidable if substantial injury has been caused by reason of such irregularity.—*Blum Singh v. Sarwan Singh*, 16 C. 33. The same view has been taken by the High Court of Lahore in *Behari Lal v. Ram Chand*, 110 I. C. 773. In *Venkata v. Sama*, 14 M. 227, the High Court of Madras has held that any delay in making the deposit under r. 84 is not more than a mere irregularity and does not vitiate the sale. See also *Raman Chetty v. Olagappa Chetty*, 3 L. B. R. 225. But if the balance of the purchase money is not paid, there is no sale under this rule.—*Munshi Mahomed Ali v. Kibria*, 15 C. W. N. 350.

**Sale when complete**—The function of a Nazir or other officer appointed to conduct an auction-sale is of a ministerial character. If he conducts it in the presence of the presiding officer, and the latter forthwith declares under Or. XXI, r. 64 who the purchaser is and signs the formal order, the sale is complete. If it is not held in his presence, it can be completed only by his order closing the bid or an order accepting the bid under Or. XXI, r. 84. Where in anticipation of sanction, the Nazir accepts the deposit required from the highest bidder there is only in law an offer and it is open to the Court to resume the auction; *Jaiadhar Jha v. Matukdhari Jha*, 3 P. 548 : 76 I. C. 113 : A. I. R. 1923 Pat. 525. The sale was ordered to take place in the precincts of the Court on the 4th and 5th May, 1931. A report was called for on the 7th May, 1931 and the application objecting to the sale was filed by the judgment-debtor on the 5th of June, 1931 : held, that the sale was not complete on the 5th May, and that the application was within time.—*Jetha Mal v. Punjab and Sind Bank Ltd.*, 138 I. C. 86 : A. I. R. 1932 Lah. 525.

The mere making of the last bid does not conclude the sale; it is necessary for the conclusion of the sale that the officer conducting it should accept the final bid, make a declaration as to who is the purchaser and also order him to pay the deposit under this rule.—*Munshi Lal v. Ram Narain*, 35 A. 65.

"Where the decree-holder is the purchaser."—Soh-rolé (2) is new. It empowers the Court to dispense with the 25 per cent. deposit when the decree-holder is the auction-purchaser. This en-rolé does not require the making of an express order exempting the decree-holder from the deposit of 25 per cent. of the amount of the purchase-money; the permission under Or. XXI, r. 72 impliedly dispenses with such deposit.—*Nur Din v. Bulaqi Mal*, 131 I. C. 237 : A. I. R. 1931 Lah. 78; *Mathra Das v. Brij Rani*, 116 I. C. 212 : A. I. R. 1929 Lah. 492.

"In default of such deposit."—A decree-holder or other person who purchases property at a Court-sale and fails to pay the deposit (25 per cent.) directed to be paid under this rule is a defaulting purchaser within the

meaning of rule 71 and liable, as such, to make good any deficiency of price happening on a re-sale and all expenses attending the same.—*Javherbhai v. Haribhai*, 5 B. 575. See also *Vallabhan v. Pangunni*, 12 M. 454.

The provisions of Or. XXI, r. 71 for making a defaulting purchaser liable for any deficiency on a re-sale, extends to all sales, whether of moveable or immovable property, and also to re-sales held under Or. XXI, rr. 77, 84 and 86.—*Ramdhan v. Rajrani*, 7 C. 337 : 9 C. L. R. 23. See also *Rajendra Nath v. Ram Charan*, 2 C. W. N. 411, where it has also been held that Or. XXI, r. 87 does not apply to a case in which the property is put up again and sold forthwith under this rule.

In case of any irregularity or misrepresentation by the auctioneer in conducting the sale, the officer conducting the sale instead of proceeding under this rule should refer the matter to the Court, when it appears to him that the bidder has been misled by such misrepresentation.—*Kala Mea v. Harperink*, 36 C. 323 (P. C.) : 9 C. L. J. 165 : 13 C. W. N. 249.

Where a decree-holder, having bid for the property, failed to pay the poundage fee in the manner required by the High Court rules, and the property was again put up for sale. Held, that r. 71 applied, and not rr. 84 and 86.—*Madhu Sudan v. Purna Chandra*, 9 C. L. J. 115.

In the absence of proof of substantial injury to the judgment-debtor, an auction-purchaser's omission to deposit the 25 per cent. in Court is a mere irregularity and does not vitiate the sale.—*Inaitulla v. The Punjab National Bank Ltd.*, 67 I. C. 427. It is not open to the Court to extend time for payment, but still when the Court extends time and the sale is confirmed it cannot be set aside merely on the ground of the irregularity.—*Varankkot v. Vykunda*, 69 I. C. 1001 : 43 M. L. J. 477 : A. I. R. 1923 Mad. 48.

"Forthwith."—The word "forthwith" shows that the re-sale is a continuation of the original sale and no adjournment is therefore allowable.—*Bhim Singh v. Sarwan Singh*, 16 C. 33, 38; *Hari Singh v. Chaudhri Sanwan*, A. I. R. 1929 Lah. 744, *Babu Singh v. Gurbakhsh*, 107 I. C. 274 : A. I. R. 1928 Lah. 249. But see *Vallabhan v. Pangunni*, 12 M. 454, where it was held it was a re-sale for the purposes of r. 71. See also *Hanumayamma v. Ankamma*, 53 M. 900 : 127 I. C. 303 (1930) M. W. N. 714 : A. I. R. 1930 Mad. 761 : 59 M. L. J. 267 (F. B.), where it has been held that the word "forthwith" means "as expeditiously as circumstances permit," in other words within "such time as appears to be reasonably early having regard to all the circumstances"; so where after the default of a purchaser a decree was issued and the re-sale was held 2 . . . that under these circumstances the re . . . held "forthwith" and the purchaser liable to make good the deficiency on re-sale.

An officer conducting a second sale under this rule is not bound to commence from the next highest bid below that made by the defaulter. He may do so if the next higher bidder is willing to abide by his bid, otherwise he should commence the sale *de novo*.—*Gour Mookh v. Lalla Gour*, 1 W. R. Mis. 11.

An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted by words and conduct and a bidding at an auction is a mere offer which may be retracted before the hammer is down.—*Agra Bank v. Hamlin*, 14 M. 235.

**85.** The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property : [S. 307.]

Time of payment  
to full of purchase-  
money.

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72. [New.]

### COMMENTARY.

**Alteration.**—The first para. of this rule corresponds to S. 307, C. P. Code, 1892, with some alterations and omissions. The words "*exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day*" which occurred in the old section, have been omitted; and the word "*from*" has been substituted for the word "*after*" which occurred in the old Code. The object of substituting the word "*from*" for the word "*after*" will be clearly understood on reference to S. 9 of the General Clauses Act X of 1897.

The reason for the omission of the words "*exclusive.....fifteenth day,*" which occurred in the old Code, is that there is already a codified law on this point, in S. 10 of the General Clauses Act X of 1897. The omission has been made adopting the law as laid down in *Surendra Narayan v. Souravini*, 10 C. W. N. 535 : 3 C. L. J. 339, in which all the cases on the point have been referred to and discussed.

"**Shall be paid.**"—The provisions of this rule are imperative, and must be given effect to. On default by the purchaser to deposit the purchase-money within 15 days of the sale, the deposit of 25 per cent. must be forfeited, notwithstanding that the decree-holder and the judgment-debtor do not ask for a re-sale but consent to the original sale being allowed to stand.—*Sambasiva Ayyar v. Vyadinadasami*, 25 M. 535. See also *Mathura v. Gauri Shankar*, 32 A. 380. The defaulting purchaser is answerable for any loss occasioned by re-sale.—*Javherbai v. Haribhai*, 5 R. 575; *Ramdhani v. Rajrani*, 7 C. 387 : 9 C. L. R. 23; *Vallabhan v. Pangunni*, 12 M. 454.

**Time-limit for the payment of the purchase-money.**—In order to satisfy the requirements of this rule it is necessary that the money should reach the Court within the time allowed, viz., before the closing of the Court on the 15th day. Section 148 does not authorise the Court to enlarge the period fixed by this rule for the payment of the balance of the purchase-money because the period is fixed by the statute and is not fixed or granted by the Court.—*Kalipada v. Basanta*, 35 C. W. N. 877.

Under the rules of the High Court, dated 21st June, 1892, payment into the Government Treasury is equivalent to payment into Court for the



purpose of this section (i.e., this rule).—*Srinivasa v. Malayacha*, 7 M. 121. But payment by the purchaser in the Post Office within time is not payment, because the Post Office is not the agent of the Court.—*Ram Chandra v. Subrao*, 22 B. 415.

When an order has been made for payment of money in a suit on a certain date, and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.—*Aravamudu v. Samiyappa*, 21 M. 385; *Peary Mohun v. Anunda Charan*, 18 C. 631; *Surendra Narayan v. Souravini*, 3 C. L. J. 339; 10 C. W. N. 535; *Sunderabai v. Bapuna*, 116 I. C. 65; A. I. R. 1929 Nag. 305. See also *Bejoy Singh v. Kirtyanand*, 13 P. L. T. 559. In *Motiram v. Bhivraj*, 20 B. 745, it has been held that the time during which a Court is closed for the vacation, is not a holiday within the meaning of this rule. Days on which the office is open and the purchase-money for property bought at a Court-sale could have been paid are office days.

Where the purchaser at a Registrar's sale is out of time in paying the balance of the purchase-money into Court, the practice of the Original Side of the Calcutta High Court is that payment of interest follows as a matter of course.—*Kanyelall v. Shama Churn*, 21 C. 566.

Time for paying balance of purchase-money may be extended with the consent of the parties concerned.—Time can be extended for payment of the balance of the purchase-money with the consent of the parties concerned; *Radha Kishan v. Hari Singh*, 100 I. C. 800; A. I. R. 1927 Lah. 337. If it be extended without their consent, the case is one of "material irregularity" within the meaning of Or. XXI, r. 90; *Varankhot v. Vykunda*, 43 M. L. J. 477; 69 I. C. 1001; A. I. R. 1923 Mad. 48; *Nathu Mal v. Malawa Mal*, 122 I. C. 561; A. I. R. 1931 Lah. 15. The effect of the consent is to waive the irregularity and the original sale must be held to be a re-sale.—*Kalpada v. Basanta*, 35 C. W. N. 877.

**Proviso.**—The proviso is new. The effect of the order for set-off is that the whole amount of the bid minus the poundage expenses should be set-off against the decree amount and nobody should look forward for payment either on the date of the sale or fifteen days thereafter. But if the amount of the bid is far larger than the decree amount, then though the decree-holder may be excused from depositing the 25 per cent. at the date of the sale, he can pay the same within 15 days thereafter. In such a case Or. XXI, r. 85 operates. But in a case where the amount of the bid is less or equal there is no scope for looking forward for payment under r. 85. In such circumstances the whole of the set-off must be deemed to have been received or realised *eo instanti* the sale is made.—*Ramaraju v. Lakshmiah*, (1930) M. W. N. 568; 130 I. C. 458; A. I. R. 1931 Mad. 103. There is no provision for a second sale on the ground that the decree-holder has set off the purchase-money against the bid to pay out of his own pocket money for rateable distribution to the other decree-holders, a contingency not expected by him when he applied for permission.—*Navajbhedu v. Totaram*, 33 Bom. L. R. 503; A. I. R. 1931 Bom. 252; 133 I. C. 737.

**86.** In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. [S. 303.]

Procedure in default of payment.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 303, C. P. Code, 1882 with an important alteration.

"May be forfeited to the Government."—The words "*may, if the Court thinks fit*" have been substituted for the word "*shall*" which occurred in the old section. The above change has been introduced to override the case in *Sambasiva Ayyar v Vydinadasami*, 25 M. 535, in which it was held that the provisions of this section (rule) as regards forfeiture were imperative. But by the present rule the Court according to the circumstances of each case, can exercise its discretion with regard to forfeiture.

"The committee have altered this rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case. The rule as it stands at present has caused great hardship in certain circumstances, *vide* the case of *Sambasiva Ayyar v. Vydinadasami*, 25 M. 535."—*See the Report of the Special Committee.*

On default of payment within the period mentioned in r. 85, the Court is not bound to order the property to be re-sold. It has a discretion to do so or not, the expression "*may, if the Court thinks fit,*" being substituted in place of the old word "*shall.*"—*Basawan v. Anpurna*, A. I. R. 1926 All. 509.

The law casts an imperative duty on the Court to have the property re-sold and to recover the balance from the defaulting auction-purchaser who may be the decree-holder. There is nothing in law to justify the view that re-sale should not take place unless the Court is moved by the decree-holder; any one who is interested in having the property re-sold can move the Court to do what is its duty.—*Chitar Singh v. Lachmi Narain*, 139 I. C. 103: 30 A. L. J. 501; A. I. R. 1932 All. 392.

"The defaulting purchaser shall forfeit all claim to the property."—When A and B both apply to purchase a property at an auction-sale in a certain proportion agreeing to pay the price also in that proportion and do actually deposit the 25 per cent. of the purchase-money in proportion to their shares, but at the time of paying the balance of the purchase-money, A is unable or unwilling to pay and B pays the whole balance amount, but immediately after the sale-certificate is issued, A comes forward and claims to purchase his share of the property, payment by B must be decreed under r. 85 to be also on behalf of A, and A is entitled to purchase his share; *Bhabataran v. Durgeshnandini*, A. I. R. 1926 Cal. 719.

**Applicability of this rule to the Original Side of the High Court.**—The provisions of r. 86 do not apply to a sale in execution of a decree of the Original Side of a Chartered High Court to enforce a deed of charge.

In such a case the deposit of 25 per cent. (less the Registrar's commission) is forfeited to the decree-holder in part payment of the mortgage debt.—*Gowal Das v. Luchmi Chand*, 57 C. 106; A. I. R. 1930 Cal. 324 (distinguishing 48 C. 69).

**Appeal.**—An appeal lay from an order passed upon an application under this rule to make a defaulting purchaser liable for the loss sustained by a re-sale.—*Ram Dial v. Ram Das*, 1 A. 181 (F. B.); *Kali Kishore v. Guru Prasad*, 2 C. W. N. 408; *Baij Nath Sahai v. Moheep Narain*, 16 C. 535; and *Rajendra Nath v. Ram Charan*, 2 C. W. N. 411. See also *Sitaram v. Jankiram*, 44 A. 266 (F. B.); 65 I. C. 813; A. I. R. 1922 All. 200. But see *Deoki Nandan v. Tapesri Lal*, 14 A. 201 (F. B.); and *Ilahi Bakhsh v. Baij Nath*, 13 A. 569.

**87.** Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale. [S. 309.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 309, C. P. Code, 1882; with this modification only that the word "*proclamation*" has been substituted for the word "*notification*" which occurred in the old section.

**Fresh proclamation.**—A fresh proclamation is only necessary where a re-sale takes place in default of payment of the full amount of the purchase-money within the time-limit prescribed by r. 85.

This rule does not apply to a case in which the property is put up again, and sold forthwith under r. 84 for default of payment of 25 per cent. deposit.—*Rajendra Nath v. Ram Charan*, 2 C. W. N. 411; *Vallabhan v. Pangunni*, 12 M. 454.

**88.** Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer. [S. 310.]

### COMMENTARY.

**Alteration.**—This rule corresponds to S. 310, C. P. Code, 1882, with some alterations. The words "*respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer*," have been substituted for the words "*respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer*," which occurred in the old section. No other change has been made. This rule is similar to sub-rule (3) of rule 77, which relates to the sale of moveable property.

**Share of undivided immoveable property.**—The provisions of S. 310, C. P. Code, 1882 (Or. XXI, r. 88) are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights and interests of a mortgagee in such a share.—*Jairam v. Beni Prasad*, 3 A. 15.

**Co-sharer.**—The requirements of this rule are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder. It contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids.—*Hira v. Unas Ali*, 3 A. 827 (2 A. 850 followed). See also *Sri Kishen v. Debi Ram*, (1888) A. W. N. 208.

A co-sharer whose bid was not accepted, the sale being confirmed in favour of another bidder, has no *locus standi* under Or. XXI, r. 90, to have the sale set aside.—*Bisheshar Kuar v. Hari Singh*, 5 A. 42.

Where a co-sharer asserted his right of pre-emption in a sale of a share of an undivided immoveable property by offering the same amount as the person preceding him did bid, there was sufficient compliance with the requirements of Or. XXI, r. 88.—*Iqbal Husain v. Ejaz Husain*, 36 I. C. 654 (2 A. 850; 3 A. 827 referred to).

A title to a share in undivided immoveable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre-emption under this rule.—*Abdul Ghafur v. Ghulam Husain*, 35 A. 296.

**Appeal.**—Order XLIII, r. 1 provides for no appeal against an order passed under this rule.

A share of an undivided immoveable property was put up for sale in execution and was knocked down to a stranger. Before it was knocked down to him, the decree-holder who was a co-sharer of such share, after obtaining permission to bid, bid the same sum as that for which it was knocked down to the stranger claiming the right of pre-emption. The Court confirmed the sale in favour of the decree-holder. Held that an appeal would not lie against the order confirming the sale.—*Muniruddin Khan v. Abdul Rahim*, 3 A. 674.

No appeal lies from an order refusing to restore an application under this rule which had been dismissed for default in appearance.—*Ghaseti Bibi v. Abdul Samad*, 29 A. 596.

**89. (1)** Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his deposit-

Application to  
set aside sale on  
deposit.

ing in Court,—

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. [S. 310-A.]

### COMMENTARY.

**Alteration.**—This rule corresponds to S. 310-A of the old Code, but several additions and alterations have been made in it to meet several conflicting rulings.

"Words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution, can claim the benefit of the rule. In other respects the committee consider it advisable to adhere to the wording of the section. The proposal that the sale should be set aside on payment of the purchase-money instead of the amount specified in the proclamation is, in our opinion, fraught with danger: it would be obviously useless, unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder."—*See the Report of the Special Committee.*

The omission of the words "*under this chapter*" which occurred in the old section, has set at rest the diversity of judicial opinion which hitherto existed regarding the applicability of S. 310-A to sales held under mortgage-decrees. The above change seems to have been made to meet the Full Bench case reported in 25 C. 703: 2 C. W. N. 353, in which it was held that the provisions of S. 310-A of the old Code were not applicable to sales held in execution of mortgage-decrees. By the omission above referred to, by the insertion of rules 4 and 5 in Or. XXXIV, (which correspond with Ss. 88 and 89 of the T. P. Act, IV of 1882), in the amended form, and also by the introduction of rules relating to mortgage-decrees in the said Or. XXXIV, the Calcutta Full Bench case has been overridden. In framing this rule the Legislature has adopted the views expressed by the Allahabad, Bombay and the Madras High Courts.

The words "*any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale,*" have been substituted for the words "*any person whose immoveable property has been sold,*" which occurred in the old section, as the wording of the old section gave rise to several conflicting rulings. The wording of the present rule will not only include the owner of the property sold, but also include any person who

holds any sort of interest in the said property by virtue of a title acquired before the sale. Thus the present rule includes a prior private purchaser, donee, mortgagee, a prior auction-purchaser, a *mokuraidar*, a tenant, a beneficial owner and *benamdar*, as in some cases the beneficial owner may be barred by the act and conduct of his *benamdar*, etc., etc.

Clause (a) is similar to Cl.(a) of the old section. Clause (b) is also similar to Cl. (b) of the old section.

Sub-rule (2) corresponds to the proviso to the old section, with some modifications. The words "*unless he withdraws his application*" have been added after the words "he shall not." The above addition has been made for the benefit of the applicant, who under the old section had no right at all to take the benefit of this rule, if he had previously filed any application under S. 311, C. P. Code, 1882. The words "*or prosecute*" have also been added after the words "to make." The above addition has been made to prevent an applicant from provisions of sub-rule and also under rule 90 under rule 90 to set aside the sale.

The period of limitation (30 days), and the Court's order for setting aside the sale, which were mentioned in the old section, have been omitted from this rule and reproduced in sub-rule (2) of rule 92. Notice of application under this rule must be given to the decree-holder and the auction-purchaser (*Vide* the proviso to rule 92). The old section was silent on this point.

**Object of enacting the present rule.**—The necessity of giving the power of making a deposit to a wider circle and to put a stop to the conflict of decisions was recognized by the Legislature, and the law appeared in the form of rule 89 of the new Code in place of S. 310-A of the old Code.

An application under this rule is not invalid simply because there is no express prayer for the setting aside of the sale—*Ronyia v Baliram*, 106 I. C. 333 : A. I. R. 1928 Nag. 111. See also *Rame Sivendra v. Audh Bihary*, 71 I. C. 332, noted *post*. The object of the rule is to put an end to every kind of contention and dispute. If the debtor wants to keep a dispute open his remedy is r. 90 and not r. 89. The effect of payment is automatically to extinguish the debt and the decree-holder's remedy is gone.—*Kummakutty v. Neelakandan*, 53 M. 943 : 128 I. C. 509 : (1930) M. W. N. 524 : A. I. R. 1930 Mad. 921 : 59 M. L. J. 893.

This rule does not apply where certain properties are sold under Or. XXI, r. 32 (2) to compensate the decree-holder for the judgment-debtor's wilfully disobeying the order of the Court passed in a suit for restitution of conjugal rights.—*Gahuruli v Asia Khatun*, 56 C. L. J. 140.

"Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale."—A judgment-debtor whose immoveable property has been sold, may apply under this rule as "a person owning such property." But if the judgment-debtor has transferred his interest in the property after the Court-sale, the question arises whether he or his transferee is entitled to apply for setting aside the sale under this rule. The Allahabad High Court, in *Ishar Das v Asaf Ali*, 34 A. 186, has held that in such a case neither the judgment-debtor nor his

transferee after the Court-sale is entitled to apply under this rule. See in this connection *Yad Ram v Sundar Singh*, 45 A. 425: 74 I. C. 778: A. I. R. 1923 All. 392. In a recent case the same High Court has held that the judgment-debtor was entitled to apply, but not the transferee; *Fatima-ul-Hasna v. Baldeo*, 48 A. 188 (F. B.): 93 I. C. 24: A. I. R. 1926 All. 204. The Bombay High Court, in *Pandurang v. Govind*, 40 B. 557: 37 I. C. 211 has held that the judgment-debtor is entitled to apply, but not the subsequent purchaser. The Patna High Court followed the Bombay decision in *Dhanwanti v. Sheo Shankar*, 4 P. L. J. 340: 51 I. C. 873. The Calcutta High Court, in *Saroda Kripa Lala v. Havendra*, 49 C. 454: 26 C. W. N. 149, has held that the subsequent purchaser is not entitled to apply.

The words "owning such property" and "holding an interest therein" should not be read independently of the expression "by virtue of a title acquired before such sale." It has been held by the Bombay High Court in *Pandurang v. Govind*, 40 B. 557: 37 I. C. 211, that there is no reason to limit the words "by virtue of a title acquired before such sale" to the word "holding an interest therein" so as to read the first clause "owning such property" as if it stood by itself. The Madras and the Patna High Courts have taken the same view in *Sundaram v. Mausam*, 44 M. 554 (F. B.): 63 I. C. 937: 40 M. L. J. 497, and *Dhanwanti v. Sheo Shankar*, 4 P. L. J. 340: 51 I. C. 873. It is clear, therefore, that the applicant under Or. XXI, r. 89 must be a person who can, even at the date of his application, be proved to be a person, either owning the property or holding an interest therein by virtue of a title, and further that that title must have been a pre-existing title that is to say a title acquired before the execution sale. The use of the word "subsisting" is not necessary. *Onkar v. ...*

*Dhan Singh*, A. I. R. 1926 Nag. 10: 90 I. C. 963.

*Quere*—Whether a trespasser in possession of the property sold in Court auction has an 'interest' which will allow him to apply under Or. XXI, r. 89 to have the sale set aside.—*Adenna v. Chinna Ramayya*, 5 M. 770: (1928) M. W. N. 159: 109 I. C. 168: A. I. R. 1928 Mad. 1191: 5 M. L. J. 445.

**Immoveable property.**—The interest of a mortgagee in a usufructuary mortgage is immoveable property within the meaning of Or. XXI, r. 89.—*Jang Bahadur v. Bhagat Ram*, 52 A. 232: 28 A. L. J. 330: 122 I. C. 409: A. I. R. 1930 All. 110. Sale of a house apart from the ground on which the house was situated and which belonged to an outsider, was still a sale of immoveable property for the purposes of Or. XXI, r. 89 and the judgment-debtor could make the deposit thereunder.—*Rang Lai v. Bishunath*, 1 R. D. 155. See also *Kuar Lakshmiraj v. Shankar*, 124 I. C. 48: A. I. R. 1930 All. 513.

**Who may apply.**—In execution of a decree against a judgment-debtor his property was sold by auction. Prior to the execution-sale, he effected private sale to another person. Subsequently, the judgment-debtor applied under this rule to set aside the execution-sale. Held that, notwithstanding the private sale, the judgment-debtor could apply under this rule to set aside the sale.—*Mulji*, 25 B. 631: *Dhanwanti v. Sheo Shankar*, 4 P. L. J. 340: *Viranna v. Sattiraju*, 52 M. L. J. 157: 100 I. C.

r. 89.

A judgment-debtor, whose property has been sold at a Court-sale, has a right to apply to have the sale set aside as a person "owning" the property, although he has transferred or attempted to transfer his interest in the property to a third party after the Court-sale.—*Pandurang v. Govind*, 40 B. 557 : 37 I. C. 211 : 18 Bom. L. R. 571; *Dhanwanti v. Sheo Shankar*, noted ante; *Sundaram v. Mausa*, 44 M. 554 (F. B.) : 63 I. C. 937; *Fatima-ul-Hasna v. Baldeo Sahai*, 48 A. 188 (F. B.) : 93 I. C. 24; A. I. R. 1926 All. 204; *Madhuri Saran v. Bishambhar*, 49 A. 839 : 102 I. C. 471; A. I. R. 1927 All. 561.

A beneficial owner can apply under this section (i.e., the rule), when the property was sold in execution of a decree against the *benamdar*.—*Baburam v. Ram Sahai*, 1 C. L. J. 29-n : 8 C. L. J. 305 (following 1 C. W. N. 135).

A co-sharer may apply under this rule.—*Tuhiram v. Izzat Ali*, 30 A. 192; *Ramchandra v. Srinivasa*, 51 M. 246; A. I. R. 1928 Mad. 399 : 109 I. C. 297 : 54 M. L. J. 455.

A co-heir may apply under this rule.—*Abdul v. Matiyar*, 30 C. 425. A legatee under a will may apply, *Dhannamal v. Veeraraghava*, 44 M. L. J. 325.

A reversioner is a person "interested" and can apply.—*Pankhabati v. Nani*, 19 C. L. J. 72.

A purchaser who purchased the property after attachment but before sale can apply.—*Gosto v. Sankar*, 26 C. L. J. 127; *Siyaram v. Ram Narayan*, 27 N. L. R. 309. The fact that his objection to attachment under r. 58 was dismissed on a ground not affecting the genuineness of the sale in his favour or that he brought no suit subsequently under r. 63 is no bar to his application to set aside the sale under r. 89.—*Ibid*.

A *benamdar* of a person whose immoveable property is sold, has a right to apply to have the sale set aside under this rule.—*Basu Poddar v. Ram Krishna*, 1 C. W. N. 135.

A mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it is entitled to make an application under this rule.—*Pareshnath v. Nabagopal*, 29 C. 1 (F. B.) : 5 C. W. N. 821 (5 C. W. N. 63 overruled). See also *Srinivasa v. Ayyathorai*, 31 M. 416 and *Safar Ali v. Raj Mohun*, 1 C. L. J. 454, even though the property is sold subject to his mortgage; *Kandaswami v. Swarnavelu*, 53 I. C. 958. A mortgagee who has purchased the equity of redemption in one portion of the mortgaged property, can apply under r. 89 to set aside the sale held under his own decree; *Aulad Ali v. Abdul Hamid*, 2 P. 715 : 74 I. C. 102 : A. I. R. 1923 Pat. 490. An under-tenant can come in and apply to have the sale of the holding set aside under this section (i.e., rule).—*Chandra Kumar v. Kamini Kumar*, 11 C. W. N. 742 (29 C. 459 : 6 C. W. N. 175-n. dissented from); see *Bepin Behari v. Kalidas*, 6 C. W. N. 336. After the sale of a *mokrari* tenure, a *durmokaridar* has a right to come in and make a deposit under this section (rule).—*Narain Mandal v. Sourindra Mohan*, 32 C. 107 (5 C. W. N. 132-n not followed). A lessee can apply.—*Adenna v. Chinna Ramayya*, 51 M. 770 : 109 I. C. 168 : (1928) M. W. N. 159 : A. I. R. 1928 Mad 1191 : 54 M. L. J. 445. The mere fact that the property was sold subject to the lease does not render the lessee incapable of avoiding the transfer. The word "property" in the rule means the tangible property sold, whether or not persons other than the judgment-debtor have any interest and it does not mean the right



title and interest of the judgment-debtor alone.—*Ibid.* A purchaser of a share of an occupancy holding has *locus standi* to apply under this section (rule).—*Benodini v. Peary Mohan*, 8 C. W. N. 55; *Kunja Behari v. Sambhu Chandra*, 8 C. W. N. 232; *Asgar Ali v. Asaboddin Kazi*, 9 C. W. N. 134; *Omar Ali v. Moonshi Basiruddin*, 7 C. L. J. 282; 12 C. W. N. 64-n. Following this case it has been held that the purchaser of a non-transferable occupancy holding is entitled to make a deposit under this rule to have the execution-sale set aside and the fact that the landlord himself is the auction-purchaser makes no difference; *Fazoo Mia v. Sultan Ahmad Ahmed Chowdhury*, 55 C. 108; 31 C. W. N. 1050; 106 I. C. 143; A. I. R. 1927 Cal. 817.

Where the provisions of the E. B. and Assam Tenancy (Amendment) Act apply, a permanent under-tenure holder has a *locus standi* to apply under this rule for setting aside the sale of a taluk in execution of a rent-decree.—*Sarat Chandra v. Matilal*, 23 C. W. N. 597; 52 I. C. 237.

In *Dononath v. Kalikumar*, 23 I. C. 916, it has, however, been held that a mortgagee of a non-transferable occupancy holding cannot apply under this rule, when the holding has been sold under a rent-decree and purchased by the decree-holder. See also *Abdul Aziz v. Tafazuddin*, 19 C. W. N. 326; 23 I. C. 839. The Patna High Court has held that a purchaser of a portion of a non-transferable occupancy holding cannot apply; *Mahanti Lal v. Harkissen*, 19 C. W. N. 176-n. But the High Court of Calcutta in *Fazoo v. Sultan Ahmed*, 55 C. 108; 106 I. C. 143, *ante*, held following *Omar Ali v. Moonshi Basiruddin*, 7 C. L. J. 282, that the purchaser of a part of a non-transferable holding can set aside the sale on making a deposit in such a case.

A purchaser subsequent to attachment and prior to sale can apply.—*Mulchand v. Govind*, 30 B. 575.

**Who cannot apply under this rule.**—A person whose interests were not affected by the sale could not, under S. 310-A, apply to set aside the sale; *Ramchandra v. Rakhmabai*, 23 B. 450. See also *Abdul Rahman v. Matiyar*, 30 C. 425. A person who has merely contracted to purchase land cannot apply, because such a contract does not of itself create any interest in the property.—*Mahadeo v. Vasudev*, 23 B. 181; *Subba Reddi v. Vasireddi*, A. I. R. 1923 Mad. 659. If the conveyance be prior to the attachment the purchasers would equally have no *locus standi* as their interests are not affected.—*Ibid.*

The holder of a money-decree who has attached immoveable property before it was sold by the mortgagee decree-holder is a person whose 'interests are affected by the sale' within the meaning of r. 90 but he has no 'interest by virtue of a title acquired before such sale' within the meaning of r. 89. So he can apply under r. 90 but not under r. 89.—*Purshottam v. Sundar*, 55 B. 239; 132 I. C. 433; A. I. R. 1931 Bom. 277; 33 B. L. R. 455.

A person whose claim under Or. XXI, r. 53 and a suit under Or. XXI, r. 63 have been dismissed, cannot apply under this rule; *Onkar v. Dhan Singh*, A. I. R. 1926 Nag. 10; 90 I. C. 963; *Satyam v. Perraju*, A. I. R. 1931 Mad. 753. But where a third party who had purchased the property

prior to the attachment by the decree-holder, made a deposit of the purchase-money under Or. XXI, r. 89 to set aside the sale in execution, and subsequently succeeded in his suit for a declaration of his right to the property, he is entitled to a refund of the deposit so made by him from the decree-holder-auction-purchaser (irrespective of the applicability of r. 89) under S. 72 of the Contract Act, as an involuntary payment made under coercion (following 12 M. J. A. 65 and 40 C. 598 (P. C)).—*Ibid.*

A judgment-debtor, who had sold his immoveable property while it was under attachment in execution of the decree against him, is not entitled to apply.—*Magantal v. Deshi*, 25 B. 631.

A person to whom the judgment-debtor sells or mortgages the property after the sale in execution is not entitled to apply.—*Hazariram v. Badar Ram*, 1 C. W. N. 279, because no title was acquired by him before the sale. (Dissented from in *Appaya Shetti v. Kunhati*, 30 M. 214. 17 M. L. J. 127). See also *Manicka v. Rajagopala*, 30 M. 507; *Saroda Kripa Lala v. Harendra*, 49 C. 454. 26 C. W. N. 149; *Sundaram v. Mausaa*, 44 M. 554 (F. B.): 63 I. C. 937; 40 M. L. J. 497. A person who acquires a mortgage in trust from the judgment-debtor of the properties sold in an execution-sale after the Court-sale, is not entitled to apply.—*Gopala v. Viswanatha*, 58 I. C. 856 (F. B.): 39 M. L. J. 84. But see *Gantasola v. Thatavarthi*, 54 I. C. 753, *contra*.

A judgment-debtor who after the sale of his property in execution sells it to a third person, is not entitled to apply.—*Ishardas v. Asaf Ali*, 34 A. 186; *Subtarayudu v. Lakshminarasamma*, 38 M. 775.

A purchaser in execution of a mortgage-decree of an entire non-transferable occupancy holding cannot apply.—*Abdur Rahman v. Premde*, 22 C. L. J. 108. 20 C. W. N. 40.

The purchaser under a money-decree of a non-transferable occupancy holding has no *locus standi* to pay in the money under Or. XXI, r. 89, C. P. Code; *Bishun Dayal v. Jagdish Narayan*, 2 P. L. R. 12.

A mortgagee decree-holder cannot apply under this rule when he himself sold a part of the property in execution of another decree.—*Muhammad v. Ahmad Said*, 33 A. 481.

A donee of the property sold when the gift was made before attachment, cannot apply.—*Erode Manikkoth v. Puthedeth*, 26 M. 365.

A second mortgagee who was not a party to the suit of the first mortgagee, and whose interest has not passed under the sale, cannot apply.—*Mallikarjunadu v. Linga Murti*, 26 M. 232.

An attaching creditor cannot apply.—*Kedarnath v. Uma Charan*, 6 C. W. N. 57. But see *Dhirendra v. Kamini*, 23 C. W. N. 899.

A person who claims a title to the mortgaged property adverse to the mortgagee cannot apply.—*Ram Singh v. Salig Singh*, 29 A. 84: (1905) A. W. N. 193.

An *interim* receiver, appointed under S. 20 of the Provincial Insolvency Act of 1920 after the sale of the insolvent's properties, has no power, unless he is expressly authorized to that effect, to apply under this rule to have the

sale of the insolvent's properties set aside, as he cannot be said to be "a person owning such property".—*Ram Chandra v. Sankara Aiyar*, 50 M. L. J. 239 : 93 I. C. 271 : A. I. R. 1926 Mad. 357.

**Court.**—The Court mentioned in this rule is a Civil Court and not the Court of the Collector or the sale-Officer when the sale proceedings take place.—*Biswanath v. Dasrath*, A. I. R. 1927 All. 754 : 100 I. C. 726.

"A sum equal to five per cent."—This 5 per cent. is intended as a compensation to the purchaser for the trouble and disappointment caused to him.—*Trimbak v. Ram Chandra*, 23 B. 723. It must be paid even if the decree holder is the purchaser.—*Chundi Charan v. Banke Behary*, 26 C. 449, 451-52 (F. B.) : 3 C. W. N. 283 ; *Tirumal v. Syed Dastaghiri Miyah*, 22 M. 286 ; *Munshi Rai v. Rup Narain*, 6 P. 386 : 103 I. C. 724 : A. I. R. 1927 Pat. 288. In addition to 5 per cent. the purchaser is entitled to be paid by the judgment-debtor any loss of interest and costs which he may have incurred.—*Umeshchandra v. Kunjalal*, 57 C. 676 : 129 I. C. 181 : A. I. R. 1930 Cal 685.

This case has not been followed in *Ashutosh v. Sudhangshu*, 58 C. 510 : 183 I. C. 597 : A. I. R. 1931 Cal. 688, which has held that where a mortgagor applies to set aside a mortgage-sale in pursuance of a decree passed by the High Court on its Original Side, the applicant should deposit 5 per cent. of the purchase money under Or. XXI, r. 89 and nothing more ; the provisions of Or. XXI, r. 93 or r. 37 of Chap. XXVII of the Calcutta High Court Rules and Orders not applying.

"On his depositing."—The sale will not be set aside unless the applicant deposits the whole amount mentioned in sub-rule (1) within the prescribed period, viz., 80 days from the date of the sale. In *Chundi Charan v. Banke Behary*, 26 C. 449 (F. B.) : 3 C. W. N. 283, it has been held that when there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside (25 C. 609, distinguished). See also *Dattatraya v. Jagannath*, 31 Bom. L. R. 433 : 117 I. C. 527 : A. I. R. 1929 Bom. 215. In *Muthu Ayyar v. Ramasami Sastrial*, 20 M. 159, it has been held that a judgment-debtor is entitled to have the sale set aside under this section (rule), if he deposits 5 per cent. of the purchase-money, including that deducted by the Court for poundage, and fulfils the requirements of Cl. (b) even though something more on account of poundage was recoverable from him under the head of costs. The failure to affix stamps by way of poundage fees to an application for setting aside a sale as required by rule 15 of Chap. XVII of the Allahabad High Court Rules is nothing more than a mere irregularity and will not prevent the Court from entertaining an application under Or. XXI, r. 89 ; if all the conditions required by that rule are complied with, the Court may give time to pay the poundage fee.—*Abdul Wahid v. Tribhawan*, 133 I. C. 407 : A. I. R. 1931 All. 756 : 30 A. L. J. 13.

Where properties were sold in separate lots and deposit was made in respect of one such lot only, the sale in respect of such lot may be set aside.—*Panna Lal v. Bhola Nath*, 123 I. C. 818 : A. I. R. 1930 All. 843. But see *contra*, *Rameshwar Singh v. Mangal Prasad*, 9 P. 310 : 125 I. C. 570 : 11 P. L. T. 830 : A. I. R. 1930 Pat. 318.

When the amount payable by the judgment-debtor under this rule has been calculated by an officer of the Court and has been deposited, an order setting aside the sale must be made by the Court as a matter of right.—*Makbool Ahmad v. Bazle Salhan*, 25 C. 609. In *Ugrah Lal v. Radha Pershad*, 18 C. 255, it has been held that when the amount payable by the judgment-debtor has been calculated and settled by an officer of a Court, and when the amount has been paid into Court, an order setting aside a sale must be made as a matter of right, although it was subsequently discovered that the amount was short by a small sum. See also *Sheik Fakir v. Deraj Mohini*, 11 C. W. N. 116; *Rangini Sundari v. Hiralal*, 33 C. W. N. 1170. Where the amount falls short of the amount required to a small extent, that is not a substantial shortage and does not vitiate the deposit, but any delay beyond the 30 days from the date of the sale cannot be disregarded or excused.—*Mohamed Cassim v. David*, 6 R. 490: A. I. R. 1928 Rang. 286: 113 I. C. 810.

A deposit under this rule must not be conditional.—*Dulhin Mathura v. Bansidhar*, 16 C. W. N. 904: 15 C. L. J. 83: 10 I. C. 880. The rule is inconsistent with the notion that payment can be made either under protest or coupled with condition.—*Kumakutty v. Neela Kandan*, 53 M. 943: 128 I. C. 509: (1930) M. W. N. 524: A. I. R. 1930 Mad. 921: 59 M. L. J. 893. The Court has no power to order that the decree-holder should draw out the money on his executing a security-bond and a suit will not lie for refund of the money deposited.—*Ibid.* See also *Nurjahan v. Asia*, 35 C. W. N. 1056.

The judgment-debtor deposited the decretal amount with the extra percentage under Or. XXI, r. 89, but in his application he prayed that it may not be paid to the decree-holder pending disposal of an appeal. Subsequently on the objection of the decree-holder, he withdrew the prayer aforesaid. Held, that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decretal amount having been withdrawn, the Court was bound to set aside the sale; *Rameshivendra v. Audh Bihari*, 71 I. C. 332.

A new application without any actual deposit is not sufficient compliance with the law.—*Mahomed Akbar v. Sukhdeo*, 13 C. L. J. 467.

Under this rule the essential upon which the action of the Court is to depend is the deposit within 30 days, and not the fact of the application being made within that period.—*Mathuji v. Kondoji*, 7 Bom. L. R. 263; *Sadasheo v. Narayan*, 106 I. C. 568; *Mahomed Cassim v. David*, 6 R. 490: A. I. R. 1928 Rang. 286: 113 I. C. 810.

An application under this rule need not be in writing, but the application whether oral or written must be in time. Deposit of money alone is not sufficient. Held, therefore, that a tender by a person who was neither an attorney, nor a Vakil, nor a Mukhtear, for the owner of the property sold, does not comply with the provisions of this rule and is consequently invalid.—*Sarri Begun v. Haidar Shah*, 9 A. L. J. 12: *Parat v. Ambalath*, 32 I. C. 45; *Rameshivendra v. Audh Bihari*, 71 I. C. 332; *Kabiruddin v. Krishna*, 109 I. C. 449: A. I. R. 1923 Nag. 136. But see *Thimmarasu Venkata v. Venkatappa*, 46 M. L. J. 119: (1924) M. W. N. 137, where it was held, that the fact that the required deposit was made by

the pleader's clerk instead of by the pleader himself did not vitiate the application.

A deposit under r. 89 is a voluntary deposit and the person making the deposit cannot maintain a suit to have the sale set aside and for refund of the money deposited.—*Raghu Ram v. Deo Kali*, 7 P. 30: A. I. R. 1928 Pat. 193: 115 I. C. 193.

The formality of depositing money need not be gone into when the decree-holders who are also the auction-purchasers certify that the decree has been settled out of Court and pray that the sale may be set aside.—*Shivaram v. Manu Lal*, A. I. R. 1928 Pat. 40.

Where deposit is made within thirty days.—If the Court be closed on or before the last day of the period limited, the judgment-debtor may deposit the amount of the debt into Court on the first day the Court reopens.—*Soshee Bhusan v. Gobind Chunder*, 18 C. 331; *Peary Mohun v. Anunda Charan*, 18 C. 631. See also *Aravamudu Ayyangar v. Samiyappa Nadan*, 21 M. 358, and *Sambasiva Charu v. Ramasami Reddi*, 22 M. 179; and S. 10 of the General Clauses Act (X of 1897).

Deposit of decretal amount with costs within 30 days.—Deposit of 5 per centum of the purchase-money after the rejection of the special appeal. Held that the application was barred and the judgment-debtor was not entitled to exclude the period during which the special appeal was pending.—*Chowdhry Kesri Sahay v. Gaiji Roy*, 29 C. 626: 6 C. W. N. 776.

An act of the Court cannot prejudice any party. Therefore where on the last day of making a deposit under this rule, the deposit could not be made owing to the presiding officers leaving the Court earlier than usual and the deposit was made the next day; held that the deposit was valid and in time.—*Dulhin Mathura v. Bansidhor*, 16 C. W. N. 904: 15 C. L. J. 83: 10 I. C. 880; *Gholam v. Manindra*, 22 I. C. 842.

Extension of time.—The Court has no jurisdiction to extend the time prescribed by this rule but extension may be granted with the consent of parties; *Rameswar v. Sureshwar*, 39 I. C. 664: 2 P. L. J. 164.

Nature of deposit.—A deposit must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale, unless the judgment-debtor has strictly complied with the law. The deposit of Government promissory note is not sufficient.—*Rahim Bux v. Nundo Lal*, 14 C. 321. See also *Musst. Shakoti v. Jotindra Mohon*, 1 C. W. N. 132.

Where after deposit under this section (rule) the judgment-debtor prayed that the money deposited might be retained in Court pending the hearing of an application under 8. 108, C. P. Code, 1882. Held that the sale ought to have been set aside.—*Hanooman Singh v. Luchman*, 8 C. W. N. 355.

A mere payment of the sale-proceeds into Court is not a sufficient compliance with the requirements of this section (rule). Actual receipt of sale-proceeds by the decree-holder is necessary to set aside a sale.—*Trimbak v. Ram Chandra*, 23 B. 723.

Where properties were sold in separate lots, and the judgment-debtor applied under this rule to set aside the sale of one of the properties by tendering the balance due under the decree, after deducting the amounts bid by the decree-holder for some of the properties, and the amount deposited by the other purchaser. *Held* that there was no deposit within the terms of the section (rule).—*Kripa Nath v. Ram Lakshmi*, 1 C. W. N. 703

"For payment to the decree-holder."—The word "decree-holder" in sub-rule (1) (b) refers to that person alone in satisfaction of whose decree the sale took place. It does not refer to the other decree-holders who claim rateable distribution of the sale-proceeds under S. 73.—*Ganesh v. Vitthal*, 37 B. 387. It was held in *Harai v. Faizlur*, 40 C. 619, that when a judgment-debtor deposits such amount as is sufficient to satisfy the claim of the person in satisfaction of whose decree the sale was ordered, the other decree-holders cannot come in for rateable distribution under S. 73. See also *Hari Sundari v. Shashi Bala*, 1 C. W. N. 195; *Beharilal v. Gopallall*, 1 C. W. N. 695 (followed in *Roshunlall v. Ramlall*, 30 C. 262; 7 C. W. N. 341). As to the proper amount to be deposited, see *Karunakara v. Krishna*, 39 M. 429; 27 I. C. 952; 28 M. L. J. 262.

"Less any amount received by the decree-holder."—It is not necessary that the payment to the decree-holder should be in cash; it is enough if he is anyhow satisfied as to the whole amount due to him.—*Lakshmi Ammal v. Sankaran Nair*, 24 M. L. J. 205; *Vedala Lakshminarasammah v. Paacha Lakshammal*, (1912) M. W. N. 756. But a judgment-debtor cannot take advantage of the amount paid by his co-judgment-debtors and deposit the balance; *Karunakara v. Krishna*, 39 M. 429; 27 I. C. 952; 28 M. L. J. 262.

"Received" means actual receipt by the decree-holder. A mere payment into Court of the sale-proceeds does not satisfy the requirements of this rule.—*Trimbak v. Ram Chandra*, 23 B. 723 (followed in *Tota Ram v. Chhoturam*, 25 Bom. L. R. 446; 73 I. C. 454; A. I. R. 1923 Bom. 299; *Karunakara v. Krishna*, noted ante).

Court.—By virtue of r. 91-A passed by the Bombay High Court an application under r. 89 and the deposit may be made to the Collector or other officer to whom the decree is referred for execution and it shall be deemed to have been made in or into Court within the meaning of r. 89.—*Mahadu v. Patlu*, 31 Bom. L. R. 221; 116 I. C. 269; A. I. R. 1929 Bom. 189. The 'Court' means 'the Court executing the decree' and not the sale office, but where the money was deposited in the office of the Collector who had sold the property and intimation is sent to the Civil Court that the money had been transferred to the Civil Court account within 30 days of the date of the sale, the deposit is good and the provisions of the rule are complied with.—*Abdul Wahid v. Ram Krishna*, 131 I. C. 596; A. I. R. 1931 All. 303.

Sub-rule (2)—"He shall not be entitled to make or prosecute an application."—In a case where, after an application to set aside a sale was made, under the judgment-debtor's rule another application was made to have the benefit of the former. J. 953. But the Court should in such a case put the judgment-debtor to his election whether he would withdraw the application under r. 90, and if he refuses to do so, it should dismiss the application made under this rule; *Sarri Begam v. Ram Chandar*, 47 A.

850 : 88 I. C. 500 : A. I. R. 1925 All. 778 : 23 A. L. J. 760. But the provisions of this sub-rule do not apply where an application, though purporting to be made under r. 90, is really one under S. 47 ; *Harihar v. Rama Pandu*, 33 B. 698 : 4 I. C. 253 : 11 Bom. L. R. 1113.

After the rejection of an application under this rule judgment-debtors, other than the applicant, made an application under rule 90. *Held*, that the present application was not barred by sub-rule (2).—*Ashruf Ali v. Net Lal*, 23 C. 682. See also *Sital v. Nand Lal*, 13 C. W. N. 519.

Where in an application to set aside a sale there are joint prayers under rr. 89 and 90 without any actual deposit of purchase-money, such an application cannot be entertained under sub-rule (2), r. 90.—*Narayan v. Rasul Khan*, 23 B. 531 (535).

A judgment-debtor having applied under this section (rule) to set aside an execution-sale, his application was rejected and the sale was confirmed under Or. XXI, r. 92. Subsequently he brought a suit to set aside the sale. *Held* that the suit was barred by sub-rule (3) of rule 92.—*Damodar v. Vinayak Trimbak*, 26 B. 40.

A judgment-debtor who makes an application under Or. XXI, r. 90, which is dismissed for default, is thereby disqualified from subsequently applying for getting back his property under r. 89.—*Murlidhar v. Baldeo*, 20 O. O. 329. But see *Mirza Aliq Beg v. Fazlul Haq*, A. I. R. 1928 All. 196 : 116 I. C. 490, which has held that such subsequent application is maintainable if the full amount of the decree and 5 per cent. of the purchase-money is paid within the period of limitation.

**Necessary parties.**—It is clear from the provisions of the proviso to r. 92, sub-rule (2), that both the decree-holder and the auction-purchaser are necessary parties to an application under this rule ; *Musst. Bibi Zainab v. Paras Nath*, 2 P. 800 : 75 I. C. 430 : A. I. R. 1924 Pat. 37 ; *Rameshwar Singh v. Mangal Prasad*, 9 P. 310 : 125 I. C. 570 : 11 P. L. T. 880 : A. I. R. 1930 Pat. 318. There is nothing in r. 89 to indicate that the judgment-debtor or the applicant is to trace out who are the sale should trace out who are the parties and make them parties to it. The rule does not require the application to nominate any person as an applicant party. The auction-purchaser and the decree-holder who are already on the record need not be specifically mentioned and impleaded.—*Dip Chand v. Sheo Prasad*, 27 A. L. J. 769 : A. I. R. 1929 All. 593. It is the duty of the Court to issue notice to the person whom it has previously declared as auction-purchaser to show cause against the sale being set aside.—*Jit Singh v. Daulatia*, 124 I. C. 23 : A. I. R. 1930 All. 167.

**Notice.**—What is necessary is that notice should be given to the decree-holder and auction-purchaser and r. 92 does not require them to be formally made parties. Notice may be issued after 30 days, but it is the duty of the party to apply for issue of notice and the Court is not bound to issue notice without an application ; *Musst. Bibi Zainab v. Paras Nath*, noted under heading "Necessary Parties," ante ; *Raj Chandra v. Kali Kanta*, A. I. R. 1923 Cal. 394. See Or. XXI, r. 92.

**Confirmation of sale.**—Confirmation of sale under r. 92 is no bar to the applicability of this rule, and a sale may be set aside even after such confirmation.—*Pita v. Ghunilal*, 31 B. 207, 217.

**Applicability of this rule to sales under Rent Act.**—This rule does not apply to the sale of a tenure or holding held in execution of a decree for its own arrears, inasmuch as S. 54 of the B. T. Amendment Act (I of 1907, B. C.) has expressly laid down that this rule would not apply to such sales.—*Asiruddi v. Mokhodamoyee*, 12 C. W. N. 434: 35 C. 543. But this case does not apply to East Bengal and Assam as the Amending Act of that province (Act I of 1903), has not made this rule inapplicable to that province. So the rulings under the old Code, in which it has been held that S. 310-A of the C. P. Code, 1832, applies to the sale of a tenure or holding in execution of a decree for its own arrears are still good law, so far as that province is concerned. See *Ali Miah v. Ramjan*, 13 C. W. N. 224.

This section (rule) applies to the sale of the tenure in execution of a decree for its own arrears. An auction-purchaser is entitled to notice before an order is made under this section (rule).—*Janardhan v. Kali Kristo*, 23 C. 393 (followed in *Krishnadhan v. Damayanti*; *Behary v. Russick*, 23 C. 396 note and in *Bungshidhar v. Kedar Nath*, 1 C. W. N. 114). See also *Nityananda v. Hira Lal*, 5 C. W. N. 63 at p. 64.

This section (rule) does not apply to sales under Act X of 1859, as the Code of Civil Procedure applies only up to the sale and does not apply after it.—*Harish Chandra v. Ananta Charan*, 2 C. W. N. 127.

**Rule if applies to sales on the Original Side of the High Court under mortgage-decree.**—This rule applies to sales held in execution of mortgage-decrees on the Original Side of the High Court.—*Virjiban Dass v. Biseswar Lal*, 48 C. 69: 24 C. W. N. 1032: 60 I. C. 406. But see *contra*, in *Surendra v. Gurupada*, 24 C. W. N. 536, where it has been held that though this rule applies to sales under mortgage-decrees in the mofussil, it does not apply to such sales held in the High Court. Order XXI, r. 89 is framed in language applicable to mofussil practice and is not in terms applicable to the practice of the High Court in its Original Side as regards sales held in execution of mortgage-decrees. Where by reason of the fact that no amount is specified in any proclamation of sale as that for the recovery of which the sale is ordered, the words of the rule cannot be applied strictly and the High Court has only to apply them as fairly as possible to the circumstances of the sale on the Original Side. The mortgagor judgment-debtor could under this rule have the sale set aside on paying the amount due to the decree-holder mortgagee and 5 per cent. compensation to the purchaser.—*Kalyanee v. Hari Mohan*, 56 C. 477: A. I. R. 1929 Cal. 574. But see *Ashutosh v. Sudhangshu*, 58 C. 510: 133 I. C. 597: A. I. R. 1931 Cal. 698.

**Sub-rule (3)—Recovery of costs.**—In considering an application to have the sale set aside the Court has only to consider the amount for the recovery of which the sale was ordered. It is wrong to say that on the Original Side of the High Court a person desiring to take advantage of r. 89 is obliged to pay a lump-sum making a guess of the amount or to go to the attorneys of the plaintiffs and find out from them how much they are prepared to consider as correct. Sales are not ordered for the recovery of the



amount of costs before they are attached. (Amendment of the High Court Rules, Original Side suggested).—*Kalyanee v. Hari Mohan*, 56 C. 477: A. I. R. 1929 Cal. 574.

**Appeal against order under the rule.**—Under the old Code, an order setting aside or refusing to set aside a sale passed on an application under S. 310-A, was not appealable because it was not included under S. 588 (Or. XLIII, r. 1) in the list of appealable orders. It was however appealable as a decree, if the question as to whether the sale should be set aside or not arose "between the parties to the suit or their representatives" in the course of the execution proceedings and as such came within the purview of S. 47.—*Pita v. Chunilal*, 31 B. 207; *Maganlal v. Mulji*, 25 B. 631; *Murlidhar v. Anandarao*, 25 B. 418: 3 Bom. L. R. 100; *Pandurang Govind v. Krishnabai*, 1 Bom. L. R. 74; *Phul Chand v. Nurshing*, 28 C. 73 (followed in *Imtiaz Begam v. Dhuman Begam*, 29 A. 275; *Manikka v. Rajagopala*, 17 M. L. J. 291; *Harihar v. Rama Pandu*, 33 B. 698: 4 I. C. 253: 11 Bom. L. R. 1113). But under the present Code, an order setting aside or refusing to set aside a sale (under r. 92) with reference to an application under this rule (r. 89) is appealable as an order being included in the list of appealable orders given in Or. XLIII, r. 1. An auction-purchaser also can now appeal from an order under this rule; *Kachu v. Trimbak*, 44 B. 472; *Gadigappa v. Shidappa*, 48 B. 638: 83 I. C. 155: A. I. R. 1924 Bom 495: 26 Bom. L. R. 817.

Where the Court dismissed an application by the judgment-debtor on the ground that there was no valid deposit and thereupon an appeal was preferred, held, that the auction-purchaser was a necessary party to the proceeding and appeal and that the appeal should be dismissed for want of proper parties.—*Rameshwar Singh v. Mangal Prasad*, 9 P. 310: 125 I. C. 570: 11 P. L. J. 880: A. I. R. 1930 Pat. 318.

The true nature of the order must be examined, and the character of the parties affected by it must be ascertained, before deciding whether the order is one under S. 47.—*Mahomed Akbar v. Sukhdeo*, 13 C. L. J. 467.

An order on an application to set aside a sale under this rule does not come within the definition of "decree" in S. 2.—*Asimuddi v. Pran Mohini*, 15 C. W. N. 844. No second appeal lies.—*Rangini Sundari v. Hiralal*, 33 C. W. N. 1170.

**Revision.**—Where a Court refuses to entertain an application under Or. XXI, r. 89, on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of S. 115 of the Civil Procedure Code, and so the High Court will interfere in revision in such a case; *Sundaram v. Maus*, 44 M. 554: 40 M. L. J. 497: 63 I. C. 937 (F. B.); *Dhanwanti v. Sheoshankar*, 4 P. L. J. 340: 51 I. C. 873; *Aulad Ali v. Abdul*, 2 P. 715: A. I. R. 1923 Pat. 490: 74 I. C. 102. But it has been held by the Allahabad High Court in *Yad Ram v. Sundar Singh*, 45 A. 425 (F. B.): A. I. R. 1923 All. 392: 74 I. C. 778, that no revision lies in such a case.

Where the Court refused to set aside a sale, and the judgment-debtor applied for a revision, the High Court refused to grant it, on the ground that the order was not appealable. Held, that the order was appealable, and the High Court was competent to grant revision. —

*Durga Prasad v. Chandika*, 118 I. C. 805. An order contravening the provisions of Or. XXI, rr. 89 and 92 is an illegal exercise of jurisdiction and is a material irregularity within S. 115, C. P. Code.—*Panna Lal v. Bhola Nath*, 128 I. C. 818: A. I. R. 1930 All. 843.

The High Court can interfere in revision if an application under Or. XXI, r. 89 has been wrongly admitted on the ground that it was made by a person interested to apply.—*Subba Reddi v. Vasireddi*, A. I. R. 1923 Mad. 659 (44 M. 554 (F. B.) followed).

**Dismissal of application for default in appearance.**—No appeal lies where an application under this rule is dismissed for default in appearance and the Court refuses to restore it to file.—*Ghasiti Bibi v. Abdul Samad*, 29 A 596.

**Date of sale.**—The "date of the sale" is the date on which the sale takes place and the highest bid is accepted and the deposit paid, and not the date when the Court confirms the sale and directs the remainder of the purchase-money to be collected; *Vanakkusal v. Ratilal*, 28 Bom. L. R. 510: 95 I. C. 549: A. I. R. 1926 Bom. 335.

**Limitation.**—Under Art. 166, Sch. I of the Limitation Act, 1908, an application under this rule to set aside the sale, must be made within 30 days from the date of the sale. But where the final bid remains unaccepted by the officer conducting the sale for some days, this period of limitation does not begin to run till the acceptance of the bid.—*Munshulal v. Ram Narain*, 35 A. 65.

A judgment-debtor may obtain reversal of sale by deposit of money in Court but the Limitation Act provides that such deposit must be within 30 days of the sale. The Court has no jurisdiction except under the provisions of the Limitation Act to extend the time nor has the Court jurisdiction to set aside a sale by allowing the judgment-debtor to deposit the decretal amount after the period of limitation has expired. The Court can only give time with the consent of the parties.—*Rameshwar v. Sureshwar*, 2 P. L. J. 164.

It is not enough to make the application within 30 days; *Mahomed Akbar v. Mahomed Sukhdeo*, 13 C. L. J. 467; *Munna Lal v. Radha Kishan*, 37 A. 591: 30 I. C. 186: 13 A. L. J. 793. Both the application and the deposit must be made within 30 days from the date of the sale. A sale in execution cannot be set aside under Or. XXI, r. 89 without an application (oral or written) within 30 days from the date of sale.—*Venkata Narasimma v. Lakshmi Narasimham*, 32 I. C. 783.

For further notes, see r. 90, *post*.

**Applicability of this rule to sales under mortgage-decrees.**—It was held by the Calcutta High Court that S. 310-A did not apply to a sale of mortgaged property under a decree made in accordance with the provisions of the Transfer of Property Act (IV of 1832).—*Kedar Nath v. Kali Churn*, 25 C. 703 (F. B.): 2 C. W. N. 353 (23 C. 693 overruled; 19 A. 235 disapproved of). This Full Bench decision was explained in *Dakshina Mohun v. Srimati Basumati*, 4 C. W. N. 474, where it was held that S. 104 of the Transfer of Property Act (IV of 1832) was an enabling section, and the rules made by the High Court (Circular Order No. 13, dated 27th April, 1832) under S. 104 of the T. P. Act, (IV of 1832), did not limit the applicability of the

provisions of the Civil Procedure Code as regards sales held in execution of mortgage-decrees; and distinguished in *Shyam Kishen v. Sunder Keer*, 31 C. 373. The Allahabad, Bombay and the Madras High Courts hold, on the other hand, that this rule applies where a sale of immoveable property has taken place under a mortgage-decree.—*Raja Ram v. Chunni Lal*, 19 A. 205; *Srinivasa Ayyangar v. Ayyatherai Pillai*, 21 M. 416; *Tirumal v. Syed Dastaghini Miyah*, 22 M. 286; *Krishnaji v. Mahadev*, 25 B. 104; *Mallikarjunadu Setti v. Lingamurti*, 25 M. 244 (F. B.).

The Calcutta decisions are no longer law. The transfer, into Or. XXXIV of the present Code, of the sections of the Transfer of Property Act relating to decrees in mortgage-suits, makes it clear that rule 89 applies to sales under mortgage-decrees also. A mortgagor whose immoveable property has been sold in execution of a decree for the sale of the mortgaged property passed under Or. XXXIV, r. 5, may therefore apply under this rule to set aside the sale; *Virjiban Das v. Biswar Lal*, 48 C. 69; 24 C. W. N. 1032; 60 I. C. 406.

Order IX does not apply to proceedings under this rule.—An application to set aside a sale under this rule is a proceeding in execution and not an original proceeding, and hence the provisions of Or. IX do not apply to it.—*Bhagwan v. Dattatraya*, 50 B. 457; 96 I. C. 411; A. I. R. 1926 Bom. 377; 28 Bom. L. R. 686.

**90. (1)** Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. [S. 311.];

#### COMMENTARY.

**Alterations.**—This rule corresponds to S. 311, C. P. Code, 1882, with some important additions and alterations. Section 311 ran thus:—"The decree-holder, or any person whose immoveable property has been sold under this Chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity."

"The Committee have struck out the provision as to irregularity in attaching the property, as such irregularity obviously cannot affect the price. They have introduced the words 'rateable distribution of assets' to clear up a doubt which has been the subject of discussion in several cases. They have altered the language of the proviso in order to meet the

doubts which have been raised as to the evidence upon which the Court can act (*Tasadduk Rasul Khan v. Ahmad Husain*, 21 O. 66 (P. C.)).—*Report of the Special Committee.*

**Effect of the alterations.**—(1) The words "*Any person whose immovable property has been sold*" in the old Code, were the subject of discussion in several cases and the High Courts were not unanimous in the interpretation of these words, as will appear from the several conflicting rulings quoted below. The Legislature, in order to set at rest the conflicting rulings, has framed the present rule to clear up the doubts which hitherto existed. The present rule is much more comprehensive than the old section. The words "*or any person entitled to share in a rateable distribution of assets*" have been inserted in the present rule adopting the principles laid down in *Lakshmi v. Kuttunni*, 10 M. 57; *Sorabji v. Govind Ramji*, 16 B. 91, *Ajudhia Prasad v. Nand Lal*, 15 A. 318 and 29 O. 548. The rulings in which contrary views have been expressed have been overridden by the present rule.

(2) "*Any person whose interests are affected by the sale.*"—The words "*whose interests are affected by the sale*" have been added to the present rule in order to render the scope of the present rule wider than that of the old section. The wording of the old section was not clear enough to include the cases of persons whose interests were affected by the sale and hence there was diversity of judicial opinion on the point, as will appear from the several rulings noted below. The scope of the present rule has been enlarged by the addition of the above words. But persons whose interests are not affected by the sale cannot apply under this rule to set it aside. A person claiming a title adverse to that of the judgment-debtor or by title paramount to the judgment-debtor is not within the meaning of these words, inasmuch as his title to the property is not affected by the sale whether the sale is regular, or irregular. The above change has been introduced in accordance with the view expressed in *Asmutunnissa v. Ashruff*, 15 C 488 (F. B.) and *Subbarayadu v. Pedda Subbarazu*, 16 M. 476.

(3) "*Fraud in publishing or conducting the sale.*"—The words "*or fraud*" have been added after the word "*irregularity.*" "We think that the existing law, as contained in S. 311 of the present Code, is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under S. 311, a decree open to second appeal. This result which often involves a considerable prolongation of these proceedings. We think that applications for setting aside a sale under the present rule should be applicable to them whether they are based on the ground of irregularity or on the ground of fraud."—*Report of the Select Committee.*

Another important change made in the present law is the insertion of the word "*fraud.*" Under the old Code it was held by all the High Courts that an application to set aside a sale on the ground of "*fraud*" in publishing or conducting it did not fall within S. 311 but such application fell within S. 244 of the C. P. Code, 1893 (S. 47) and the period of limitation in such cases was 3 years and not 30 days. But under the present

Code, all applications to set aside a sale whether on the ground of irregularity or fraud in publishing or conducting it, are to be determined under this rule. The object of the change has been clearly explained in the report of the Select Committee quoted above. The effect of the change, is that the period of limitation for such an application has been shortened, and the right of second appeal has been curtailed. Under the old law an application to set aside a sale on the ground of fraud of any kind fell within S. 244, C. P. Code, 1882 (S. 47), and hence the period of limitation was three years, and there was a second appeal. (*Vide Hiralal v. Chundra Kanto*, 26 C. 539: 3 C. W. N. 403; *Kokil Singh v. Edal Singh*, 31 C. 385 and *Ramayad Sahu v. Bindeswari Kumar*, 6 C. L. J. 102). Under the present rule, however, fraud in publishing or conducting the sale, has been excluded from the operation of S. 47. But where the sale is vitiated by any other kind of fraud (except the fraud in publishing or conducting the sale), the case must fall within S. 47, as before. *It is the only particular kind of fraud that has been excluded from the operation of S. 47.* There are and may be innumerable and inconceivable kinds of fraud and it is impossible to give any exact definition of the word.

Again under the present law, an application to set aside a sale, may be made either on the ground of irregularity or on the ground of fraud in publishing or conducting it. But irregularity in attaching the property is no longer any ground for setting aside a sale, as will appear from the Report of the Special Committee, quoted above. The words "publishing or conducting" refer respectively to S. 287, C. P. Code, 1882 (r. 66), and to the action of the officer by whom the sale is held (32 B. 572); they do not refer to any irregularity or fraud in the execution proceedings prior to publication or conducting the sale.

(4) "Unless upon the facts proved, the Court is satisfied."—The language of the proviso has been altered in order to meet the doubts which have been raised as to the evidence upon which the Court can act. In the proviso, the words "unless upon the facts proved the Court is satisfied" have been substituted for the words "unless the applicant proves to the satisfaction of the Court." The above alteration has been made adapting the principle laid down in *Tasadduk Rasul Khan v. Ahmad Husain*, 21 C. 66 (P. C.), where it has been held that in an application to set aside a sale it is necessary for the applicant to show not only that there has been a material irregularity, but also that substantial injury has been sustained in consequence of such material irregularity; and in the absence of evidence it is not to be presumed that the irregularity was the cause of the substantial injury.

In the Full Bench case of *Lala Mobaruk Lal v. Secretary of State*, 11 C. 200, and in 7 C. 466, 3 C. 542, 9 C. 656, 20 C. 599, 24 C. 295, 30 C. 1, 6 C. W. N. 688, 6 C. W. N. 836, 20 M. 159, it has been held that where property has been sold at an inadequate price and it is also proved that there has been a material irregularity in publishing or conducting the sale, the fair inference to draw in the case is . . . the inadequacy of the price, until proved . . . or to meet those conflicting rulings, the language of the provision has been altered and under the present law it must be satisfactorily proved that the irregularity was the cause of the substantial injury. No inference can now be drawn that irregularity was the cause of the substantial injury. The rulings in which a view

Who may apply under this rule.—(1) "Decree-holder or any person entitled to share in a rateable distribution of assets."—The term "decree-holder" in this rule is not limited to the decree-holder who instituted the execution proceedings, but may include a decree-holder who is entitled to come in and share in the proceeds under S. 73.—*Pragji Kala v. Assa Jalal*, 35 I. C. 530; *Lakshmi v. Kuttunni*, 10 M. 57; *Chakrapani v. Dhanji*, 24 M. 311; *Bijoy Singh v. Hukum Chand*, 29 C. 548. See also *Ajudhia Prasad v. Nand Lal*, 15 A. 318; *Athappa Chelli v. Rama Krishna*, 21 M. 51. See also *Chaitratap Singh v. Jadukul Prosad*, 20 C. 673 and *Sorabji v. Govind Ramji*, 16 B. 91. The two latter cases have been dissented from in *Matungini Dassi v. Monmotha Nath*, 4 C. W. N. 542.

The expression "rateable distribution" in Or. XXI, r. 90 is not wide enough to cover the distribution of dividends under the Provincial Insolvency Act. That rule is a rule framed under the C. P. Code and it has application only to rateable distribution under S. 73, C. P. Code, and has no application to distribution of dividends under the Provincial Insolvency Act.—*Sullemanj v. Pragn Kala*, 39 I. C. 932; 10 S. L. R. 189.

A person whose application for execution has been dismissed for default is entitled to a share in a rateable distribution of the assets and as such can apply under this rule.—*Byomkesh v. Jatindra*, 18 C. W. N. 1311.

(2) "Any person whose interests are affected by this sale."—The expression "any person whose interests are affected by the sale" has been substituted for the expression "any person whose immovable property has been sold," which occurred in the old S. 311. In the Full Bench case of *Asmut-unnessa v. Ashruff Ali*, 15 C. 488 (F. B.), this expression was held to mean "any person whose interests are affected by the sale." It was held in this case that a person who claims to be the purchaser from a judgment-debtor prior to the attachment, is not entitled to come in under rule 90 and object to the sale of the judgment-debtor's property, because the sale being prior to the attachment his interest cannot be legally affected by the sale. This Full Bench Case has been followed in *Ram Chandra v. Rukhma Bai*, 23 B. 450, and dissented from by Mahmood, J., in *Sheo Prasad v. Hira Lal*, 12 A. 440 (following 14 C. 240). In *Matungini Dassi v. Monmotha Nath*, 4 C. W. N. 542, it has been held that an attaching creditor is not a "person whose immovable property is sold," nor does he come within the words "the decree-holder." But in the case of *Dhirendra v. Kamini*, 28 C. W. N. 899, it has been held that an attaching creditor who has attached the property in execution of his decree is a person "whose interests are affected by the sale" and can apply under this rule. See also *Narain Pal v. Rudra*, 29 A. L. J. 880; 133 I. C. 426. A distinction, however, has been made between the person attaching the property in execution of his decree and the person attaching the same before judgment. A plaintiff attaching the property before judgment has no *locus standi* to apply under the rule; *Jogendra v. Mammotho*, 16 C. L. J. 566; 17 C. W. N. 80; *Badiar v. Sarada*, 42 C. L. J. 37; 89 I. C. 688; A. I. R. 1925 Cal. 1103. In *Aubhoya Dassi v. Pudmo Lochun*, 22 C 802, it has been held that a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent is entitled to apply under rule 90, to set aside the sale (15 C. 488 distinguished). An unregistered transferee, before decree, of a portion of an occupancy holding can apply to set aside a sale held in execution of a decree obtained against the recorded tenant, as a person whose immovable property has been sold within the meaning of Or. XXI, r. 90.—*Azgar Ali v. Asaboddin Kazi*, 9 C. W. N. 134. An auction-purchaser of the interests of an unregistered transferee of an occupancy holding as well as the unregistered transferee himself may apply under this rule to set aside a sale.—*Haradhan v. Girish Chandra*, 13 C. W. N. 99 (9 C. W. N. 134; 10 C. W. N. 240, referred to). A person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree, may apply to set aside the sale.—*Nissa Bibi v. Radha Kishore*, 11 O. W. N. 312 (9 C. W. N. 134 followed). But a person who claims to have purchased the holding from the tenant, cannot apply as the representative of the judgment-debtor to set aside a sale, if the holding

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be not transferable by custom or usage.—*Prosunno Kumar v. Bamachurn*, 13 C. W. N. 652 (11 C. W. N. 312 followed). *Quare*, whether a person claiming an occupancy right can have the sale set aside.—*Kuti Baru v. Jitendra*, 35 C. W. N. 31; A. I. R. 1931 Cal. 425; 131 I. C. 561.

The judgment-debtor sold his properties to another before the date of the execution-sale. But at the time of the execution-sale the properties were sold as belonging to him. Held that the judgment-debtor was a person whose interests were "affected by the sale" within the meaning of this rule; *Muhammad Mohideen v. Ramanadhan*, 23 L. W. 872; 92 I. C. 597; A. I. R. 1926 M. 307. A co-judgment-debtor to set aside a sale is maintained by other judgment-debtors have proved *v. Kutiswar*, A. I. R. 1926 Cal. 829; 93 I. C. 870; *Jadoonath v. Astwani*, 16 C. L. J. 98; 16 I. C. 974. The words "whose interests are affected by the sale" include persons with pecuniary or other interests. Where in executing a mortgage-decree, the Court ordered that the property of the appellant, one of the judgment-debtors, should not be sold until the properties of the other judgment-debtors had been put up to sale, the appellant is entitled to apply for setting aside the sale of the properties of the other judgment-debtors on the ground of irregularity and fraud and consequent inadequacy of price, because if the other properties were sold for an inadequate price, the property of the appellant would be threatened.—*Bibi Mehdattunnissa v. Sewak Ram*, A. I. R. 1931 Pat. 217; 132 I. C. 111.

The words in r. 90 "whose interests are affected by the sale" refer to existing interests in the property sold. The phrase cannot be extended to the claims of creditors, for that would involve (1) proof of claim in the execution-proceedings and (2) a construction which would make the words "the decree-holder or any person entitled to a share in a rateable distribution of assets" redundant.—*Pragji Kala v. Asa Jalal*, 35 I. C. 530. But see *Abdul Aziz v. Tafazzuddin*, 19 C. W. N. 326.

It was held under the old Code that an auction-purchaser was not entitled to apply under S. 311 to set aside a sale held in execution of a decree, as he was not "a person whose immoveable property was sold within the meaning of that section."—*Brij Mohan v. Rai Uma Nath*, 19 I. A. 154; 20 C. 8 (P. C.) (followed in *Ram Narain v. Dwarka Nath*, 4 C. W. N. 13; referred to in *Khetter Nath v. Faizuddin Ali*, 24 C. 682). Under the present Code the Code of Civil Procedure, 1908, so that an auction-purchaser has no right to apply under this rule (relying upon 3 P. L. J. 207; A. I. R. 1928 Cal. 828; 116 I. C. 155. The Madras High Court has held that an auction-purchaser is entitled to apply under this rule, because his interests are affected by the sale; *Bhabiriseti v. Pakanali*, 38 M. L. J. 228; 55 I. C. 333. The Patna High Court has held that an auction-purchaser is not entitled to apply under this rule, because "interests affected by the sale" mean interests in the property existing before the sale; *Khetro Mohan v. Sheikh Dilwar*, 3 P. L. J. 516; 46 I. C. 614; *Kartik v. Nagendra*, 74 I. C. 760; A. I. R. 1924 Pat. 319. The Rangoon High Court held the same.—*K. V. A. L. Chettyar v. Maricar*, 6 R. 621; 1931 Sind 107. See also *Kalumal v. Ahmed*, A. I. R. 1931 All. 107. Allahabad High Court has taken n.



different view from the Patna decisions and has held that an auction-purchaser is entitled to apply under this rule on the ground that the word "interests" is a term which covers "every sort of interest recognized by law, such as, in the case of an auction-purchaser, the liability to pay the money, liability to complete and take a transfer of the property, and, from his own point of view, the necessity of finding the requisite funds, and also the necessity of carrying through to fruition the provisional contract in which he has entered"; *Ravinandan v. Jagannath*, 47 A. 479: 87 I. C. 278: A. I. R. 1925 All. 453: 23 A. L. J. 233. This case was at first followed in *S. N. V. R. S. Subramanian v. N. L. M. Chettyar Firm*, 5 R. 516: 105 I. C. 465: A. I. R. 1927 Rang. 301, and in *Nihal Chand v. Pritam Singh*, 132 I. C. 525: A. I. R. 1931 Lah. 630. But now see *contra*, *Nihal Chand v. Pritam*, A. I. R. 1932 Lah. 468; and *K. V. A. L. Chettyar v. Maricar*, noted *ante*.

Where in execution of a decree obtained against a Hindu widow, certain properties were sold, and the presumptive reversioner sought to set aside the sale on the ground of irregularity in the proclamation and the conduct of sale, held that he is a person "whose interests are affected by the sale" within the meaning of this rule, and so the application is maintainable; *Adanamoli Chetti v. Chinnaaswami*, (1926) M. W. N. 631: 97 I. C. 574: A. I. R. 1926 Mad. 959. See also *Meenakshi v. Palaniappa*, A. I. R. 1928 Mad. 1138: 113 I. C. 873. A reversioner to a Hindu widow's estate is entitled to apply under Or. XXI, r. 90, to set aside a sale of immoveable property—*Brijkishore v. Pratap Narain*, 4 P. L. J. 369: 51 I. C. 359.

A person alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor applied to have a sale of certain joint-family property, which had taken place in execution of the decree, set aside. Held that the applicant's proper remedy was a regular suit, and not a proceeding under this section (rule).—*Subbarayadu v. Pedda*, 16 M. 476.

Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under this rule and object to the sale.—*Abdul Gani v. Dunne*, 20 C. 418 (15 C. 433 followed) See also *Timmanna Banta v. Mahabala Bhatta*, 19 M. 167.

Where immoveable property has been sold in execution of a decree against the ostensible owner, the real owner cannot apply under this rule.—*Hardwari v. Salamatullah*, 38 A. 358.

A person claiming to be a co-sharer in certain undivided property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed that it might be confirmed in his favour with reference to the provisions of S. 310, C. P. Code, 1882 (Or. XXI, r. 88). Held that he had no *locus standi* to make an application under this rule.—*Bisheshwar Kuar v. Hari Singh*, 5 A. 42. See also *Kunjolal v. Idurali*, 97 I. C. 757; *Medni Prasad v. Nand Keshwar*, 2 P. 386: 85 I. C. 1014: A. I. R. 1923 Pat. 451. But where a property is sold in execution of a rent-decree obtained in a suit

framed under S. 148-A of the B. T. Act, by some co-sharer landholders, the other co-sharers may apply under this rule—*Khogendra v. Jatindra*, 23 C. W. N. 619; 50 I. C. 329.

An objection made by one whose property was attached and sold in execution of a money-decree for the performance of which he had become a surety, that he was no party to the decree and that his property was not liable to be attached and sold, and therefore the sale was invalid, cannot be entertained under this section (rule).—*Hub Lal v. Kanhia Lal*, 7 A. 365.

A mortgagee after obtaining a foreclosure decree under S. 86 of the T. P. Act (IV of 1882), is entitled to apply under this section (rule) to set aside a sale on the ground of irregularity.—*Rakhal Chunder v. Dwarka Nath*, 13 C. 346. But see *Bhugabati Churn v. Biseshwar*, 8 C. 367. A simple mortgagee of property sold in execution of a rent-decree is competent to apply under this section (rule).—*Safar Ali v. Raj Mohun*, 1 C. L. J. 454.

A mortgagee purchaser in execution of a mortgage-decree of an entire non-transferable occupancy holding is a person "whose interests are affected by the sale,"

execution-sale  
22 C. W. N. 7  
the sale" and who would be entitled to claim in satisfaction of his debt any surplus proceeds of the rent-sale as against the mortgagor is a person interested.—*Lakhan v. Bacha Lal*, 11 P. L. J. 500 126 I. C. 295; A. I. R 1930 Pat. 451.

A person claiming adversely to a judgment-debtor cannot apply; *Maung Kun v. Ma Nan*, 1 Bur. L. J. 234; 70 I. C. 900

An interim receiver appointed under S. 20 of the Provincial Insolvency Act can apply under this rule.—*Subramania v. Dharapuram Nidhi Ltd.*, (1928) M. W. N. 216; 109 I. C. 148; A. I. R. 1928 Mad. 454.

Strangers cannot challenge sale on the ground of irregularity.—It is not open to third parties to raise the question of irregularity in the sale in execution of a decree. The only person who can raise the question is either the decree-holder or a person whose interest is affected by the sale, and these persons can only raise the question under the provisions of Or. XXI, r. 90; *Kunjolal v. Idurali*, 97 I. C. 757.

What does and what does not amount to material irregularity.—

(a) Absence of attachment.—A regularly perfected attachment is an essential preliminary to sales in execution of simple money-decrees, and where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void.—*Mahadeo Dubey v. Bhola Nath*, 5 A. 86 (F. B) See also *Fida Husain v. Kutub Husain*, 7 A. 38; *Ram Chand v. Pitam Mal*, 10 A. 505 (516) and *Luchmeput v. Lekraj Roy*, 8 W. R. 415. It was held by the Calcutta High Court in *Panchanan v. Kunja*, 42 I. C. 259, that the Court had no jurisdiction to sell property which had not been duly attached and that the omission to attach rendered the sale void, *ipso facto*. But see *Kishory v. Mahamed Mujaffar*, 18 C. 188, where it has been held that after a sale has been confirmed and sale certificate granted to the purchaser, the sale is not to be considered as a nullity,

merely by reason of the absence of any attachment (8 W. R. 9 followed; 5 A. 86 dissented from; followed in *Hari Charan v. Chandra Kumar*, 34 C. 787). Where an objection that the property proclaimed for sale had not been attached is taken before the sale, it is the duty of the Court not to proceed with the sale but to direct an attachment.—*Sasirama v. Meherban*, 13 C. L. J. 243 (249-250): 9 I. C. 918. In *Sheo Dhyani v. Bholanath*, 21 A. 311, it has been held that the absence of an attachment, prior to the sale of immoveable property in execution of a decree, amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. The Patna High Court, in *Raja Wazir v. Bhikkhari*, 2 P. 207: A. I. R. 1923 Pat. 45, took the same view as the Calcutta High Court took in *Kishory v. Mahomed Mujaffar*, 18 C. 188, though in the Patna case the application to set aside the sale was made before the confirmation of sale. The Rangoon High Court has held that though the absence of attachment is an irregularity, it does not render the sale absolutely void, but only voidable; *Ma Pwa v. Mahomed Tambi*, 1 B. 533: 77 I. C. 368: A. I. R. 1924 Rang. 124. See also *Shankar Rao v. Manik Rao*, 68 I. C. 643: A. I. R. 1923 Nag 18; *Taraknath v. Syamacharan*, 36 I. C. 292; *Panaru v. Buldeo*, 21 I. C. 46. The Madras High Court has held that a sale without attachment is an irregularity within this rule.—*Subramania v. Krishna*, 92 I. C. 833: A. I. R. 1926 Mad. 211.

The omission to cause an attachment to be made in execution of a decree, for the realization of a mortgage-debt does not affect the validity of a sale of the mortgaged property in execution of such a decree.—*Tincouri Debya v. Shib Chandra*, 21 C. 639; *Muniappa v. Subramania*, 18 M. 437.

Where there was a subsisting attachment which was followed by an order for sale made in the life-time of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realize his decree.—*Peary Lal v. Chandi Charan*, 11 C. W. N. 163: 5 C. L. J. 80.

The procedure as regards the attachment could not be impugned after an order of sale passed without objection.—*Gajadhar v. Bechraj*, 130 I. C. 265: A. I. R. 1931 Pat. 63.

(b) **Irregular attachment.**—Under the present law irregularity in attaching the property is no ground for setting aside the sale.—*See the Report of the Special Committee*. Where the writ of attachment gave the wrong number of the premises but the proclamation of sale contained the correct number and the sale was effected in pursuance thereof, held that the sale was valid.—*Nareshchandra v. Molla Ataul*, 57 C. 1206: 129 I. C. 779: A. I. R. 1931 Cal. 35.

(c) **Omission to issue notice.**—Omission to give notice to the party against whom execution is proceeding as provided by Or. XXI, r. 22 invalidates a sale in execution of the decree.—*Ramessuri Dasee v. Doorgadas*, 6 C. 103: 7 C. L. R. 85; *Imamunnissa Bibi v. Liakat Husain*, 3 A. 424; *Vuppu Sidaramayya v. Gopala Krishnamma*, 43 M. 57: 37 M. L. J. 216: 53 I. C. 257; *Sahdeo Pandey v. Ghasiram*, 21 C. 19. See also *Gopal Chunder v. Gunomani*, 20 C. 370; and *Erava v. Sidramappa*, 21 B. 424. But see *Parash Ram v. Balmukund*, 32 B. 572; and *Ramjas v. Sheo Prasad*, 23 A. 193. Omission to issue notice under Or. XXI, r. 22 renders the sale void but irregularity in service of notice is not a material irregularity.—*Babu Das v.*

*Mir Mahamad Yusuf*, 1921 P. 181: 61 I. C. 823. An omission to serve a notice under Or. XXI, r. 22, is by itself sufficient to render the sale void for want of jurisdiction, for the notice is the very foundation of jurisdiction.—*Ram Kinkar v. Sthiti Ram*, 27 C. L. J. 523. Want of service of notice under Or. XXI, r. 22 is a good ground for granting an application under this rule and S. 47 to have the sale set aside.—*Satish Chandra v. Patna Dhana Bhandar*, 125 I. C. 655: 51 C. L. J. 197. A. I. R. 1930 Cal. 348; *Chandi Prasad v. Mt. Jumna*, A. I. R. 1928 All. 74.

The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity in publishing the sale, sufficient to justify by itself the setting aside of the sale.—*Mahpal Bahadur v. Rambahadur*, 52 I. C. 167.

Notice of sale need not be given to a receiver who is not in possession of the property sold, and a sale therefore without notice to him is not irregular.—*Maung Ohn Tin v. Chettyar Firm*, 7 R. 425: A. I. R. 1929 Rang. 311.

Omission to issue notice under Or. XXI, r. 66, is an irregularity within r. 90.—*Jaggannath v. Daud*, 4 L. 243: 75 I. C. 103: A. I. R. 1923 Lah. 592; *Tukaram v. Sakharama*, 25 N. L. R. 53. 118 I. C. 49: A. I. R. 1929 Nsg. 130.

During the suit the son was represented by his father as guardian. At the time of execution the son became a major but that was not brought to the notice of the Court. Notice under Or. XXI, r. 32 was served on the father but not on the son. Held, that there was nothing contrary to law in that separate notice of the execution petition was not initially issued to the son under r. 22, though he was a major, and that he having waived the issue of it, if it was necessary, cannot be heard to say that its absence is an illegality so as to vitiate the sale; *Ramanathan v. Ramanathan*, A. I. R. 1929 Mad. 275 (1917) M. W. N. relied on; 39 M. 1031 and 51 M. 768 referred to).

(d) Omission to state in the sale-proclamation the amount of rent or revenue payable in respect of the property to be sold.—Omission to state in the sale-proclamation the amount of rent payable in respect of a tenure is not a material irregularity within the meaning of this section (rule).—*Mahendro Coomar v. Heera Mohun*, 7 C. 723. Nor an omission to state the real rent which was higher than that stated in the sale-proclamation.—*Muhammad Mukarram v. Nanak Chand*, 122 I. C. 234: A. I. R. 1930 Lah. 692.

Where a revenue-paying land is advertised for sale, non-statement of the revenue assessed upon it, as required by the provisions of Or. XXI, rr. 68 and 70 is an irregularity; but a sale cannot be set aside on account of such irregularity without proof of substantial damage.—*Macnaghten v. Mahabir Pershad*, 9 C. 656 (P. C.): 11 C. L. R. 494 (reversing 9 C. L. R. 134).

Although inadequacy of price is no ground for refusing to confirm a sale, yet any error in the sale-notification in specifying the amount of Government revenue of the property sold is an irregularity, for which, on proof of substantial injury, a sale is liable to be set aside.—*Giridhari Singh v. Hurdeo Narain*, 3 I. A. 230: 26 W. R. 44 (P. C.) (affirming 19 W. R. 227). See also *Madarsah v. Palaniappa*, 23 M. 623; *Bali Ram v. Narasingdas*,

28 C. W. N. 593 : 75 I. C. 546 (P. C.): A. I. R. 1923 P. C. 93 : 45 M. L. J. 403.

(e) Other errors, omissions and mis-statements in the sale-proclamation.—An omission to state in the sale-proclamation the precise amount of claims received from other decree-holders, subsequently to the order directing the sale, can scarcely be called an irregularity at all.—*Mohamed Ali v Mahabir Prasad*, 35 I. C. 411.

The mistake in the dimensions of the property as stated in the sale-proclamation, is a material irregularity, but this by itself is not sufficient to set aside the sale. It must be held further that there has been substantial injury to the judgment-debtor by reason of this irregularity; *Kishundas v. Narain Dutt*, 96 I. C. 196 · A. I. R. 1926 Lab. 587.

Where in a proclamation of sale the area of the land was stated to be 144 acres, whereas it was 440 acres and its value as Rs. 20,000 when in fact it was worth about two lakhs of rupees · held that the sale was vitiated by material irregularity and should be set aside.—*Smith v. Gokul*, 11 P. 424.

It is not for every omission that a sale is liable to be set aside. To render a sale liable to be set aside, it must be shown that the omission was a material one.—*Promatha v. Bejoy Madhab*, 53 I. C. 148.

In a sale of immoveable property the sale-proclamation notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was, in fact, one charge only amounting to Re 800. Held that the error in the sale-proclamation amounted to such an irregularity in publishing the sale as must have materially affected the price, and that the sale must therefore be set aside.—*Kanji Mal v. Bibi Sailo*, 8 A. 116.

A misdescription of property in the sale-proclamation brings a case for setting aside a sale held under the Public Demands Recovery Act within the rule laid down in 14 C 9 —*Ram Taruk v. Mosahebali Khan*, 6 C. W. N. 246. See also *Ram Tarack v. Dilwar Ali*, 5 C. W. N. 521 (F. B.).

The omission in a sale-proclamation to mention particulars as to the numbers, value, etc., of Government Promissory notes under attachment for sale, is not such an irregularity as would vitiate the sale.—*Lachmeput v. Lekraj Roy*, 8 W. R. 415.

There is no provision in the C. P. Code in making it necessary to mention the income of the property in the proclamation of sale and failure to do so does not amount to a material irregularity in conducting or publishing the sale.—*Mahna Singh v. Salig Singh*, 110 I. C. 339 : A. I. R. 1928 Lab. 918.

Where the Court had acted wrongly in overlooking the rules laid down for the preparation of the sale-proclamation, the sale should be set aside.—*Ram Prasad v. Shiva Kumar*, 133 I. C. 529 : 29 A. L. J. 849.

(f) Mis-statement of the value of the property in the sale-proclamation.—The absence from the sale-proclamation of a valuation of the property to be sold, if it had not a different effect on the mind of intending or possible bidders, is not a material irregularity.—*Mahomed Ali v. Mahabir Prasad*,

35 I. C. 411. See also *Riprudan v. Nanku*, 109 I. C. 443 : A. I. B. 1923 Nag. 281; *Veeramanni v. Kalyanasundaram*, 105 I. C. 201 : A. I. B. 1927 Mad. 1093; *Maharaj Bahadur v. Sachindra*, 32 C. W. N. 303 : A. I. B. 1923 Cal. 323; *Mt. Sukhrani v. Krishna Prasad*, 105 I. C. 153 : A. I. B. 1923 Pat. 108; *Rup Eshore v. Collector of Etah*, 52 A. 115 : 120 I. C. 545 : 27 A. L. J. 1223 : A. I. B. 1923 All. 948; *Darlat v. Bakshi*, 55 C. 813 : 53 C. L. J. 575 : 35 C. W. N. 75 : A. I. B. 1931 Cal. 490 : 131 I. C. 853.

The Privy Council has held that the exact value of the property of which the sale has been ordered in execution of a decree must be stated in the sale-proclamation and an under-statement of the value of property in the sale-proclamation is a material irregularity in publishing or conducting the sale.—*Sadamand Khan v. Phul Kaur*, 25 I. A. 145 : 20 A. 412 (P.C.) : 2 C. W. N. 559 (relied upon in *Rajal Ramasur Proshad v. Bai Sati Kishan*, 8 C. W. N. 257 and *Moti Lal v. Bhatani Kurnari*, 6 C. W. N. 836; distinguished in *Rajal Proshad v. Jamuna Pershad*, 31 C. 922 : 8 C. W. N. 254; followed in *Sati Sami Naicker v. Ramasami Naicker*, 23 M. 563).

This Privy Council decision was overlooked in *Abdul Kasher v. Benode Lal*, 12 C. W. N. 757 in which it has been held that the statement in the sale-proclamation of a value which proves to be inadequate is no irregularity, but not a material irregularity, as such statements are made without much consideration and it is well-known that purchasers do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold (dissented from in *Sitadarya v. Rajmohan*, 15 C. W. N. 577; *Kabilanund v. Pirthi Chand*, 16 C. W. N. 704 and *Pran Singh v. Janardan*, 14 C. L. J. 541).

Where the decree-holder knowingly made a mis-statement of the value of the property in the sale proclamation and the judgment-debtor suffered substantial injury thereby, there was a material irregularity within the meaning of Or. XXI, r. 90 and the sale should be set aside.—*Parash Nath v. Hari Charan*, 52 I. C. 23. When the gross under-valuation of properties in the sale-proclamation had the effect of deterring intending purchasers from bidding at the sale and offering a reasonable value, the sale should be set aside.—*Ambika v. Manikganj Loan Office*, 33 C. W. N. 848 : A. I. B. 1929 Cal. 818.

Omission to mention the valuation of the property according to the judgment-debtor and omission to give the judgment-debtor a proper opportunity to state his valuation if it result in apparent loss to the judgment-debtor, is a material irregularity in publication or conduct of sale.—*Allauddin v. Monoranjan*, 51 C. L. J. 336 : 127 I. C. 254 : A. I. B. 1930 Cal. 511.

The absence of specification in the sale-proclamation of the encumbrances to which the property advertised for sale is subject, coupled with the mis-statement of its value, amounts to a material irregularity within the meaning of this section.—*Moti Lal v. Bhatani Kurnari*, noted ante.

A judgment-debtor is not precluded from raising the question of valuation in an enquiry under r. 90 simply because the question had already been decided when the sale proclamation was settled.—*Maharaj Bahadur v. P. C. Lal*, A. I. B. 1923 Pat. 25 (the decision in *Mahadeo Singh v. Dholi Singh*, 2 P. 917 : A. I. B. 1934 Pat. 111 regarding valuation was held to be really obiter and not binding).

It is essential for a judgment-debtor, in order to succeed in an application under this rule to show that the inadequacy of the prices stated in the sale-proclamation was caused in consequence of the irregularity. It is not an irregularity to have stated two separate valuations in the proclamation, the decree-holder's valuation and the judgment-debtor's valuation.—*Nand Kishwar v Kedar Nath*, 40 I. C. 849 (2 P. L. J. 180 distinguished); *Raghunath v. Hazari*, 37 I. C. 872 (F. B.).

A sale is liable to be set aside on the ground of material irregularity when the price realised is very inadequate and the sale-proclamation understated the value of the property and omitted to state the amount due under a mortgage thereon.—*Mahendra Nath v. Bipin Behary*, 33 I. C. 946.

In ascertaining the value of the property, only the rents realizable from the tenants and not the *abwabs* that used to be realized from them should be taken into account.—*Shosi Bhushan v. Ahmed Hossein*, 27 C. W. N. 439.

Gross under-valuation of the property in the sale-proclamation coupled with insufficient description and insufficient proclamation of the property constitute material irregularity which vitiates the sale.—*Chatturpatt Singh v. Surendra Nath*, (1918) P 33: 44 I. C. 412.

Where the Court omitted to fix a reserve price under r. 72-A and the property was sold for a lesser amount than the decree amount, the sale was set aside.—*Mahomed Abdulla v. Sakhamam*, 54 B. 348: 125 I. C. 908: A. I. R. 1930 Bom. 290.

(g) Omission to make an order absolute.—An omission to make an order absolute for sale under S. 89 of the Transfer of Property Act (IV of 1882) is not a material irregularity for setting aside a sale held in execution of a mortgage-decree.—*Phul Chand v. Nursingh Pershad*, 28 C. 73 (18 C. 139 and 22 C. 931 referred to).

A sale held in contravention of S. 99 of the T. P. Act (IV of 1882) is not a nullity, but an irregular and voidable sale. It can be avoided under S. 244, C. P. Code, 1882 (S 47), before or after confirmation. But if the application is made after confirmation, the applicant must prove that owing to fraud or other reasons he was kept in ignorance of the sale.—*Askutosh v. Behary Lal*, 35 C. 61 (F. B.): 11 C. W. N. 1011: 6 C. L. J. 320. See also *Muthu v. Karuppan*, 30 M. 313: 17 M. L. J. 163 and *Venkayya v. Surayya*, 30 M. 362: 17 M. L. J. 325.

(h) Omission to beat drum.—Omission to have a drum beaten as required by Or. XXI, rr. 54 and 57, was held to be a material irregularity so as to render a sale held in execution of a decree liable to be set aside.—*Trimbak Rayji v. Nana*, 10 B. 504; *Nand Lal v. Tola Ram*, 67 I. C. 752; *Gopi Chand v. Benani*, 1 L. L. J. 197.

(i) Postponement of sale and issue of fresh proclamation.—Where a sale is postponed, whether definitely or to a fixed date, it is necessary in the absence of an express arrangement between all the parties, that a fresh proclamation should be made, giving notice of the day to which the sale has been postponed; omission to do so is a material irregularity; *Goopee Nath v. Roy Luchmeepul*, 3 C. 542: 1 C. L. R. 349; unless the

proclamation has been waived; *Bipin v. Jatindra*, 37 C. 897: 6 I. C. 818; *Rup Kishore v. Collector of Etah*, 27 A. L. J. 1228: A. I. R. 1923 All. 948.

Where there is a series of short postponements each less than seven days but which, taken together in the aggregate, amount to more than seven days, a fresh proclamation of sale is necessary.—*Jamini Mohan v. Chandra Kumar*, 6 O. W. N. 44.

The property of a judgment-debtor was advertised for sale on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was re-leased to a third party. Notwithstanding this fact no fresh proclamation was made, and the sale took place on the day originally fixed. *Held* that the omission to issue a fresh proclamation was a material irregularity.—*Shib Prakash v. Sardar Doyal*, 3 C. 544: 2 C. L. R. 260.

When a sale does not take place on the day fixed, an indefinite postponement cannot be regarded as an adjournment from day to day, and a fresh notice should fix another date for the sale, and where, in consequence of an indefinite postponement, an estate has been purchased at an inadequate price and specially by the judgment-creditor, the irregularity is one that has occasioned substantial injury, and justifies a setting aside of the sale.—*Jhoomuck Chowdhry v. Radha Pershad*, 25 W. R. 323.

Where a sale was adjourned to the next day but the sale officer did not record his reasons for the same and the proclamation did not give the prior incumbrance on the property, *held*, that there was material irregularity in conducting the sale; *Gulal v. Raghunir*, 30 A. L. J. 357: A. I. R. 1932 All. 369.

When the sale is postponed *sine die*, the omission to issue a fresh proclamation . . . . . *Virpal v. Kedarnath*, 41 I. C. 68. But the Collector, to whom under Or. XXI, . . . . . not apply, and it was adjourned *sine die*, but the same was continued the next day without any fresh proclamation, *held*, that there was a mere irregularity in procedure and that the sale was not vitiated.—*Kamakhyia v. Shyam Lal*, 6 O. W. N. 226: 117 I. C. 471: A. I. R. 1929 Oudh 235.

An execution-sale which had been fixed for a certain date was put off to the corresponding day in the following month, on the application of the judgment-debtor, who consented that he would not object to any irregularities affecting the sale. A notification was also issued and was proclaimed only in a public place. After the sale, the judgment-debtor contended that he was entitled to have a fresh proclamation issued on the spot where the properties were situated. *Held* that he could not now object to it.—*Hel Narain v. Gossain Luchmee Narain*, 23 W. R. 256.

Where a sale was at first proclaimed for a certain date, but was twice postponed on the application of the judgment-debtor, who consented to waive the making of a fresh proclamation: *held* that a waiver by the judgment debtor of a fresh proclamation does not necessarily prevent another attaching decree-holder from objecting to the sale on the ground of irregularity. Refusal by the Court to issue a fresh proclamation, if applied for would constitute a ground on which the irregularity of the sale might be impeached.—*Chakrapani v. Dhanji Sethu*, 24 M. 311.



(j) Effect of irregularity in publishing or conducting sale.—The words "publishing or conducting" the sale have been explained in *Parashram v. Balmukund*, 32 B. 572: 10 Bom. L. R. 752.

Where property not covered by the decree has been proclaimed and sold, the case is one of "material irregularity in publishing or conducting the sale" within the meaning of this rule.—*Imtiazunnissa v. Chuttan Lal*, 84 I. C. 746: A. I. R. 1925 All. 236: 22 A. L. J. 1119; *Piari Lal v. Kishen Lal*, 110 I. C. 876: A. I. R. 1928 All. 704. But see *Ganga Devi v. Ram Prasad*, 88 I. C. 393: A. I. R. 1925 All. 551: 23 A. L. J. 558. So also is an irregular preparation of the proclamation of sale; *Jaggannath v. Daud*, 4 L. 243: 75 I. C. 103: A. I. R. 1923 Lah. 592.

The expression "conducting the sale" refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with conducting the sale; *Ramchharbar v. Bechu*, 7 A. 641, 645.

The omission to affix sale-proclamation on a conspicuous part of the Court-house, is a material irregularity which vitiates the sale; *Laxminarayan v. Purnabai*, 48 I. C. 611.

When distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation on each of such properties amounts to an irregularity in the publication of the sale.—*Tripura Sundari v. Durga Charan*, 11 C. 74. See, however, *Pedro Antonio v. Jalbhoy Ardeshir*, 12 B. 868, where it has been held that where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided because a mere breaking up of a property into a number of lots as a means of obtaining a better aggregate price, does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. See also *Sami Pillai v. Krishna Sami*, 21 M. 417. See also *Maharaj Bahadur v. P. C. Lal*, A. I. R. 1928 Pat. 25, in which it has been held that where several *mouzas* are put up for sale in execution of a decree, the law does not require that the publication should be made in every *mouza* (distinguishing *Krishna Prasad v. Moti Chand*, 40 I. A. 140: 40 C. 635 (P. C.) on the ground that in that case the execution Court in terms directed that the sale-proclamation should be served in every *mouza* and as there was a gross contravention of the order of the Court, the Privy Council held that the sale was bad, but there was no justification for the contention that in every *mouza* comprising an estate or a tenure, a separate proclamation is to be served).

Under Or. XXI, rr. 54 and 67, it is necessary that a copy of the sale proclamation should be affixed to some conspicuous place of the property attached; and the omission to do so is a material irregularity within the meaning of this rule.—*Kalyata v. Ram Coomar*, 7 C. 466: 9 C. L. R. 114. Where the sale-proclamation was affixed on a tree at some distance from the property to be sold and not on the property itself, held, that the omission is a material irregularity.—*Rup Kishore v. Collector of Etah*, 52 A. 115: 120 I. C. 545: A. I. R. 1929 All. 948: 27 A. L. J. 1228.

Where a sale-proclamation *as framed* by the Court was not published ; held that the sale was a nullity.—*Jayarama v. Vridhajiri*, 44 M. 35 : 59 I. C. 167 : 39 M. L. J. 189.

A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale-proclamation not having been fixed up in the Collector's office as required by S. 289, C. P. Code, 1892 (Or. XXI, r. 67). An omission to fix up such notices is an irregularity, the remedy for which can only be by an application under this section.—*Nana Kumar v. Golam Chunder*, 18 C. 422 (F. B.).

Where it appeared that the Court had accepted the report of the Nazir and the Court took as evidence of the publication of the sale-proclamation and had refused to allow the judgment-debtor to give evidence of its insufficiency, held that Court was bound to hear the evidence tendered by the judgment-debtor.—*Megh Lall v. Shub Pershad*, 7 C. 34 : 8 C. L. R. 369.

Upon an application to set aside a sale, on the ground of material irregularity, it appeared that the sale notification had not been fixed up in the Collector's office as required by S. 289, C. P. Code, 1892 (Or. XXI, r. 67), and that the sale took place on and not after the 30th day from the publication of notice; but it also appeared that the applicant had himself been present at the sale, and had purchased the property and it was not shown that any substantial injury had resulted from the irregularities. Held that there was no ground for setting aside the sale.—*Bandy Ali v. Madhub Chunder*, 8 C. 932.

A decree-holder who was granted permission to bid on condition that he would not be permitted to bid for any amount below the decretal amount, bid for one item of the property for certain amount, undertaking to make up the deficiency at the time some other item was sold and the sale-officer refused to accept the bid, held, that the sale-officer's refusal to accept the bid was a material irregularity.—*Aditya v. Jagdish*, 4 Luck. 93 : 5 O. W. N. 873 : 115 I. C. 105 : A. I. R. 1929 Oudh 26.

Selling only half the house when the sale-proclamation was for the whole of the house amounts to a material irregularity in the conduct of the sale.—*Chhotey Lal v. Nawal Kishore*, A. I. R. 1930 Lah. 15.

The failure on the part of the sale-officer to follow the order in the list of sales to be held does not amount to a material irregularity.—*Inamullah v. Shambhu*, 29 A. L. J. 62 : 180 I. C. 495 : A. I. R. 1931 All. 159.

The auction-purchaser is not entitled to have the sale set aside on the ground of any mis-apprehension or mistake on his part when he is not misled by anything done or said by the sale-officer. A unilateral mistake cannot avoid a contract. A sale cannot be set aside on the mere ground that the auction-purchaser thought that the amount for which the property was knocked down included also the mortgage money charged on the property.—*Sridat v. Mohar Singh*, 30 A. L. J. 393 : A. I. R. 1932 All. 403.

(k) Sale of immovable property in execution before expiry of 30 days.—It is a material irregularity for the proclamation to be published less than 30 days prior to a sale in execution of a decree, and where damage

has resulted the sale may be set aside.—*Abdul Nossia v. Doolal Doss*, 11 O. L. R. 303; *Megh Lall v. Shib Pershad*, 7 C. 34; 8 C. L. R. 369. *Contra* in *Ram Chandar v. Kamta Prasad*, 4 A. 300; *Venkata v. Sama*, 14 M. 227; *Laxminarayan v. Purnabai*, 48 I. C. 611.

Holding a sale of immoveable property before the expiration of 30 days from the date of fixing up the copy of proclamation under r. 68, is an irregularity in publishing a sale, and is something more than a material irregularity in publishing a sale to which this refers.—*Bakhshi Nand Kishore v. Malak Chund*, 7 A. 289; *Jasoda v. Mathura*, 9 A. 511; *Sadhu Saran v. Panchdeo Lal*, 14 C. 1; *Ganga Prasad v. Jaglal*, 11 A. 33; *Basharutulla v. Uma Churn*, 16 C. 794; *Tasadduk v. Ahmad Husain*, 20 I. A. 176; 21 O. 66 (P. C.); *Raja Wazir v. Bhikhari Ram*, 2 P. 207; 68 I. C. 363; A. I. R. 1923 Pat. 45.

An application made on the day of sale by the judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent," as, by virtue of Or. XXI, r. 68, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale.—*Harbans Sahai v. Bhairu Pershad*, 5 C. 259; 4 O. L. R. 23, and *Bhekraj Koeri v. Gendh Lall*, 5 C. 878.

As to the effect of misrepresentation by the auctioneer while conducting the sale, see *Kala Mea v. Harperink*, 36 C. 323 (P. C.); 13 C. W. N. 249; 9 O. L. J. 165.

(1) Effect of omission to hold sales at the stated time and place.—A sale by public auction in execution of a decree which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the C. P. Code. The time to be notified for a sale must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings.—*Chedam Lal v. Amir Beg*, 7 A. 676; *Khodeja Bibee v. Ram Narain*, 12 W. R. 511; *Pokhraj Singh v. Gossain Munraj Poorie*, 12 W. R. 281.

A property advertised for sale under r. 66 was sold on the day fixed but at an earlier hour than that stated in the proclamation. Held that there had been no sale within the meaning of the Code—proclamation of time and place of sale and the holding of sale at such time and place, being conditions precedent to the sale being a sale under the Code.—*Basharutulla v. Uma Churn*, 16 C. 794. See also *Babu Ram v. Inamullah*, 49 A. 402; 99 I. C. 926. A. I. R. 1927 All. 241; 25 A. L. J. 302.

Where a sale is adjourned under S. 291, C. P. Code, 1882 (Or. XXI, r. 69), it is necessary to mention the hour of sale and its non-specification is a material irregularity within the meaning of this rule.—*Bhikari Misra v. Rani Surjmoni*, 6 C. W. N. 48. See also *Mahabir Pershad v. Dhanukdhari*, 31 C. 815 (818); 8 C. W. N. 686 (affirmed in 34 C. 709 (P. C.)); 11 O. W. N. 739.

Where a sale was held neither on the day originally advertised nor on the day to which it had been adjourned but on a third day, held, it was a material irregularity in the conduct of sale.—*Hari Sadhan v. Shib Gopal*, 35 C. L. J. 140.

Where property was sold at an inadequate price owing to the hour of sale not being fixed as required by r. 69,—held that there had been a

material irregularity causing substantial injury to the judgment-debtor.—*Surnomoyee v. Dakhina Ranjan*, 24 C. 291 (followed in *Jamini Mohan v. Chandra Kumar*, 6 C. W. N. 44).

It is the practice of the Courts under the rules of the High Court, to place all properties intended for sale on a list and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of S. 291, C. P. Code, 1882 (Or. XXI, r. 69).—*Lal Mohun v. Nunu Mohamed*, 17 C. 152.

Where a sale is held at a place different from that specified in the proclamation, the case is not merely one of material irregularity but the sale is void altogether; *Jayrama v. Virdhagiri*, 44 M. 35: 59 I. C. 167: 39 M. L. J. 188.

(m) Effect of purchase by decree-holder without permission under Or. XXI, r. 72.—A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void; it is a good sale unless and until set aside by the Court under the provisions of S. 292, C. P. Code, 1882 (Or. XXI, r. 73).—*Javherbai v. Haribhai*, 5 B. 575 (followed in *Chintamanrao v. Vithabai*, 11 B 588). See also *In the matter of Veerappa Chetty*, 6 B. L. R. Ap. 37: 14 W. R. 405. But in *Rukhinee Bullubh v. Brojo Nath*, 5 C. 308, it has been held that a decree-holder is absolutely bound to have express permission from the Court before he can purchase the property; and whether this objection is taken and pressed or otherwise, a sale to him is invalid.

When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing the property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside.—*Woopendronath v. Brojendro Nath*, 7 C. 346: 9 C. L. R. 263 (disapproved in *Mahomed Mira Ravuthar v. Savvasi Vijaya*, 23 M. 227 (P. O.): 4 C. W. N. 288, where it has been held that any dissuasion by a bidder at a judicial sale of other persons from bidding does not of itself amount to a charge of fraud and will not invalidate the sale).

Under the terms of S. 294, C. P. Code, 1882 (Or. XXI, r. 72), it is discretionary with the High Court to set aside a sale at which a decree-holder had bid and purchased without permission of the Court; and in dealing with such a case, the Court, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless, it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity.—*Mathura Das v. Nathuni Lal*, 11 C. 731.

A mortgagee decree-holder was refused leave to bid at the sale in execution of his mortgage decree, but notwithstanding such refusal, he purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession. Held that the plaintiff had been guilty of an abuse of the process of the Court

has resulted the sale may be set aside.—*Abdul Nossia v. Doolal Doss*, 11 C. L. R. 303; *Megh Lall v. Shib Pershad*, 7 C. 34; 8 C. L. R. 369. *Contra* *io Ram Chandar v. Kamta Prasad*, 4 A. 300; *Venkata v. Sama*, 14 M. 227; *Laxminarayan v. Purnabai*, 48 I. C. 611.

Holding a sale of immoveable property before the expiration of 30 days from the date of fixing up the copy of proclamation under r. 68, is an irregularity in publishing a sale, and is something more than a material irregularity in publishing a sale to which this refers.—*Bakhshi Nand Kishore v. Malak Chund*, 7 A. 289; *Jasoda v. Mathura*, 9 A. 511; *Sadhu Saran v. Panchdeo Lal*, 14 C. 1; *Ganga Prasad v. Jaglal*, 11 A. 33; *Basharatulla v. Uma Churn*, 16 C. 794; *Tasadduk v. Ahmad Husain*, 20 I. A. 176; 21 C. 66 (P. C.); *Raja Wazir v. Bhikhari Ram*, 2 P. 207; 68 I. C. 363; A. I. R. 1923 Pat. 45.

An application made on the day of sale by the judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent," as, by virtue of Or. XXI, r. 68, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale.—*Harbans Sahai v. Bhairo Pershad*, 5 C. 259; 4 C. L. R. 23, and *Bhekras Koeri v. Gendh Lall*, 5 C. 878.

As to the effect of misrepresentation by the auctioneer while conducting the sale, see *Kala Mea v. Harperink*, 36 C. 323 (P. C.); 13 C. W. N. 249; 9 C. L. J. 165.

#### (1) Effect of omission to hold sales at the stated time and place.

—A sale by public auction in execution of a decree which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the C. P. Code. The time to be notified for a sale must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings.—*Chedami Lal v. Amir Beg*, 7 A. 676; *Khodeja Bibee v. Ram Narain*, 12 W. R. 511; *Pokhray Singh v. Gossain Munraj Pooree*, 12 W. R. 281.

A property advertised for sale under r. 66 was sold on the day fixed but at an earlier hour than that stated in the proclamation. Held that there had been no sale within the meaning of the Code—proclamation of time and place of sale and the holding of sale at such time and place, being conditions precedent to the sale being a sale under the Code.—*Basharatulla v. Uma Churn*, 16 C. 794. See also *Babu Ram v. Inamullah*, 49 A. 402; 99 I. C. 926; A. I. R. 1927 All. 241; 25 A. L. J. 302.

Where a sale is adjourned under S. 291, C. P. Code, 1882 (Or. XXI, r. 69), it is necessary to mention the hour of sale and its non-specification is a material irregularity within the meaning of this rule.—*Bhikari Misra v. Rani Surjamoni*, 6 C. W. N. 48. See also *Mahabir Pershad v. Dhanukdhari*, 31 C. 815 (818); 8 C. W. N. 686 (affirmed in 34 C. 709 (P. C.); 11 C. W. N. 739).

Where a sale was held neither on the day . . . . . nor on the day to which it had been adjourned but material irregularity in the conduct of sale.—*H* C. L. J. 140.

Where property was sold at an inadequate price owing to the hour of sale not being fixed as required by r. 69,—held that there had been a

material irregularity causing substantial injury to the judgment-debtor.—*Surnomoyee v. Dakhina Ranjan*, 24 C. 291 (followed in *Jamini Mohan v. Chandra Kumar*, 6 C. W. N. 44).

It is the practice of the Courts under the rules of the High Court, to place all properties intended for sale on a list and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of S. 291, C. P. Code, 1882 (Or. XXI, r. 69)—*Lal Mohun v. Nunu Mohamed*, 17 C. 152.

Where a sale is held at a place different from that specified in the proclamation, the case is not merely one of material irregularity but the sale is void altogether; *Jayrama v. Virbhagiri*, 44 M. 35 : 59 I. C. 167 : 39 M. L. J. 188.

(m) Effect of purchase by decree-holder without permission under Or. XXI, r. 72.—A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void; it is a good sale unless and until set aside by the Court under the provisions of S. 292, C. P. Code, 1882 (Or. XXI, r. 73).—*Jacherbai v. Haribhai*, 5 B. 575 (followed in *Chintamanrao v. Vithabai*, 11 B 538) See also *In the matter of Veerappa Chetty*, 6 B. L. R. Ap. 37 : 14 W. R. 405. But in *Rukhinee Bullubh v. Brojo Nath*, 5 O. 303, it has been held that a decree-holder is absolutely bound to have express permission from the Court before he can purchase the property; and whether this objection is taken and pressed or otherwise, a sale to him is invalid.

When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing the property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside.—*Woopendronath v. Brojendra Nath*, 7 C. 346 : 9 C. L. R. 263 (disapproved in *Mahomed Mira Ravuthar v. Saccasi Vijaya*, 23 M. 227 (P. C.) : 4 C. W. N. 289, where it has been held that any dissuasion by a bidder at a judicial sale of other persons from bidding does not of itself amount to a charge of fraud and will not invalidate the sale)

Under the terms of S. 294, C. P. Code, 1882 (Or. XXI, r. 72), it is discretionary with the High Court to set aside a sale at which a decree-holder had bid and purchased without permission of the Court; and in dealing with such a case, the Court, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless, it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity.—*Mathura Das v. Nathuni Lal*, 11 O. 731.

A mortgagee decree-holder was refused leave to bid at the sale in execution of his mortgage decree, but notwithstanding such refusal, he purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession. Held that the plaintiff had been guilty of an abuse of the process of the Court

in bidding at the sale and buying the property *benami*, and that the sale, therefore, ought not to be enforced.—*Mahomed Gazeer v. Ram Lall*, 10 C. 757.

A purchase by the son of a decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of S. 294, C. P. Code, 1882 (Or. XXI, r. 72), and is absolutely void if the purchase were made with funds which were joint-property of the father and son.—*Narayan Deshpande v. Anaji Deshpande*, 5 B. 130.

An assignee of a decree under an oral agreement has no *locus standi* to apply for the execution of the decree, and it is not necessary for him to obtain leave to bid at the sale in execution of a decree. Therefore a purchase by such an assignee without leave under S. 294, C. P. Code, 1882 (Or. XXI, r. 72) is not a material irregularity within the meaning of this section.—*Dakshina Mohan v. Srimati Basumati*, 4 C. W. N. 474.

A person declared to be the purchaser of property put up for sale did not, as required by Or. XXI, r. 84, pay a deposit of 25 per cent., immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. Held that there was no sale at all of the property.—*Intizam Ali v. Narain Singh*, 5 A. 316; *Amir Begam v. Bank of Upper India*, 30 A. 273; 5 A. L. J. 336; *Ahmad Bakhsh v. Lalla Prasad*, 28 A. 238.

(n) Default in making the deposit of 25 per cent. under Or. XXI, r. 84.—When a deposit is not duly made, the sale is liable to be set aside; but when a question arises as to whether a deposit was duly made or not, the Court is bound to inquire into and decide the question.—*Kuppayyan v. Ramasami Ayyan*, 6 M. 197.

At a sale in execution the property was knocked down to a bidder at Rs. 260, and on account of his inability to make a deposit, the property was re-sold for Rs. 50. Held that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might have recovered the deficiency of the price under S. 293, C. P. Code, 1882 (Or. XXI, r. 71).—*Beepin Chunder v. Purresh Nath*, 9 C. 98; 12 C. L. R. 316.

Failure of the auction-purchaser to make, and of the officer conducting the sale to receive, the deposit of 25 per cent., as required by Or. XXI, r. 84, constitutes a material irregularity in conducting the sale.—*Bhim Singh v. Sarwan Singh*, 16 C. 33 (5 A. 316 *dissented from*). In *Venkata v. Sama*, 14 M. 217, it has been held that any delay in making the deposit required by S. 306, is not more than a mere irregularity and does not vitiate the sale.

(o) Effect of mere inadequacy of price.—Inadequacy of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings.—*Reet Bhunjun v. Meeturjeet*, 6 W. R. Mis. 31; *Nuddea Kishore v. Bungshee Mohun*, 17 W. R. 210; *Hubeebool v. Allender*, 14 W. R. 44; *Alimooddy v. Chunder Nath*, 24 W. R. 227; *Khodaja Bibee v. Johad Roheen*, 14 W. R. 320.

An execution-sale cannot be set aside on the ground of material irregularity under Or. XXI, r. 90, if there is nothing to warrant the necessary or at least reasonable inference that the inadequacy of the price was the

result of the irregularity.—*Taimuddi Bepari v. Lakpat Bepari*, 45 I. C. 212; *Mahna Sing v. Salig Ram*, 110 I. C. 339: A. I. R. 1928 Lah. 918; *Ramaswami v. Rama Nathan*, 107 I. C. 295: A. I. R. 1928 Mad. 684.

The sale of immovable property to the highest bidder for a price which subsequently appears to be too low, is not a material irregularity in publishing or conducting the sale, and a sale cannot be set aside on that ground.—*Lakshmi v. Krishnabhat*, 8 B. 424.

Although inadequacy of price is no ground for refusing to confirm a sale, yet an error in the same notification, in specifying the amount of the Government revenue of the property sold, is an irregularity for which, on proof of substantial injury, a sale is liable to be set aside.—*Girdhari Singh v. Hurdeo Narain*, 3 I. A. 230: 26 W. R. 44 (P. C.) (affirming 19 W. R. 237).

Where a material irregularity is proved and it is also shown that the price realized was much below the true value, it may ordinarily be inferred that the low price was in consequence of the irregularity.—*Venkata Subbaraya v. Zemindar of Karvetinagar*, 20 M. 159.

(p) Proof of material irregularity and substantial injury.—If it is proved that the price obtained for property sold is greatly inadequate, and if it is also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.—*Kalyara v. Ram Coomar*, 7 C. 466: 9 C. L. R. 114 (3 C. 542 approved). In *Gur Buksh Lall v. Jawahir Singh*, 20 C. 599, it has been held that the relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence, or be inferred, when such inference is reasonable, from the nature of the irregularity and the extent of inadequacy of the price (9 C. 656 and 11 C. 200 referred to; followed in *Sheo Rutton v. Net Loll*, 30 C. 1: 6 C. W. N. 698 and in *Moti Lall v. Bhawani Kumari*, 6 C. W. N. 836). In *Surnomoyee v. Dakhina Ranjan*, 24 C. 291, it has been held that where there has been a material irregularity causing substantial injury to the debtor, it is sufficient under S. 311, C. P. Code, 1882 (Or. XXI, r. 90), if the evidence, though not "direct evidence" shows that the injury was a necessary result of the irregularity complained of (20 I. A. 176: 21 C. 66 (P. C.) explained). In *Venkata Subbaraya v. Zemindar of Karvetinagar*, 20 M. 159, it has been held that where a material irregularity is proved, and it is also proved that the price realized is inadequate, it may ordinarily be inferred that the low price was a consequence of the irregularity even though the manner in which the irregularity produced the low price be not definitely made out. In *Gopee Nath v. Roy Luchmeput*, 3 C. 542: 1 C. L. R. 349, it has been held that where property has been sold at an inadequate price, the fair inference to draw in the case is that the inadequacy of the price was the result of the irregularity. In *Lala Mobaruk Lal v. The Secretary of State*, 11 C. 200 (F. B.) it has been held that no positive rule can be laid down, permitting an inference to be drawn in all cases, that the inadequacy of the price is due to the irregularity of the sale. In *Or. XXI, r. 90*, it has been held (Or. XXI, r. 90), to set aside a sale, the applicant to show not only that there has been a material irregularity, but also that substantial injury had been sustained in consequence of such material irregularity;



and in the absence of evidence it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former.—*Tasadduk Rasul v. Ahmad Husain*, 20 I. A. 176 : 21 C. 66 (P. C.); *Satish Chunder v. Thomas*, 11 C. 658 (9 C. 656 ; 11 C. 200, discussed); *Bonomali v. Woornesh Chunder*, 7 C. 730 : 9 C. L. R. 341 (3 C. 542 : 1 C. L. R. 349 considered); *Jagan Nath v. Makund Prasad*, 18 A. 37 (21 C. 66 referred to); *Shirin Begam v. Agha Ali*, 18 A. 141 (15 I. A. 171 and 20 I. A. 176 referred to); *Arunachellam v. Arunachellam*, 15 I. A. 171 : 12 M. 19 (P. C.); *Macnaghten v. Mahabir Pershad*, 9 C. 656 (P. C.) : 11 C. L. R. 494 (reversing 9 C. L. R. 134); *Harbans Lal v. Kundan Lal*, 21 A. 140. See also *Mahabir Pershad v. Dhanukdhari*, 31 C. 815 : 8 C. W. N. 686 Even under the old Code, that is under S. 256 of Act VIII of 1859, which corresponds with S. 311, C. P. Code, 1882 (Or. XXI, r. 90), it was held that where material irregularity had occurred as from non-issue of the sale-proclamation, the party applying to set aside a sale on that ground was bound to prove that he had sustained substantial injury thereby. See *Joytara v. Mahomed Hossein*, 2 W. R. Mis. 2; *Abdool Mahomed v. Shit Doolaree*, 11 W. R. 114, *Leak Ram v. Mohesh Doss*, 12 W. R. 488; *Nujmooddeen Ahmed v. Abdool Azeez*, 15 W. R. 95, *Chunder Shekhar v. Jadub Chunder*, 19 W. R. 78; *Sanwul Singh v. Makhur Pandey*, 2 N. W. P. H. C. R. 143 and *Sheo Prokash v. Hurdai Narain*, 22 W. R. 550. The leading case on the point is the Privy Council case of *Tasadduk Rasul v. Ahmad Husain*, 20 I. A. 176 : 21 C. 66 (P. C.)

Where the judgment-debtor did not until after the sale had been completed put forth the plea that he was an agriculturist, held, that the plea could not be allowed to be raised (15 I. A. 171 relied on).—*Mahomed Abdulla v. Sakharam*, 54 B. 348 : 125 I. C. 908 : A. I. R. 1930 Bom. 290.

The irregularities in complying with the requirements of Or. XXI, rr. 54, 66 and 68, coupled with gross under-value in the selling price are sufficient to have the sale set aside.—*Pakmuddin v. Hazari*, 11 L. L. J. 55 : 117 I. C. 231 A. I. R. 1929 Lah. 441.

The failure to give a direction for advertisement of the sale in the gazette does not amount to a material irregularity in the conduct of the sale within Or. XXI, r. 90. A judgment-debtor applying to set aside a sale must show not only that there has been material irregularity in the conduct of the sale but also that such irregularity has resulted in substantial injury to him.—*Gopi Chand v. Benarsi Das*, 53 I. C. 794.

Suppression of processes and inadequacy of price are quite enough to bring the cases within the rule.—*Kusam Kumari v. Kutiswar*, 93 I. C. 870 : A. I. R. 1926 Cal. 829 The proviso is satisfied if the judgment-debtors have sustained substantial injury by reason of the material irregularity, being deprived of their proper remedy and getting a low price in the sale.—*Brij Kumar v. Jagdamba*, A. I. R. 1929 All. 671; *Baburam v. Inamullah*, 49 A. 402 : 99 I. C. 926 : A. I. R. 1927 All. 241 : 25 A. L. J. 302.

The circumstances that the decree-holders offered to return the properties to the judgment-debtor at the prices for which they bought them but the offer was not accepted, may be taken into consideration in judging whether the judgment-debtor has really suffered any injury by the sale.—

*Maharaj Bahadur v. Sachindra*, 32 C. W. N. 309; A. I. R. 1923 Cal. 328 : 113 I. C. 562.

One of the most usual forms of showing injury is to show that the property has been sold at a gross under-value.—*Beas Singh v. Khedu Mian*, 123 I. C. 637; A. I. R. 1930 Pat. 58.

It is not enough to show that the sale was advertised for one date and held on another; it is necessary for the applicant to prove substantial injury therefrom.—*Newal v. Ramsundar*, 129 I. C. 661 : 11 P. L. T. 701; A. I. R. 1931 Pat. 43. See also *Seth Nanhelal v. Umrao*, 58 I. A. 50; 35 C. W. N. 331 noted under r. 92, *post*.

(q) Omission to make the legal representatives of a deceased judgment-debtor or decree-holder parties to the sale-proceedings.—Where subsequent to the attachment of immovable property in execution of a money-decree, the judgment-debtor died, and the property was then sold without making the legal representatives of the judgment-debtor parties to the sale-proceedings.—*Held*, that the sale was regular and valid notwithstanding such omission.—*Sheo Prasad v. Hira Lal*, 12 A. 440 (F. B.) (6 M. 180 dissented from). See also *Net Lal v. Kareem Bux*, 23 C. 686; *Aba v. Dhondu Rai*, 19 B. 276; *Malkarjun v. Narhari*, 25 B. 337 (P. C.); 5 C. W. N. 10 (reversing 21 B. 424); *Abdur Rahman v. Shankar Dat*, 17 A. 162; *Stowell v. Ajudhia Nath*, 6 A. 255; *Dulari v. Mohan Singh*, 3 A. 759 and *Janardhan v. Ram Chandra*, 26 B. 317. But see *Ramasami Ayyangar v. Bhagirathi*, 6 M. 180; *Krishnayya v. Unissa Begam*, 15 M. 399; and *Groves v. Administrator-General of Madras*, 22 M. 119. In *Jagadish v. Bamasundari*, 23 C. W. N. 608, the omission to bring the legal representative on record was held to be a mere irregularity which might lay the sale open to attack.

As to the effect of omission to make the legal representatives of a deceased judgment-debtor or decree-holder parties to the sale-proceedings, see notes under S. 50.

Where subsequent to a decree and prior to sale the judgment-debtor was declared insane under Act XXXV of 1858, and an application was made to set aside the sale. *Held* that these facts only amounted to a material irregularity within Or. XXI, r. 90, and that substantial injury must be proved.—*Narayana Kothan v. Kalia Sundaram*, 19 M. 219.

“ . . . . . ” tion to set aside a sale on a minor in the execution and defect is a mere irregularity. 64 I. C. 25.

(r) Effect of sale after the order of postponement.—When a Court executing a decree passes an order postponing a sale, but the sale takes place before such order reaches the officer conducting the sale: *Held* that the defect in the sale amounted to an illegality and not merely an irregularity within the meaning of this section (rule).—*Sant Lal v. Umraounissa*, 12 A. 96 (4 A. 382, 3 A. 701, and 11 A. 333 referred to). See also *Maijha Singh v. Jhow Lal*, 6 N. W. P. H. C. R. 354; *Mainjan v. Man Singh*, 3 A. 686; and *Nonidh Singh v. Sohun Koor*, 4 N. W. P. H. C. R. 135. See, however, *Bessesswari v. Hurra Sundar*, 1 C. W. N. 226, where it has been held

that if a property is sold before the order of an appellate Court under S. 545, C. P. Code, 1882 (Cr. XLI, r. 5), staying execution of decree, is communicated to the Court holding the sale, such a sale is not void and cannot be treated as a nullity (4 N. W. P. H. C. R. 398, 6 N. W. P. H. C. R. 354, and 2 A. 686 distinguished).

Where a sale in execution took place under an order obtained notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for postponement, the petition of postponement having been by mistake filed in the wrong Court, held that the judgment-debtor was entitled to have the sale set aside.—*Ganga Pershad v. Gopal Singh*, 11 I. A. 234 : 11 C. 136 (P. C.).

A sale held in spite of an issue of an injunction to stay the sale is invalid and ought to be set aside.—*Ramanathan v. Arunachellam*, 38 M. 766 : 22 I. C. 99.

(s) Effect of sale after attachment under Or. XXI, r. 53.—Where a Court in which an application for execution was pending received an order from another Court under S. 273, C. P. Code, 1882 (r. 53), for attaching the decree and returned the order with an intimation that it did not contain information as to the amount of the decree and subsequently held the sale, held that the sale was invalid and that it was not a mere irregularity as the Court had no jurisdiction to hold the sale and that it should be accordingly set aside.—*Manik Lal v. Baamali*, 32 C. 1104 : 3 C. L. J. 27 : 10 C. W. N. 193.

Fraud in publishing or conducting sale.—The present Code has altered the law in an important aspect in as much as an application based on fraud in publishing or conducting a sale comes within the purview of Or. XXI, r. 90 and not under S. 47.—*Sheo Prasad v. Premna Kunwar*, 40 A. 122 : 15 A. L. J. 920 : 43 I. C. 522.

The words "or fraud" have been added in the new Code after the word "irregularity". The effect of adding the words "or fraud" to the present rule is to transfer applications setting up fraud in publishing or conducting the sale from S. 47 to the present rule. The result is that no second appeal will now lie from an order made on such application, whether the order be one setting aside the sale or refusing to set aside the sale, for the order has no longer the force of a decree, not being one under S. 47 but one under r. 92 and only one appeal lies from an order made under r. 92 [Or. XLIII, r. 1 (g) and S. 104, sub-section (2)].—*Sheo Prasad v. Premna Kunwar*, 40 A. 122 : 15 A. L. J. 920 : 43 I. C. 522 ; *Jagannath v. Daud*, 4 L. 243 : 75 I. C. 103 : A. I. R. 1923 Lah. 592 ; *Maula Bux v. Raghubar*, 3 P. L. J. 645 : 48 I. C. 560. In the absence of the words "or fraud" under the old Code, it was held by all the High Courts that an application to set aside a sale on the ground of fraud in publishing or conducting it, fell within the purview of S. 244 (now S. 47). The result was that under the old Code a second appeal lay from an order made on such application, because an order made under S. 47 has the force of a decree, and all decrees are open to second appeal, subject to the provisions of Ss. 100—102 ; *Nemai Chand v. Denonath*, 2 C. W. N. 691 ; *Bhubon v. Nundalal*, 26 C. 324. It seems, therefore, that the object of the Legislature, in requiring applications to set aside a sale on the ground of fraud in publishing or conducting the sale,

to be made under the present rule instead of under S. 47, is to exclude the right of second appeal with a view to bring proceedings on such applications to a speedy termination.

The question as to how far an innocent purchaser for value without notice of fraud, irregularities or infirmities in the proceedings or decree would be affected, has been elaborately discussed by Mokerjee, J., in the case of *Bireswar v. Panch Couri*, 37 C. L. J. 145, where it has been held that judicial sales fraudulently procured will not give a good title to a purchaser even in a case in which he may not be guilty of fraud. See also *Mahabir Ram v. Ram Bahadur*, 72 I. C. 625 : A. I. R. 1923 Pat. 435; *Jaqdeo v. Ujiyari*, 108 I. C. 899 : 26 A. L. J. 412 : A. I. R. 1928 All. 354.

When circumstances affecting the validity of an execution-sale have been brought about by the fraud of one of the parties to the suit, and give rise to a question between those parties such as apart from fraud, would be within the provisions of S. 244, C. P. Code, 1882 (S. 47), a suit will not lie to impeach the validity of the sale on the ground of such fraud.—*Mohendra Narain v. Gopal Mondul*, 17 C. 769 (F. B.) (11 C. 376, 5 M. 217; 6 B. 148 and 9 B. 468, approved. 14 C. 679 dissented from in part; followed in *Shiva Pershad v. Nundo Lal*, 18 C. 139; and in *Jagannath v. Watson & Co.*, 19 C. 341). In *Bhubon Mohun v. Nanda Lal*, 26 C. 324 3 C. W. N. 399, it has been held that the Full Bench decision in 17 C. 769 (F. B.) has been in effect overruled by the decision of the Privy Council in *Prosunno Kumar v. Kali Das*, 19 C. 683 (P. C.), and further that an application to set aside a sale on the ground of fraud would come under S. 244, C. P. Code, 1882 (S. 47), notwithstanding that the purchase was made by a person who was a third party. See also *Nemas Chand v. Deno Nath*, 2 C. W. N. 691. In *Rajani Kant v. Hossainuddin*, 4 C. W. N. 538, it has been held that where a judgment-debtor applies to set aside a sale, alleging circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder or auction-purchaser, the case comes under S. 244, C. P. Code, 1882 (S. 47) (19 C. 683, 24 C. 707 referred to). See also *Kokil Singh v. Edal Singh*, 31 C. 385. But in *Uma Kanta v. Deno Nath*, 28 C. 4 : 5 C. W. N. 124, it has been held that a mere allegation of fraud in a petition to set aside a sale without an attempt to prove it, is not sufficient to bring the case under S. 244, C. P. Code, 1882 (S. 47), but such a case comes under S. 811, C. P. Code, 1882 (Or. XXI, r. 90). In *Luchmipat v. Mandil Koer*, 3 C. W. N. 333, it has been held that if the application of the judgment-debtor be regarded as one under Or. XXI, r. 90, then it would be necessary to make the application within 30 days, but if it be regarded as one under S. 244, C. P. Code, 1882 (S. 47), then the period of limitation is 3 years.

A plaintiff having applied unsuccessfully under Ss. 103 and 311, C. P. Code, 1882, to set aside an *ex parte* decree and the sale of his property in execution thereof on the ground of fraud, brought a suit for the same relief. Held that the suit was maintainable and not barred by Ss. 13 and 244, C. P. Code, 1882.—*Prannath v. Mohesh Chandra*, 24 C. 546 (affirmed by the Privy Council in 28 C. 475 : 5 C. W. N. 757). See also *Khagendra Nath v. Prannath*, 29 C. 395 (P. C.) : 6 C. W. N. 473.

When a decree-holder obtains leave to bid and enters into an agreement with another to dissuade others from purchasing, and at the sale adopts means of an innocent character to discourage bidding, held that such

conduct does not amount to fraud and the purchaser (the decree-holder) did not go beyond the limits of what he was entitled to do in order to make a good bargain. *Held* also, that the omission of the decree-holder to disclose the agreement to the Court at the time of applying for leave to bid did not amount to a fraud.—*Mahomed Mira Ravuthar v. Savvasi Vijaya*, 23 M. 227 (P. C.): 4 C. W. N. 288 (reversing 19 M. 315 and disapproving of the passage in the judgment in 7 C. 246: 9 C. L. R. 263, that "if the decree-holder or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside").

The purchaser at a sale by public auction succeeded, by the exercise of fraud and collusion with the agent of the execution-creditors, in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held* that the High Court had power under S. 622, C. P. Code, 1882 (S. 115), to rescind the order made by the Court of first instance confirming the sale.—*Sabbaji Rau v. Srinivasa Rau*, 2 M. 264.

An adjustment was made out of Court between a decree-holder and the judgment-debtor, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the adjustment had been certified but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale, and himself purchased the property. The judgment-debtor applied to set aside the sale. *Held* that the judgment-debtor was entitled to prove the adjustment and to have the sale set aside.—*Ramayyar v. Ramayyar*, 21 M. 356.

The purchase of a property at an execution-sale by the decree-holder in the name of another person at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale.—*Srimati Sarat Kumari v. Nemai Charan*, 5 C. W. N. 265 (10 C. 757 referred to).

In a suit to set aside a sale in execution of a decree, it appeared that the property was purchased by the decree-holder's pleader himself, although he obtained permission of the Court to bid for his client, and that he acted in an underhand manner towards his client. *Held* that the transaction was tainted with fraud and that the sale must be set aside.—*Subbarayudu v. Kotayya*, 15 M. 389.

Where it is alleged that a property not included in the decree has been published for sale, such fraud is one in publishing and conducting the sale which falls under this rule. Consequently a suit to set aside a sale on account of such fraud is not maintainable.—*Piara Lal v. Kishan Lal*, 110 I. C. 876: A. I. R. 1923 All. 704.

To bring a property to sale subject to a bogus mortgage is fraud in publishing the sale within the meaning of this rule.—*Meenakshi v. Palaniappa*, A. I. R. 1928 Mad. 1138: 113 I. C. 873.

What amounts to waiver of irregularity by the judgment-debtor.—An application by a judgment-debtor for an adjournment of the sale without issue of fresh proclamation and beat of drum, does not amount to a waiver preventing him to apply to set aside the sale held on the day adjourned on

the ground that proclamation of sale was not served on each of the properties and consequently the sale fetched a low value.—*Preo Lall v. Radhika Prosad*, 6 C. W. N. 42 (distinguished in *Raja Thakur Barham v. Anant Ram*, 2 C. L. J. 584).

Failure to publish the sale-proclamation is not an illegality vitiating the sale, but only an irregularity which can be waived by the judgment-debtor; *Nripati v. Jatindra*, 91 I. C. 407 : A. I. R. 1926 Cal. 577.

The fact that the judgment-debtor consents that the sale should be held without the issue of a fresh proclamation does not indicate that he waives the non-specification of the hour of the day to which the sale is adjourned, inasmuch as he has no control over the form of the order of the Court.—*Bhikari Misra v. Rani Surjamoni*, 6 C. W. N. 48 (24 C. 291 referred to).

A judgment-debtor got an execution-sale postponed on undertaking that he would not raise any objection on the ground of illegality or irregularity. After the sale took place on the postponed date he applied to set it aside on the ground of an illegality of which he was not cognizant at the time he gave the undertaking. Held that he was estopped from impeaching the sale.—*Lakshmi Prasanna v. Rajendar Poddar*, 47 I. C. 831.

The fact that the judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made no mention of the irregularities relied on, does not create an estoppel.—*Mahatap Deo v. Leelanund Singh*, 7 C. 613 : 9 C. L. R. 398 (followed in *Raman v. Kunhayan*, 17 M. 304). See, however, *Girdhari Singh v. Hurdeo Narain*, 26 W. R. 44 (P. C.) 3 I. A. 230 (affirming 19 W. R. 227 ; followed in *Raja Thakur Barham v. Anant Ram*, 2 C. L. J. 584) See also *Arunachalam v. Arunachalam*, 15 I. A. 171 12 M. 19 ; *Mohan Lal v. Kali Charan*, 49 A. 788 : 102 I. C. 126 : A. I. R. 1927 All. 513 ; *Maharaj Bahadur Singh v. Sachindra*, 32 C. W. N. 309 : A. I. R. 1928 Cal. 328 : 113 I. C. 562 ; *Maung Ohu Tin v. Chettyar Firm*, 7 R. 425 : A. I. R. 1929 Rang. 311 ; *Hardani v. Ram Nath*, 27 A. L. J. 619 : 116 I. C. 448 : A. I. R. 1929 All. 704.

Where a sale was at first proclaimed for a certain date but was twice postponed on the application of the judgment-debtor who consented to waive the making of a fresh proclamation, held that a waiver by a judgment-debtor of a fresh proclamation after sale has been adjourned, does not necessarily prevent another attaching-creditor from objecting to a sale so held on that ground.—*Chakrapani Chettiar v. Dhanji Sett*, 24 M. 311.

Where a decree directed the sale of a property subject to a prior charge of a Bank who was a party to the suit, but the sale-proclamation did not specify the charge, and the Bank obtained permission to bid at the sale and had in fact bid at the sale and where the record showed that the Bank was the Bank was that the sale—our.—*Punjab* Ah. 673. But a person bidding at an irregular sale is not estopped from challenging the regularity of the sale.—*Ibid*.

A judgment-debtor is not estopped from making the application under Or. XXI, r. 90 for setting aside the sale simply because he does not appear in obedience to the notice served upon him under Or. XXI, r. 66, for settling the terms of the proclamation (not following A. I. R. 1927 All. 513).—*Madanlal v. Ripusudanprasad*, 124 I. C. 250: A. I. R. 1930 Nag. 191.

For the meaning of the word "waiver" and its effect, see *Dhanukdhari v. Nathma*, 11 C. W. N. 848: 6 C. L. J. 62; *Manindra Chandra v. Secretary of State*, 34 C. 257: 5 C. L. J. 148; and *Ambika v. Whitwell*, 6 C. L. J. 111, noted under S. 11.

**Equitable estoppel—Agreement not to challenge validity of sale.**—In an application under this section (rule) the judgment-debtor got time on condition of his paying up the decretal amount within a certain time and then he failed to pay the amount. *Held* that the judgment-debtor was bound by the agreement and that he was estopped from contesting the legality of the sale.—*Uttam Chandra v. Khetra Nath*, 29 C. 577 (8 C. 455 followed; followed in *Harakh Singh v. Saheb Singh*, 6 C. L. J. 176). Where time had previously been repeatedly granted by the decree-holder for compromise, and on the final date to which payment was adjourned the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that upon his failure to pay the money on the date to be fixed, his right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties. *Held* that the Court had no jurisdiction subsequently to vary the terms of the final agreement at the instance of the judgment-debtor in spite of the protest of the decree-holder (6 C. L. J. 176: 29 C. 577 referred to). *Held*, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding (18 C. 461 followed).—*Chandrabala v. Prabodh Chandra*, 36 C. 422: 9 C. L. J. 251.

A judgment-debtor who might have raised an objection to a sale but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable.—*Umed v. Jasram*, 29 A. 612: 4 A. L. J. 519 (26 C. 727, 7 A. 641 followed).

**Sale of property in separate lots though advertised to be sold in a lump, and vice versa.**—It is entirely within the discretion of the Court to direct that a property should be sold in portions, even though it had been attached or proclaimed as an entirety; and that the sale of the whole estate against the will of the judgment-debtor, when the sale of a portion would suffice, was an irregularity which caused material injury to the judgment-debtor.—*Abdool Hye v. Macrae*, 23 W. R. 1.

When property is advertised to be sold in separate lots, and is afterwards sold in a lump, this is an irregularity; but the person who wishes to set aside the sale on the ground of such irregularity, must show affirmatively that substantial damage has been sustained by him on account of such irregularity.—*Roy Nandipat v. Urquhart*, 4 B. L. R. A. C. 181: 13 W. R. 209 (reversing 12 W. R. 493); *Ramaswami v. Ramanathan*, 107 I. C. 295: A. I. R. 1928 Mad. 684.

Combination among bidders not to bid against each other, when amounts to fraud.—A combination among certain purchasers not to bid against each other does not constitute any fraud or impropriety such as would have the effect of vitiating the sale.—*Hari Balkrishna v. Nara Moreshwar*, 18 B. 342; *Doorga Singh v. Sheo Prasad*, 16 C. 194; *Mahomed Mira Ravuther v. Savvasi Vijaya*, 23 M. 227 (P. C.); *Satis Chandra v. Porter*, 9 C. L. J. 244: 36 C. 226; *Gobindov. Shyam Lal*, 1 C. L. J. 85. See, however, *Ambika Prasad v. Whitwell*, 6 C. L. J. 111 (dissented from in *Jyoti Prakash v. Jhoomull*, 36 C. 134: 13 C. W. N. 87).

Application to set aside sale for arrears of rent.—The procedure to be followed upon the sale of an under-tenure is now that prescribed by the Civil Procedure Code. Section 311, C. P. Code, 1882 (Or. XXI, r. 90), does not apply only to sales made under Chapter XIX of the C. P. Code, 1882, and the sale of an under-tenure may be set aside upon any of the grounds mentioned in that section.—*Azizoonnessa Khatoon v. Gora Chand*, 7 C. 163: 8 C. L. R. 493.

A transferee of a permanent transferable tenure, who has not given notice of the transfer to the landlord, cannot bring a suit to set aside the sale of the tenure in execution of a rent-decree against the former tenant; his proper course is to satisfy the rent-decree, or to apply under this section (i.e., rule) and to appeal against the order rejecting his application to set aside the sale.—*Pany Chunder v. Hur Chunder*, 10 C. 496

If a judgment-debtor has made an application under this rule he is competent to apply under S. 174 of the B. T. Act, if he withdraws his former application.—*Sital Rai v. Nanda Lal*, 13 C. W. N. 591.

A civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII of 1880, B. C.) on the ground that the sale was vitiated by material irregularity leading to substantial injury.—*Ram Tarack v. Dilwar Ali*, 5 C. W. N. 521 (F. B.) (14 C. 1 and 23 C. 641, overruled; and 14 C. 9 referred to).

A decree-holder for rent of a fractional share stands in the position of ordinary creditors, having no lien on the tenure, and is only entitled to sell the right, title and interest of the judgment-debtor; and consequently a

rent-decree by a co-sharer landlord is not a decree under the Bengal Tenancy Act, VIII of 1885.

Necessary parties to an application under this rule.—The decree-holder is a necessary party to an application under this rule. Hence where a judgment-debtor applied under this rule to have a sale in execution of a decree against him, the holder until long after must be dismissed—

under the old Code, there was a conflict of opinion whether he was a necessary party to an application for setting aside a sale under S. 311; *Karamat Khan v. Mir Ali*, 11 A. W. N. 121; *Surendra Mohini v. Amaresb*, 39 C. 687: 14 I. C. 67; *Menajuddi v. Toam Mandal*, 39 C. 831: 15



I. C. 176 Under the present Code he is a necessary party; see the proviso to sub-rule (2), r. 92.

A beneficial owner is not a necessary party to a proceeding for setting aside an execution-sale. It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner, although his *benamdar* only, and not he, is made a party to the proceedings.—*Baroda Kanta v. Chunder Kanta*, 29 C. 682: 6 C. W. N. 706.

Under Or. XXI, r. 90, the auction-purchaser is a necessary party to a proceeding for setting aside an auction-sale.—*Ajijuddin Ahamed v. Khoda Bux*, 50 I. C. 5. It is sufficient that the auction-purchaser is named in the body of the petition and notice is given to him after the application had become time-barred.—*Samitra v. Damri*, 62 I. C. 61. The language of this rule, however, does not justify such a strict construction, see *Abdur Rahman v. Har Narayan*, 68 I. C. 238: 9 O. L. J. 211, where it has been held that though some of the decree-holders auction-purchasers were not made parties, the service of notice upon them even after the period of limitation is a sufficient compliance with the rule. See also *Satish Chandra v. Rakhal*, 47 O. L. J. 62: 107 I. C. 733: A. I. R. 1928 Cal. 189; *Kirpa Ram v. Nand Lal*, 107 I. C. 494: A. I. R. 1928 Lah. 413, which held that the auction-purchaser is not a necessary party to an application under this rule. It is not necessary to implead, in the sense of showing as a party in the heading of an application under r. 90, the successful auction-purchaser.—*Bakhshi Sain Das v. Punjab National Bank*, 111 I. C. 506: A. I. R. 1928 Lah. 418; *Gazanfar v. Ram-ratan*, 25 I. C. 907; *Nitai v. Bishun*, 11 P. 504: A. I. R. 1932 Pat. 255, which has held that all that is necessary is that under r. 92 the sale shall not be confirmed or set aside unless notice of the application has been given to all persons affected thereby; the law does not impose any period of limitation for the issue of notices, though the application under Or. XXI, r. 90 should be made within 30 days. But see *Haridas v. Mofattal*, 26 N. L. R. 127: 121 I. C. 658: A. I. R. 1930 Nag. 5, which has held that the auction-purchaser is a necessary party both in the proceeding and appeal. A transferee from an auction-purchaser is a necessary party if the proceedings are commenced after the transfer.—*Menajuddi v. Toam Mandal*, 39 C. 881: 15 I. C. 176.

**Sale on a holiday.**—A sale in execution of a decree is illegal, if made on a holiday, whether it is a fixed holiday or only a day on which the Courts are closed by order of the High Court.—*Haro Jemadar v. Jadub Chunder*, 3 W. R. M. 24. But see *Bisram Mahlon v. Sahibunnissa*, 3 A. 333, where it has been held that the sale of immovable property by an *amin* on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.

**Sale after satisfaction of the decree.**—An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made.—*Chunni v. Lala Ram*, 16 A. 5.

An order for sale and a sale under such order are *ultra vires* and nullities when, in fact, there was no jurisdiction in the Court to make the order.—*Balcant Rao v. Mahammad Husain*, 15 A. 324.

**Limitation for an application to set aside a sale.**—Under Art. 166 of the Limitation Act, 1908, no application to set aside a sale under this

rule must be made within 30 days from the date of the sale. But where the irregularity in publishing or conducting the sale has, by the fraud of the decree-holder or any other party to the sale, been kept concealed from the judgment-debtor, he is entitled to apply under this rule whether the sale has been confirmed or not and the time for making the application is to be reckoned from the time when the fraud first became known to him.—*Mohendro Narain v. Gopal*, 17 C. 769; *Golam Ahad v. Judhister*, 30 C. 142; *Bhusan v. Profulla*, 48 C. 119; 60 I. C. 801; *Ramesh Chandra v. Biraj Sundari*, 32 C. W. N. 519. Where the finding is that notice under Or. XXI, r. 22 was duly served, the judgment-debtor cannot bring his case under S. 47 of the Code to have the sale declared a nullity and Art. 181 of the Limitation Act does not apply. If there was no fraud the question of the date of knowledge of the judgment-debtor is irrelevant; *Galstaun v. Syed Mahamad*, 36 C. W. N. 242. An application to set aside a sale under Or. XXI, r. 90 on the ground of non-service of notice as provided for by Or. XXI, r. 32, should be made within 30 days from the date of the sale. If it is an application under S. 47 of the Code it must be made within 3 years from the date of the sale. But the time may be extended by the Court in appropriate cases under S. 18 of the Limitation Act—*Surya Kanta v. Jogendra*, 51 C. L. J. 591; A. I. R. 1932 Cal. 391.

When an application is made for setting aside a sale on the ground of material irregularity in publishing or conducting it, and consequent substantial loss, it is not open to the judgment-debtor to rely on some other ground for the same purpose; *Harbins Lal v. Kundan Lal*, 21 A. 140; but he can by way of additional particulars point out by a further application, which may be made after more than 30 days, that certain heavy incumbrances which did not exist had been notified in the sale proclamation; *Ram Saran v. Girdhari*, 49 A. 236; 92 I. C. 557. A. I. R. 1925 All 305; 24 A. L. J. 236.

As has already been stated in the commentary to this rule, the application to set aside a sale on the ground of fraud in publishing or conducting it, was under the old Code to be made under S. 244 (now S. 47) and the period of limitation for such an application was 3 years from the date of the sale. Such an application under the present Code must be made under r. 90 and the period of limitation is 30 days from the date of the sale.

Article 166 of the Limitation Act (IX of 1908), as amended by Act I of 1927.—Article 166 of the Limitation Act (IX of 1908), as amended by Act I of 1927 contains the law on the point. In Act IX of 1871 the article corresponding to this article was Art. 159 and was in these words: "To set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting the sale—Thirty days—From the date of the Sale." Prior to that, S. 256 of Act VIII of 1859 (Code of Civil Procedure) contained a similar provision. In Act XV of 1877 the words were originally the same as in Act IX of 1871. But by Act XII of 1879 the following words were added:—"Or on the ground that the decree-holder has purchased without the permission of the Court." The same Act added a similar clause to the then Civil Procedure Code (Act X of 1877). The addition was made because in the absence of such a provision it had been held that a sale to a decree-holder, who had not got the express permission of the Court was absolutely void.—See *Rukhinee Bullubh v. Brojonath*, 5 C. 303. Under the Code of 1893 an application to set aside a sale on the

ground of fraud in publishing or conducting a sale had to be made under S. 244 and the period of limitation for such application was 3 years from the date of sale under the general Art. 178 of the then Limitation Act. Under the Code of 1908 such application came to be within the scope of Or. XXI, r. 90. In the Limitation Act of 1908, Art. 166 appeared in a general form in the words "Under the same Code to set aside a sale in execution of a decree." And it was meant to apply to all applications for setting aside a sale, irrespective of the ground on which the sale may be impeached, provided only that the application was one under the Code; in other words, it did not matter whether it fell under Or. XXI, r. 72, 89, 90 or 91 or under S. 47 of the Code. Still there was some conflict on the question whether an application by a judgment-debtor would not fall under Or. XXI, r. 90 and so would not fall under Art. 181 of the Limitation Act of 1908 rather than under Art. 166. To remove this doubt a few words have been added and the article now runs — "Under the same Code to set aside a sale in execution of a decree including any such application by a judgment-debtor".

**Application to set aside a sale on other grounds.**—Where a judgment-debtor applies to have the sale set aside not only on the ground of material irregularity in publishing and conducting the sale but also on the ground that no notice of the application for attachment and sale was given, as required by Or. XXI, r. 22, the case falls within S. 47, and hence there is a second appeal; *Rajagopala v. Ramanujachariar*, 47 M. 288 : 80 I. C. 92 : A. I. R. 1924 Mad. 431 (F. B.) : 46 M. L. J. 104. The question whether there was suppression of sale processes, can only be raised under S. 47, and therefore a second appeal lies. *Kumed v. Prasanna*, 40 C. 45; *Rampada v. Kanai*, 44 C. L. J. 167. A. I. R. 1926 Cal. 1219. Where the decree-holder is the auction-purchaser, and when an application is made to set aside the sale on any ground other than that covered by this rule, and there is no application under r. 89, the case falls within S. 47 and is subject to second appeal; *Superior Bank Ltd v. Budh Singh*, 22 A. L. J. 413 : 83 I. C. 1028 : A. I. R. 1924 All. 698; *Akshita v. Govindarajulu*, 47 M. L. J. 549 : A. I. R. 1924 Mad. 778. The mere fact that in the application to set aside the sale, S. 47 is mentioned, will not bring the application within S. 47 either for the purposes of appeal or of limitation. *Mateur Rasul v. Abdul*, 30 C. W. N. 86 : 89 I. C. 765 : A. I. R. 1926 Cal. 109.

A judgment debtor cannot have a Court-sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge, subsequent to the confirmation of the sale — *Abdubakar Saheb v. Mohidin Saheb*, 20 M. 10. When a judgment-debtor makes an application to set aside a sale under this section (rule) after the expiry of the prescribed period of limitation, he must bring his case within S. 18 of the Limitation Act; to enable him to do this, it is not enough for him to shew that the execution-proceedings were irregular and fraudulent; he must carry the fraud further and show that the existence of his right to set aside a sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser; *Kailash v. Bissonath*, 1 C. W. N. 67; *Nabin v. Bipin*, A. I. R. 1926 Cal. 229. See also *Luchmipat v. Musummat Mandil Koer*, 3 C. W. N. 333, where it has been further held that if the proceedings be regarded as taken under S. 244, C. P. Code, 1882 (S. 47), the judgment-debtor need not make his application within 30 days, the limitation for such application being 3 years from the date when

the right to make such application accrued. In *Bhubon Mohun v. Nunda Lal*, 26 C. 324: 3 C. W. N. 399, in *Nimai Chandra v. Deno Nath*, 2 C. W. N. 691, in *Lalman Das v. Jagannath*, 22 A. 376, and in *Srimati Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265, it has been held that the period of limitation for an application to set aside a sale under S. 244, C. P. Code, 1882 (S. 47) on the ground of fraud is three years.

An application under this rule on behalf of a minor judgment-debtor, was rejected on the ground that the applicant did not legally represent the minor, and the sale was confirmed. From this order the judgment-debtor appealed. Held that, assuming the first application to have been rightly rejected, the second which was made by a duly authorized guardian was not barred under the provisions of S. 7 of the Limitation Act.—*Baldeo Singh v. Kishan Lal*, 9 A. 411 (1 C. 226 referred to).

A claim under this rule may be joined with a claim for a declaration that the sale is a nullity on the ground that the decree in execution of which the sale took place was passed against a deceased judgment-debtor and so null and void.—*Jamila Khatun v. Dayanand*, 7 P. 331: 107 I. C. 848: A. I. R. 1928 Pat. 372

judgment-debtor, and after his  
against a person as his heir, who  
to the proper heirs the property  
was sold, held that such a sale can only be set aside in the regular way by proceedings under this section (rule) or by a regular suit within a year of the confirmation of the sale as provided by Art. 12 (a) of the Limitation Act.—*Malkarjun v. Narhari*, 27 I. A. 216: 25 B. 337 (P. C.). 5 C. W. N. 10: 2 Bom. L. R. 927: 10 M. L. J. 368 (reversing 21 B. 424, explained in *Golam Ahmad v. Judhister*, 30 C. 142: 7 C. W. N. 305, distinguished in *Jwala Sahai v. Masiat Khan*, 26 A. 346 and in *Khirajmal v. Diam*, 32 I. A. 23: 32 C. 296 (P. C.): 9 C. W. N. 201: 1 C. L. J. 584 (P. C.)).

Purchase by the decree-holder *benami* at a price less than that at which the decree-holder got permission to bid for would vitiate the sale; and an application to set aside such a sale comes under S. 244, C. P. Code, 1882 (S. 47), and is therefore governed by Art. 181 of the Limitation Act.—*Srimati Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265.

**Effect of decision on matters falling under this rule.**—A decision on questions arising out of an application for setting aside a sale under this rule is conclusive and a separate suit will not lie; nor can a sale be impeached by way of defence without setting aside the sale under this rule; *Jhara v. Amritmoyi*, 33 I. C. 47.

On an application by one of the judgment-debtors for setting aside a sale, it was found that there was fraudulent suppression of the proceeds in connection with the property  
property  
be set aside *in toto* and not to the extent of the  
the benefit of setting aside the sale accrued  
applicant but also to the other judgment-debtor  
*v. Birajasundari*, 32 C. W. N. 519: 103 I. C. 33: 47 C. L. J. 351: A. I. R. 1923 Cal. 349.

ground of fraud in publishing or conducting a sale had to be made under S. 244 and the period of limitation for such application was 3 years from the date of sale under the general Art. 178 of the then Limitation Act. Under the Code of 1908 such application came to be within the scope of Or. XXI, r. 90. In the Limitation Act of 1908, Art. 166 appeared in a general form in the words : " Under the same Code to set aside a sale in execution of a decree." And it was meant to apply to all applications for setting a sale, irrespective of the ground on which the sale may be impeached, provided only that the application was one under the Code; in other words, it did not matter whether it fell under Or. XXI, rr 72, 89, 90 or 91 or under S. 47 of the Code. Still there was some conflict on the question whether an application by a judgment-debtor would not fall under Or. XXI, r. 90 and so would not fall under Art. 181 of the Limitation Act of 1908 rather than under Art. 166. To remove this doubt a few words have been added and the article now runs :—" Under the same Code to set aside a sale in execution of a decree including any such application by a judgment-debtor".

**Application to set aside a sale on other grounds.**—Where a judgment-debtor applies to have the sale set aside not only on the ground of material irregularity in publishing and conducting the sale but also on the ground that no notice of the application for attachment and sale was given as required by Or. XXI, r. 22, the case falls within S. 47, and hence there is a second appeal; *Rajagopala v. Ramanujachariar*, 47 M 288 : 80 I. C. 92 : A. I. R. 1924 Mad. 431 (F. B.) : 46 M. L. J. 104. The question whether there was suppression of sale processes, can only be raised under S. 47, and therefore a second appeal lies; *Kumed v. Prasanna*, 40 C. 45; *Rampada v. Kanai*, 44 C. L. J. 167. A. I. R. 1926 Cal. 1219. Where the decree-holder is the auction-purchaser, and when an application is made to set aside the sale on any ground other than that covered by this rule, and there is no application under r. 89, the case falls within S. 47 and is subject to second appeal; *Superior Bank Ltd. v. Budh Singh*, 22 A. L. J. 413 : 83 I. C. 1028 : A. I. R. 1924 All 698. *Akshia v. Govindarajulu*, 47 M. L. J. 549 : A. I. R. 1924 Mad. 778. The mere fact that in the application to set aside the sale, S. 47 is mentioned, will not bring the application within S. 47 either for the purposes of appeal or of limitation, *Mateur Rasul v. Abdul*, 30 C. W. N. 86 : 89 I. C. 765 : A. I. R. 1926 Cal. 109.

A judgment-debtor cannot have a Court-sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge, subsequent to the confirmation of the sale—*Abdubakar Saheb v. Mohidin Saheb*, 20 M 10. When a judgment-debtor makes an application to set aside a sale under this section (rule) after the expiry of the prescribed period of limitation, he must bring his case within S. 18 of the Limitation Act; to enable him to do this, it is not enough for him to show that the execution-proceedings were irregular and fraudulent; he must carry the fraud further and show that the existence of his right to set aside a sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser; *Kailash v. Bissonath*, 1 C. W. N. 67; *Nabin v. Bipin*, A. I. R. 1926 Cal. 220. See also *Lachmapat v. Musummat Mandil Koer*, 3 C. W. N. 333, where it has been further held that if the proceedings be regarded as taken under S. 244, C. P. Code, 1882 (S. 47), the judgment-debtor need not make his application within 30 days, the limitation for such application being 3 years from the date when

the right to make such application accrued. In *Dhubon Mohun v. Nunda Lal*, 26 C. 324: 3 C. W. N. 399, in *Nimai Chandi v. Deno Nath*, 2 C. W. N. 691, in *Lalman Das v. Jagannath*, 22 A. 376, and in *Srimati Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265, it has been held that the period of limitation for an application to set aside a sale under S. 244, C. P. Code, 1882 (S. 47) on the ground of fraud is three years.

An application under this rule on behalf of a minor judgment-debtor, was rejected on the ground that the applicant did not legally represent the minor, and the sale was confirmed. From this order the judgment-debtor appealed. Held that, assuming the first application to have been rightly rejected, the second which was made by a duly authorized guardian was not barred under the provisions of S. 7 of the Limitation Act.—*Baldeo Singh v. Kishan Lal*, 9 A. 411 (1 C. 226 referred to).

A claim under this rule may be joined with a claim for a declaration that the sale is a nullity on the ground that the decree in execution of which the sale took place was passed against a deceased judgment-debtor and so null and void.—*Jamila Khatun v. Dayanand*, 7 P. 331: 107 I. C. 848: A. I. R. 1928 Pat. 272.

... judgment-debtor, and after his  
... gainst a person as his heir, when  
... o the proper heirs the property  
was sold, held that such a sale can only be set aside in the regular way by proceedings under this section (rule) or by a regular suit within a year of the confirmation of the sale as provided by Art. 12 (a) of the Limitation Act.—*Malkarjun v. Narhari*, 27 I. A. 216: 25 B. 337 (P. C.): 5 C. W. N. 10: 2 Bom. L. R. 927: 10 M. L. J. 363 (reversing 21 B. 424, explained in *Golam Ahad v. Judhister*, 30 C. 142: 7 C. W. N. 305; distinguished in *Jwala Sahai v. Masiat Khan*, 26 A. 346 and in *Khiraajmal v. Diam*, 32 I. A. 23: 32 C. 296 (P. C.): 9 C. W. N. 201: 1 C. L. J. 534 (P. C.)).

Purchase by the decree-holder *benami* at a price less than that at which the decree-holder got permission to bid for would vitiate the sale; and an application to set aside such a sale comes under S. 244, C. P. Code, 1882 (S. 47), and is therefore governed by Art. 181 of the Limitation Act.—*Srimati Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265.

Effect of decision on matters falling under this rule.—A decision on questions arising out of an application for setting aside a sale under this rule is conclusive and a separate suit will not lie; nor can a sale be impeached by way of defence without setting aside the sale under this rule; *Jhara v. Amritmoyi*, 33 I. C. 47.

On an application by one of the judgment-debtors for setting aside a sale, it was found that there was fraudulent suppression of the processes in connection with the sale and that there was a substantial injury inasmuch as the property was sold much below its proper value, held (1) that the sale should be set aside *in toto* and not to the extent of the applicant's interest; (2) that the benefit of setting aside the sale enured not only to the benefit of the applicant but also to the other judgment-debtors as well.—*Ramesh Chandra v. Birajasundari*, 32 C. W. N. 519: 103 I. C. 33: 47 C. L. J. 351: A. I. R. 1928 Cal. 349.

Where an application under r. 90 is dismissed, no suit for cancellation of the sale can lie on an allegation of fraud and irregularity in the publication or conduct of auction-sale; *Tukaram v. Sakharamsa*, 25 N. L. R. 58: 118. I. C. 49: A. I. R. 1929 Nag. 130. See also *Nand Kishore v. Sultan Singh*, 7 L. 1: 93 I. C. 1007: A. I. R. 1926 Lah. 165; *Ma Saw v. Maung Kyaw*, 5 R. 606 105 I. C. 706: A. I. R. 1928 Rang. 18, and notes under r. 92 (3), *post*.

This rule does not apply to Revenue Sales in Madras.—*Jagannath v. Kathaperumal*, 105 I. O. 88: A. I. R. 1927 Mad. 1035.

**Appeal.**—Under Or. XLIII, r. 1, Cl. (j), an appeal lies from an order under this rule, and r. 92 setting aside or refusing to set aside the sale. But no second appeal lies from the order of the first appellate Court.—*Satyendra v. Chauri*, 45 C. L. J. 557: 104 I. C. 188: A. I. R. 1927 Cal. 657; *Mahadeo Singh v. Dhobi Singh*, 2 P. 916: 74 I. C. 838; *Jagannath v. Daud*, 4 L. 243 75 I. C. 103 A. I. R. 1923 Lah. 592; *Jivan Singh v. Sawan Mal*, 54 I. C. 941; *Gour v. Digambar*, 30 C. W. N. 586: A. I. R. 1926 Cal. 790; *Jagdeo v. Ujiyari*, 108 I. C. 699: 26 A. L. J. 412: A. I. R. 1928 All. 354; *Ramiah v. Athmanatha*, 117 I. C. 727: A. I. R. 1929 Mad. 624; *Gulam Ahmad v. Kanhaiyalal*, 120 I. C. 209: A. I. R. 1930 Nag. 58; Nor did an appeal lie under the Letters Patent from the order of the first appellate Court, *Piari Lal v. Madan Lal*, 39 A. 191: 39 I. C. 460: 16 A. L. J. 46; *Parja v. Mulchand*, 6 L. 250: A. I. R. 1925 Lah. 624; *Muhammad v. Ishanullah*, 14 A. 226 (P. B.).

An appeal lies under Or. XLIII, r. 1 (j) from an order dismissing an application under this rule for default; *Kali Kanta v. Shyam Lal*, 25 C. L. J. 163: 38 I. C. 598. There is no distinction on principle as regards dismissal for non-appearance of one or for non-appearance of both the parties.—*Ansarali v. Bhim Shankar*, 56 C. 969: 33 C. W. N. 392: 119 I. C. 374: A. I. R. 1929 Cal. 407. See also *Narendra v. Rakhaldas*, 41 C. L. J. 286: 79 I. C. 351: A. I. R. 1925 Cal. 510.

**Revision.**—No revision lies from an order dismissing an application under this rule for default; *Narendra v. Rakhaldas*, 41 C. L. J. 286: 79 I. C. 351: A. I. R. 1925 Cal. 510. But where the lower appellate Court misreads a ruling of the Court, and on its basis refuses to entertain an application of a party which it had jurisdiction to entertain, it acts with material irregularity, and revision lies; *Ram Saran v. Girdhari*, 48 A. 286: 92 I. C. 557: A. I. R. 1926 All. 305: 24 A. L. J. 286. See also *Jagdeo v. Ujiyari*, 108 I. C. 699: 26 A. L. J. 412: A. I. R. 1928 All. 354. The applicant in revision must show that either the procedure for sale has been vitiated right from the very beginning and so is entirely illegal, or he must show there has been irregularity in the proceeding which has caused damage of a serious kind to his interest.—*Gajadhar v. Bechraj*, 130 I. C. 265: A. I. R. 1931 Pat. 63.

**Whether Or. IX applies to application under this rule.**—The provisions of Or. IX do not apply to proceedings in execution; *Basarutulla v. Reazuddin*, 53 C. 679: A. I. R. 1926 Cal. 773; *Hari Charan v. Manmatha*, 41 C. 1: 18 C. W. N. 343; *Dalasubramania v. Swarnammal*, 38 M. 199; *Bhubaneswar v. Tilukdhari*, 4 P. L. J. 135. See notes to Or. IX and r. 9 under the heading "Whether r. 9 applies to Execution Proceedings."

Where the applicant under this rule failed to appear when his name was called out and his pleaders said they had no instructions and the Court dismissed:

the application for default and immediately afterwards the man appeared in Court and applied for restoration, *held*, that there was no default and the Court could under S. 151 treat the order of dismissal as a mistaken one and set the matter right — *Ram Shanker v. Ram Narain*, 26 A. L. J. 382: 108 I. C. 576: A. I. R. 1928 All. 301. No order of dismissal in default should be passed till the end of the day when the Court was rising because there could be no default until the Court rose for the day — *Ibid*. It is open to the Court to invoke its inherent jurisdiction under S. 151 to restore an application under r. 90 which has been dismissed for default — *Dwarkan Das v. Vaish Flour Mill*, 29 A. L. J. 622: A. I. R. 1931 All. 591.

**Rule as amended by the Rangoon High Court.**—The terms of the proviso are sufficiently complied with, if the Court treats the deposit of purchase-money of the auction-purchaser which stands to the credit of the decree-holder as a deposit by the decree-holder who has made the application to set aside the sale. — *Maung Min Sin v. Maung Maung*, 9 R. 366. The provisos to r. 90 are not *ultra vires*; the newly added proviso (a) only gives effect to the well settled principle that if a judgment-debtor knowing of an irregularity or fraud lies by and allows the sale to proceed without objection he will be estopped from impeaching the sale on the ground of irregularity or fraud though substantial injury has been caused. — *Gendaram v. O. A. O. K. R. M. Chettyar*, A. I. R. 1931 Rang. 179: 181 I. C. 721.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

**91.** The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

[S. 313.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 313, C. P. Code, 1882, with some alterations and omissions.

The words "*in execution of a decree*" have been added after the words "any such sale," the words "*the judgment-debtor had no saleable interest in the property sold,*" have been substituted for the words "the person whose property purported to be sold had no saleable interest therein," which occurred in the old Code; and the lines "and the Court may make such order as it thinks fit. Provided that no order to set aside a sale shall be made, unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order," which occurred in the old section, have been omitted from this rule, and reproduced in the next rule (r. 92) with some modifications.

**Scope of the rule.**—The purchaser at an execution-sale is entitled under this rule to seek relief, if the judgment-debtor had "*no saleable interest*" in the property sold.—This rule does not apply where he seeks relief on the ground that he was induced to buy the property for more than its real worth owing to misrepresentation or concealment in the sale-notification. — *Durga Sundari v. Govinda*, 10 C. 368; *Birj Mohun v. Rai Uma Nath*, 20 C. 8: 19 I. A. 164; *Sheo Golinda v. Dhanukdhari*, 19 C. W. N. 1291. In such a case he can seek his remedy by a regular suit. But when the judgment-debtor



had no saleable interest in the property sold, the auction-purchaser's only remedy is to apply under this rule; *Soolayman Cassim Singi Singh v. S. S. A. O. Chetty*, 52 I. C. 174; *Maung Naung v. Maung Ba Gyi*, 6 R. 469; A. I. R. 1928 Rang. 272. See further notes under r. 93.

**Want of saleable interest.**—The words "no saleable interest" mean "nothing to sell," and are not intended to confine the cases in which a purchaser shall be entitled to receive back his purchase-money to those in which the judgment-debtor though having an interest, such interest is by prohibition of law or for some other reason unsaleable.—*Munna Singh v. Gajadhar*, 5 A. 577 (F. B.).

After a sale held in execution of a mortgage decree under Chapter XXVII of the High Court rules, it transpired that the property was subject to an attachment made prior to the mortgage suit: *held*, that the purchaser was entitled to reject the title, have the sale set aside and have his deposit returned.—*Mohun Lal v. Nanibala*, 33 C. W. N. 177 : 118 I. C. 897 : A. I. R. 1929 Cal. 207.

This rule contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell, and the fact that the property is subject to a mortgage, and may fetch little or nothing if sold, does not affect the question.—*Sant Lal v. Ramji Das*, 9 A. 167 (8 C. L. R. 468 distinguished). See also *Protap Chunder v. Panioty*, 9 C. 506 : 12 C. L. R. 488. In *Durga Sundari v. Govinda*, 10 C. 368, it has been held that the meaning of this rule is, that when a purchaser buys a property which turns out to have no existence at all, or to be of no saleable value whatever, the Court may set it aside. A misrepresentation or concealment in the sale-notification which induces a purchaser to buy a property for much more than it is really worth is no ground for setting aside a sale under this rule. In *Ram Coomar v. Sushee Bhushan*, 2 C. 626, it has been held that this rule only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion of the property. See also *Sonaram v. Mohiram*, 28 C. 235 (17 M. 228 followed). But in *Naharmul Marwari v. Sadul Ali*, 8 C. L. R. 468, it has been held that if, as a fact, the property sold was covered by the mortgage, there was no saleable interest in the judgment-debtor at the time of the sale, inasmuch as under that sale the purchaser would be unable to get the particular property purchased by him.

After sale of the judgment-debtor's properties in execution, a third party filed a suit for declaration that the said properties belonged to her. Then the auction-purchaser filed an application that one quarter of the purchase-price deposited by him in Court should not be paid over to the decree-holder and that he should be allowed not to pay the balance till the decision of the declaration-suit. In spite of this the Court confirmed the sale: *held*, that the application was not under Or. XXI, r. 91, that the prayer made in the application was not justified by any provisions in the Code and the order confirming the sale was under the circumstances perfectly legal.—*Mana Shah v. Lakhmi Das*, 134 I. C. 496 : A. I. R. 1931 Lab. 244 : 32 P. L. R. 63.

Where a decree-holder auction-purchaser is satisfied by the proceeds of the sale and he subsequently discovers that the judgment-debtor was not the owner of the property and makes an application for cancellation of the sale

and fresh execution of the decree, *held* that the application falls under the purview of this rule and cannot be entertained if it is made more than 30 days after the sale, and fresh execution cannot take place without first setting aside the sale.—*Muthukumaraswami v. Muthuswami*, 50 M. 639 : 100 I. C. 522 : A. I. R. 1927 Mad. 394. See also *Jagannadha v. Basawayya*, 104 I. C. 614 : 53 M. L. J. 255 : A. I. R. 1927 Mad. 835.

This rule does not apply when the title of the judgment-debtor to part only of the property sold is defective. It applies only to a case where the judgment-debtor had no saleable interest in the property at all.—*Muhammad Rahimatullah v. Bachcho*, 27 A. 537. 2 A. L. J. 244 : (1905) A. W. N. 99 (23 A. 355 followed).

If a party purchases at a sale with full knowledge of the true state of things and knowing that the title offered is defective, a claim to be relieved from the consequence of his purchase cannot be listened to.—*Sumer Chand v. Wahid Husain*, 3 A. L. J. 819 : (1906) A. W. N. 310.

An auction-purchaser has no right to apply under this rule to set aside a sale held in execution of a decree on the ground of deficiency in the area of the land sold ; *Birj Mohun v. Rai Uma Nath*, 20 C. 8 (P. C.) (followed in *Ram Narain v. Dwarka Nath*, 27 C. 264 : 4 C. W. N. 13) or on the ground that the title of the judgment-debtor is defective ; *Khetro Mohan v. Sk. Dilwar*, 3 P. L. J. 516 : 46 I. C. 614. If he has been misled by any fraud or omission of the decree-holder he may sue him for damages,—*ibid.* But see *Sheo Gobinda v. Dhanukdhari*, 19 C. W. N. 1291, where it has been held that in case of fraud the execution purchaser has the right to have the sale set aside (20 C. 8 (P. C.) referred to).

An auction-purchaser at an execution-sale is not entitled to compensation on account of any deficiency in area of the land purchased, unless he can prove that he has sustained loss by the misdescription, but is entitled to abatement of rent for such deficiency.—*Doyal Krishna v. Amrita Lal*, 29 C. 370 (1 C. W. N. 106 distinguished ; 18 A. 322 dissented from). Where the misdescription of property in the sale-notification does not go to the essence of the contract, the remedy which a purchaser can claim is compensation and not annulment of the sale.—*Administrator-General of Bengal v. Aghore Nath*, 29 C. 420 : 6 C. W. N. 873.

A Hindu died leaving two widows, one of whom, under authority from her husband, adopted a son. Subsequently, the widows executed a mortgage-bond to liquidate the debts of their husband, and the mortgagee after obtaining a decree upon the mortgage, brought to sale the mortgaged properties which were purchased by a third party. On an application by the auction-purchaser to set aside the sale on the ground that the judgment-debtors had no saleable interest in the property, as it had upon the adoption, vested in the adopted son, *held* that as one of the widows was not a party to the adoption, it could not be said that the judgment-debtors had no saleable interest in the property.—*Faizuddin Ali v. Tinowri Saha*, 22 C. 565.

Misdescription of the name and of the rent of the talook sold is not a sufficient ground for setting aside a sale under this rule.—*Kali Kishore v. Guru Prosad*, 25 C. 99.

Where default has been made in the payment of Government Revenue for which the property is liable to be sold, the ownership of the property

nevertheless remains in the person who has made the default and until the sale for arrears of revenue actually takes place, the property is liable to be sold in execution of the decree and the purchaser at the execution-sale purchases the right to receive any surplus sale-proceeds.—*Hari Charan v. Haridas*, 2 C. L. J. 506.

A judgment-debtor who might have raised the objection in execution but refrained from doing so, and who could have also appealed against the order for sale, is estopped from raising the objection that the property sold was not legally saleable, after the sale has been carried out.—*Umed v. Jas-Ram*, 29 A. 612 (7 A. 641 : 26 C. 727 followed).

**Separate suit for refund of purchase-money.**—See notes under Or. XXI, r. 93.

**Compensation for loss of part of property bought at a Court-sale.**—Every man buys at an execution-sale with his eyes open, and the general principle is that an auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor has no saleable interest; *Khetro Mohan v. Sk Dilwar*, 3 P. L. J. 516 : 46 I. C. 614 ; *Kedar Nath v. Jagar Nath*, 74 I. C. 134. This rule furnishes a statutory exception to the doctrine of *caveat emptor*; *Ram Kumar v. Ram Gour*, 37 C. 67. But apart from the case provided for by this rule and apart from fraud, a purchaser at an auction-sale must abide by his bargain; *Abinash v. Bhuban*, 25 C. W. N. 756 ; *Sabapathi v. Thandavaroya*, 43 M. 309 : 54 I. C. 515.

**Limitation.**—The period of limitation for an application to set aside a sale under this rule is 30 days under Art. 166 of the Limitation Act IX of 1908. Under the Limitation Act, 1877 (Art. 172), the period of limitation was 60 days, but Art. 172 has been repealed by the present Limitation Act (IX of 1908).

"The committee think that in the matter of limitation an application under S. 313 (C. P. Code, 1882), should be brought into line with an application under S. 312 (C. P. Code, 1882), and they therefore propose to repeal Art. 172 and to amend Art. 166 so as to include applications under S. 313."—See Notes on Clauses to the Limitation Act.

Where in an application under this rule, a dead person was made the opposite party by *bona fide* mistake, the application was not an incompetent one for the purpose of limitation.—*Sailabala v. Kalipada*, 55 C. L. J. 345.

On the question of limitation for suits for refund of purchase-money, see notes under r. 92.

**Appeal.**—An appeal lies from an order setting aside, or refusing to set aside, a sale made under this rule and r. 92 [Or. XLIII, r. 1, Cl. (j).]

**92.** (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. [Ss. 312 & 314.]

Sale when so  
become absolute  
or be set aside.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

[S. 312 and S. 310-A, PARA. 2.]

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

[S. 313, LAST PARA.]

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

[S. 312.]

### COMMENTARY.

**Alterations**—This rule embodies in a concise and amended form the provisions contained in Ss. 312 and 314 and in the second para. of S. 310-A regarding the period of limitation for an application, and also the provisions contained in the last part of S. 313 of the C. P. Code, 1882.

"The committee think it proper to retain the provisions of the Code which make it necessary for the Court to confirm the sale in each case."—*Report of the Special Committee.*

Sub-rule (1) corresponds to para. 1 of S. 312 and to S. 314 of the old Code with some omissions and alterations. The words "*the Court shall make an order confirming the sale*" have been substituted for the words, "the Court shall make an order confirming the sale as regards parties to the suit and the purchaser" which occurred in the last part of para. 1 of S. 312. The words "*as regards parties to the suit and the purchaser*" have been omitted in view of the enlargement of the scope of rule 90, which now includes all persons whose interests are affected by the sale. The words "*thereupon the sale shall become absolute*" have been substituted for the words contained in S. 314 of the old Code, which ran as follows: "*No sale of immoveable property in execution of a decree shall become absolute, until it has been confirmed by the Court.*"

Sub-rule (2) corresponds to para. 2 of S. 312 and para. 2 of S. 310-A of the old Code with some modifications.

The proviso to sub-rule (2) corresponds to the last part of S. 313 of the old Code with this modification that the notice of application to set aside a sale under any provisions of rule 89, rule 90 or rule 91 is to be given to all persons affected by the sale, and not to the judgment-debtor and decree-holder only.

Sub-rule (3) corresponds to the last para. of S. 312, C. P. Code, 1882, with the omission of the words "*on the ground of such irregularity,*" which occurred in the old section after the words "no suit to set aside." The effect of the omission is that no suit to set aside an execution-sale is now maintainable on any of the grounds specified in rules 89, 90 and 91. Therefore, a suit on the ground of irregularity or fraud in publishing, or conducting the sale is barred by sub-rule (3). But a suit to set aside a sale on any grounds other than those specifically mentioned in the above

rules is not barred by this rule. For instance, a suit to set aside a sale on the ground of want of jurisdiction in trying the original suit, or in selling the property, or that the decree in execution of which the sale took place was obtained by fraud, or that there was fraud in the execution-proceedings prior to the publication of the sale, or that the judgment-debtor had no title to the property, etc., etc.

Rules 89, 90 and 91 refer to sales in execution of a valid and subsisting decree. Therefore sales in execution of such decrees are only voidable and not *ab initio* void. But sales are *ab initio* void where they are held in execution of decrees which are *ab initio* void on the ground of fraud or want of jurisdiction.

**Confirmation of sale.**—The Court is bound to confirm the sale in the absence of an order setting aside the sale made upon application to that effect; *Birj Mohun v. Rai Uma Nath*, 20 C. 8 (P. C.); *Dharam Chand v. Bussan Kaisha*; 54 I. C. 928; or in the event of no application under rr. 89, 90 and 91 being made; *Umesh v. Shib Narain*, 31 C. 1011; 9 C. W. N. 193, even though the decree-holder is not present on that date; if it dismisses the execution petition for default of appearance of the decree-holder, it has got inherent power to restore it to the file.—*Ram Prasad v. Kodu*, 120 I. C. 405; A. I. R. 1920 Nag. 134; A. I. R. 1930 Nag. 37. Rule 92 is mandatory in its terms; an order passed in contravention of this imperative rule is not a legal order.—*Panna Lal v. Bhola Nath*, 129 I. C. 818; A. I. R. 1930 All. 843. It has been held in *Ariatullah v. Sashi Bhusan*, 24 C. W. N. 73 that this rule does not affect the power of the Court to refuse to confirm the sale, or make it compulsory to confirm the sale when the Court finds that the sale was held under a decree which did not authorize it. A purchaser at a Court-sale has no absolute right to have the sale confirmed where there is an irregularity in the publication or the conduct of it although he is in no manner responsible for the irregularity; *Raja of Kalahasti v. Maharaja of Venkatagiri*, 38 M. 387; 25 M. L. J. 198; 21 I. C. 339. Rule 92 is no bar to the Court exercising its inherent power to refuse to confirm a sale if it is satisfied that it has been misled by the decree-holder.—*Rahmatullah v. Ladhu*, 11 L. L. J. 546; 31 P. L. R. 57; 120 I. C. 634; A. I. R. 1930 Lah. 208. Where an application under r. 90 is dismissed for default, it amounts to a confirmation of the sale under this rule; *Narendra v. Rakhal*, 41 C. L. J. 236; A. I. R. 1925 Cal. 510; 79 I. C. 350. Under S. 314, C. P. Code, 1882 (Or. XXI, r. 92) the Civil Court cannot upon or without application, refuse to confirm a sale on the ground that the price bid is too low.—*Lakshmi v. Krishnabhat*, 8 B. 424.

Once a sale has been duly effected it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court, because Or. XXI, r. 2 does not apply to such a stage when the interest of a third party, namely, the auction-purchaser intervenes. The only means by which a regular sale can be avoided are those embodied in r. 89. Where no such application is made within time, it is obligatory on the Court under r. 92 to pass an order confirming the sale, notwithstanding the circumstance that the decree-holder had admitted satisfaction of the decree.—*Seth Nanhalal v. Umrao Singh*, 58 I. A. 50; 35 C. W. N. 381; 53 C. L. J. 187; A. I. R. 1931 P. C. 33; 130 I. C. 686; 27 N. L. R. 95; 33 L. W. 449; (1931) M. W. N. 281; 60 M. L. J. 423 (P. C.); 14 O. L. J. 393; 8 O. W. N. 635; 29 A. L. J. 257; 33 Bom. L. R.

450 : 14 N. L. J. 28. Where on an application to set aside a sale, under r. 90, on the ground of fraud and material irregularity in the conduct of the sale, the Court is of opinion that no case of fraud has been made out and that though certain irregularities had been established with regard to the sale, they had not resulted in substantial injury to the judgment-debtor and the application is in consequence rejected, in such a case the Court is bound under r. 92 to confirm the sale, which thereupon would become absolute, subject to any variation on appeal.—*Ibid.*

A private satisfaction of a decree, certified in Court after the sale and before the confirmation of the sale, extinguishes the decree and prevents the Court from confirming the sale in favour of the auction-purchaser, if he be the decree-holder himself; but it does not extinguish the decree and prevent the Court from confirming the sale, where a third person has purchased the property *bona fide* at the auction-sale.—*Shankar Lal v. Jawahar Lal*, 24 N. L. R. 127 : 111 I. C. 895 : A. I. R. 1928 Nag. 265 (F. B.).

After the confirmation of a sale, a Court has no power to set aside a sale by a summary order on the ground that the right to apply for execution under which the sale had taken place was barred.—*Mahomed Hossein v. Kokil Singh*, 7 C. 91 : 9 C. L. R. 53. An order confirming a sale is intended as a judicial determination between the parties that none of the objections exists upon which the validity of the sale could have been questioned.—*Lakshan v. Ramdas*, 33 C. W. N. 795 : 118 I. C. 857 : A. I. R. 1929 Cal. 374.

If an objection to the sale is made within the time allowed by Art. 166 of the Limitation Act, i. e., within 30 days from the date of the sale, the sale should be confirmed.—*Mohendro Narain v. Gopal Mondul*, 17 C. 769 (F. B.) (780) ; *Haji v. Atharaman*, 7 M. 512. Where the officer conducting the sale makes delay in accepting the bid, without which no sale is complete the period of 30 days prescribed by r. 90 does not begin to run against a person applying to set aside the sale till the bid is accepted.—*Abdullah v. Ganpat*, 118 I. C. 900.

Where the sale-proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, and in consequence there was substantial injury to the applicants, the sale should not be confirmed.—*Athappa Chetti v. Rama Krishna*, 21 M. 51.

When after the date of sale but before the date of its confirmation, the decree in execution of which the sale took place is set aside, the sale falls to the ground, and the sale cannot be confirmed as the decree is not subsisting on that date.—*Daya Moyi v. Sarat*, 25 C. 175 : 1 C. W. N. 656. See also *Mulchand v. Mukta Prasad*, 10 A. 83. Even after the execution-sale, the judgment-debtor still retains his interest in the properties till the sale is confirmed; so an attachment of those properties after the properties were sold by public auction in another execution-proceeding but before the sale was confirmed is effective to confer rights on the attaching creditor when that auction-sale is set aside under Or. XXI, r. 89 as against a subsequent transferee of the judgment-debtor.—*Venkata Madhava v. Narayanamurthy*, 34 L. W. 531 : 131 I. C. 14 : A. I. R. 1931 Mad. 511.

**Stay of confirmation of sale.**—The Court has inherent power to stay confirmation of sale.—*Bagga Mal v. Bakeshar Lal*, 126 I. C. 443 : A. I. R. 1930 Lab. 793. The Court has no power to stay the confirmation of sale on

the basis of a payment or adjustment of the decree which has not been recorded or certified under Or. XXI, r. 2.—*Meyappa v. U Tun Hla*, 9 R. 164: 132 I. C. 713: A. I. R. 1931 Rang. 148.

**Sub-rule (2)—If deposit is made within 30 days.**—The Court has no power to entertain an application for setting aside a sale unless the deposit is made within 30 days from the date of the sale, because the requirements of sub-rule (3) are mandatory and not directory; *Vennisami v. Periyaswami*, 19 M. L. T. 192: (1916) 1 M. W. N. 179: 33 I. C. 996. See notes under Or. XXI, r. 89.

**Proviso—Before setting aside a sale, notice to be given to all persons affected.**—Under S. 313 (para 2) of the old Code, notice on the judgment-debtor of the decree-holder only was necessary but the proviso to this rule requires that the notice is to be given to all persons affected by the sale. See *Surendra Mohini v. Amaresh*, 39 C. 687; *Bibi Sharifan v. Mahomed*, 13 C. L. J. 535, *Menajuddi v. Toam Mandal*, 39 C. 891: 15 I. C. 176. An order setting aside an execution-sale without giving proper notice to the persons affected thereby, as required by the proviso, is without jurisdiction and amounts to no order; *Gossain v. Jalpadat*, 62 I. C. 113; *Sundraraja v. Asiri Naidu*, 32 I. C. 891. Such an order is one which the Court was wrong in passing and the parties whose interests were affected by the order may complain of its validity in an appeal from that order. But so long as the order stands it cannot be treated as a nullity nor can it be impeached in an appeal against a subsequent order directing the refund of the purchase-money.—*Umesh Chandra v. Safiyatunnessa*, 107 I. C. 476: A. I. R. 1928 Cal. 267. The duty of moving the Court to issue notices lies upon the applicant and on default the Court may dismiss the application; *Mt. Bibi Zainab v. Paras Nath*, 4 P. L. T. 491: 1 P. L. R. 361.

In an application to set aside a sale under r. 89, which is otherwise in order and time, the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is not fatal to it (following 37 B. 387).—*Narayana v. Pentamma*, 52 M. 861: (1929) M. W. N. 626: A. I. R. 1929 Mad. 763: 57 M. L. J. 310. The decree-holders who have applied for rateable distribution have no such direct or proximate interest as to make them affected by an application to set aside a sale under r. 89 and are therefore not entitled to notice under r. 92.—*Ramnath v. Grandhi*, (1931) M. W. N. 423: 34 L. W. 824. 132 I. C. 141: A. I. R. 1931 Mad. 465: 61 M. L. J. 909.

It is an elementary principle of law that no order should be made against a man's interest without giving him an opportunity of being heard.—*Ganeswar Singh v. Ganesh Das*, 33 C. 1178 (P. C.): 33 I. A. 134: 4 C. L. J. 177: 10 C. W. N. 969: 8 Bom. L. R. 719: 3 A. L. J. 689: 16 M. L. J. 365.

In the event of the death of the judgment-debtor, notice must issue to his representative.—*Bala Kadar v. Gulam Mohidin*, 7 B. 424.

Where after filing an application to set aside an execution-sale, the auction-purchaser dies and no notice goes to his legal representatives, the order setting aside the sale is invalid; *Ramanand v. Bajit Jha*, 75 I. C. 863.

A Receiver appointed by the Court is not entitled to any notice, because he is merely an officer of the Court and has no personal interest; service of

notice on the party in possession is sufficient.—*Maung Ohn Tin v. P. R. M. P. S. R. M. Chettyar*, 7 R. 425 : A. I. R. 1929 Rang. 311.

It is not necessary that the auction-purchaser should be made a party to the proceedings, nor is it necessary that notice to the auction-purchaser must be served in a particular manner or within a particular period. All that is necessary is that the auction-purchaser must have notice of the proceedings.—*Mani Gir v. Hazari Gir*, 10 L. L. J. 161 : 108 I. C. 391 : A. I. R. 1928 Lah. 414. See also *Kirpa Ram v. Nand Lal*, 107 I. C. 494 : A. I. R. 1929 Lah. 413. Where the auction-purchaser happening to come to Court to deposit the auction price was there informed by the Court and given ample time to reply to the application, held that this was quite sufficient notice.—*Bakshi Sain v. Punjab National Bank Ltd.*, 111 I. C. 506 : A. I. R. 1928 Lah. 418.

**Sub-rule (3).—No suit will lie to set aside an order under this rule.**—Sub-rule (3) means that a person against whom an order under this rule is made cannot bring a separate suit for setting aside the order. His only remedy is by way of appeal under Or XLIII, r. 1, Cl. (j).

An order under this rule may be either (1) an order confirming the sale, or (2) an order setting aside the sale. Again, an order confirming the sale may be made, aside the sale, or (b) - - - - - er case no suit will lie - - - - - v. Sarwan

*Singh*, 16 C. 33; *Damodar v. Vinayak*, 26 B. 40; *Gajrajmati v. Akbar Husain*, 29 A. 196; 34 I. A. 37; 11 C. W. N. 393; 5 C. L. J. 138; *Brahmayya v. Appayya*, 44 M. 351; 62 I. C. 203; *Agha Husain v. Quasim Ali*, 23 A. L. J. 946; 89 I. C. 1018; *Mt. Indar Koer v. Sah Dharam Narain*, 128 I. C. 231; 23 A. L. J. 1177; A. I. R. 1930 All. 556; *Ma Saw v. Maung Kyaw*, 5 R. 606; 105 I. C. 706; A. I. R. 1923 Rang. 18. Similarly no suit will lie to set aside an order setting aside a sale made on an application under rr. 89, 90 and 91; *Shib Singh v. Mukat Singh*, 18 A. 437.

Sub-rule (3) has no application to a suit where there is no prayer for setting aside an order confirming the sale but prayers for certain declarations and also an injunction as regards the taking of possession.—*Kalpada v. Basanta*, 35 C. W. N. 877.

**Suit to set aside an execution-sale when not barred.**—Sub-rule (3) is no bar to any suit except the suits mentioned above. It does not bar a suit by a plaintiff for a declaration that the auction-sale was void on the allegation that by reason of collusion and fraud not only of the decree-holder and the auction-purchaser but of certain other persons also.—*Bhagwandas v. Suraj Prasad*, 22 A. L. J. 1060; nor does it bar a suit by a person whose claim to the property attached and sold as the property of the insolvent, has been disallowed; *Harnam v. Ganpat*, 5 L. L. J. 9:73 L. C. 367.

Where property other than the mortgaged property was wrongly included in the auction-sale and the judgment-debtor knew nothing of the sale, his suit to recover possession of the property sold in excess of the decree would not be barred under this rule, nor would it be barred by limitation, since the sale being a nullity as it was not justified by the decree, no question of limitation under Art. 13 would arise. Further as the judgment-debtor knew nothing of the sale, and as such was not in-fault in not objecting when the sale was proclaimed, the purchaser would not be entitled to get



back the portion of his purchase-money.—*Natha Ram v. Ram Gir*, 119 I. C. 852: A. I. R. 1929 All. 673 (following *Bulaqui v. Kesri*, 50 A. 686: A. I. R. 1928 All. 363). A sale, in which the judgment-debtors had no opportunity of objection as they were entitled to do under r. 90 or of paying off certain items and getting the sale set aside as laid down in r. 89, was an irregular sale. To such a confirmation r. 92 could not be applied, there being a material irregularity in the sale as it did not comply with the provisions of the Code.—*Brij Kumar v. Jagdamba*, A. I. R. 1929 All. 671. The auction-purchaser is a necessary party in a suit for setting aside a sale which has been confirmed under r. 90, non-joinder of whom will entail dismissal.—*Bahadur Ali Khan v. Co-operative Credit Society*, A. I. R. 1929 Lah. 778. Though an unsuccessful applicant under r. 90 cannot bring a suit to have the sale declared void, his prayer in the said suit that even if the sale be valid, he may be declared entitled to the surplus sale-proceeds alone, must be adjudicated upon and a decision given on it.—*Radhi v. Buta*, 119 I. C. 431: A. I. R. 1929 Lah. 618.

**Suit to set aside a sale held under Public Demands Recovery Act, whether barred or not.**—A suit to set aside an irregular sale of property held under the Public Demands Recovery Act is not barred by the provisions of S. 244 or S. 312, C. P. Code, 1882 (r. 92).—*Ram Taruk v. Mosahabali*, 6 C. W. N. 246 (14 C. 9 followed). See also *Ram Tarack v. Dilwar Ali*, 5 C. W. N. 521 (F. B.): 29 C. 73 (14 C. 1 and 23 C. 641 overruled; 14 C. 9 referred to); *Girish Chandra v. Golam Karim*, 38 C. 451: 10 C. W. N. 347: 3 C. L. J. 235; *Janukdhari Lal v. Gossain Lal*, 13 C. W. N. 710. But see the cases noted under S. 47, in which a contrary view has been taken.

**Suit to set aside a sale when barred by S. 47.**—See notes under S. 47, C. P. Code.

**Plea of bar of limitation after confirmation.**—No application to set aside a sale held in execution of a decree on the ground that the application for attachment and the sale was barred by limitation, can be made after confirmation of sale; *Lakhu Rai v. Maharaja Kesho Prasad*, 38 I. C. 876: 2 P. L. J. 157.

**"Court."**—The word "Court" as used in this rule means the Civil Court and not, in the case of a decree transferred to the Collector for execution, the Collector; *Fazal v. Manzur*, 40 A. 425: 45 I. C. 773.

**Appeal from order passed under this rule.**—An order under this rule setting aside or refusing to set aside a sale, is appealable under Or. XLIII, r. 1 (g).—*Tota Ram v. Khub Chand*, 7 A. 253 (F. B.). See also *Baldeo Singh v. Kishan Lal*, 9 A. 411.

An appeal lies from an order setting aside a sale passed under Or. XXI, r. 92; *Amund Chunder v. Nitai Bhoomij*, 16 C. 429; *Dakshina Mohan Roy v. Srimati Basumati*, 4 C. W. N. 474. But no second appeal lies from the order passed on first appeal; *Surendra Mohini v. Amaresh*, 39 C. 687; *Jewan Singh v. Sanwal*, 168 P. R. 1919; *Jagmohan v. Bachcha*, 25 C. C. 78: 66 I. C. 929; *Nanak Chand v. Mt. Jamna*, 91 I. C. 213; A. I. R. 1926 Lah. 204; *Mani Gir v. Hazari Gir*, 10 L. L. J. 161: 108 I. C. 391: A. I. R. 1928 Lah. 414; *Ganda Mal v. Narsingh*, 115 I. C. 636: A. I. R. 1929 All. 553.

An order dismissing for default an application to have a sale set aside, is an order within the meaning of Or. XXI, r. 92 and as such is appealable under Or. XLIII, r. 1 (j).—*Kalikanta v. Shyam Lal*, 25 C. L. J. 163: 38 I. C. 598. But a contrary view has been taken in *Basaratulla v. Reazuddin*, 30 C. W. N. 570: 96 I. C. 705: A. I. R. 1926 Cal. 773: 53 C. 679, where it has been held that an order dismissing an application to set aside a sale merely on default of appearance of the parties, cannot be regarded as in any way confirming the sale, and as such is not appealable under Or. XLIII, r. 1 (j).

An appeal lies to His Majesty in Council from an order passed under this rule and r. 90.—*Krishna Pershad v. Motichand*, 40 C. 635: 40 I. A. 140.

No appeal lies from an order refusing to confirm a sale.—*Gulab Singh v. Kishen Singh*, 117 I. C. 231: A. I. R. 1929 Lah. 438.

A judgment-debtor who has been adjudicated an insolvent cannot appeal from an order confirming sale of his property.—*Bhagwan Das v. Amritsar National Bank*, 111 I. C. 432: A. I. R. 1928 Lah. 675

Revelation.—There is no appeal from the order of the Court refusing to confirm the sale, but refusal to confirm a sale in the absence of an application under rr. 89, 90 or 91 is a material irregularity, and revision will lie; *Prem Das v. Gokal Chand*, 98 I. C. 866: A. I. R. 1927 Lah. 71. An order contravening the provisions of Or. XXI, rr. 89 and 92 is an illegal exercise of jurisdiction and is a material irregularity within S. 115, C. P. Code.—*Panna Lal v. Bholu Nath*, 128 I. C. 818: A. I. R. 1930 All. 843. A revision would lie where the appellate Court misconstrued the law on which the judgment of the trial Court was based, i. e., where it wrongly held that the trial Court's order was under Or. XXI, r. 92, whereas it was equally consistent with an order under S. 151.—*Jhanda v. Muhammad Ismail*, A. I. R. 1927 Lah. 808.

Limitation for suits to set aside a sale in execution.—A suit to set aside a sale held in execution of a decree is governed by Art. 12 of the Limitation Act, and must be brought within one year from the date of its confirmation.—*Abul Munsoor v. Abdool Hamid*, 2 C. 98; *Mahomed Hossein v. Purundur Mahto*, 11 C. 287; *Suryanna v. Durgi*, 7 M. 258. See, however, *Kali Mohun v. Ananda Moni*, 9 C. L. R. 18.

One year's limitation prescribed by Art. 12 of the Limitation Act is not confined only to suits which seek no relief other than a declaration that a sale ought to be set aside, but apply also to suits where other relief is sought which can only be granted on annulment of the sale.—*Malkarjun v. Narhari*, 27 I. A. 216: 25 B. 337 (14 B. 279 overruled in effect; 21 B. 424 (F. B.) reversed; explained in *Gulam Akad v. Judhister*, 30 C. 142: 7 C. W. N. 305; distinguished in *Jwala Sahai v. Masiat Khan*, 26 A. 346 and in *Khizarjmal v. Daim*, 32 C. 296 (P. O.): 9 C. W. N. 201).

The period of limitation for a suit to set aside an execution sale is one year, when the case does not come under S. 244, O. P. Code, 1892 (S. 47), but when it does, the period of limitation is 3 years. See *Bhubon Mohun v. Nunda Lal*, 26 C. 324: 3 C. W. N. 399; *Nemai Chand v. Deno Nath*, 2 C. W. N. 691; *Sm. Sarat Kumari v. Nimai Charn*, 5 C. W. N. 265; and *Lalman Das v. Jagan Nath*, 23 A. 376.

**Step in aid of execution.**—An application by a decree-holder who has purchased the property in execution of his own decree for confirmation of sale, is not an application to take some step in aid of the execution within the meaning of Art. 182 of the Limitation Act.—*Umesh Chandra v. Shib Narain*, 9 C. W. N. 193 : 31 C. 1011.

An application by the decree-holder for the rejection of a petition of a judgment-debtor objecting to the sale, and for confirmation of sale is a step in aid of execution.—*Gobind Pershad v. Rung Lal*, 21 C. 23 (5 A. 576 followed). But the confirmation of the sale in execution of the decrees by the Court of its own motion without any petition of the decree-holder is not an application to take some step in aid of execution within the meaning of Art. 179 (4) of the Limitation Act, 1877; *Motendro Chandra v. Mohendro Nath*, 10 C. L. R. 330; *Dhiraj Mahtab Chand v. Ram Brahma*, 4 B. L. R. A. C. 115 : 13 W. R. 38. In *Gunga Bishen v. Dhiraj Mahtab Chand*, 12 B. L. R. 506-note : 10 W. R. 224, it was held that where a sale was confirmed after objection by the judgment-debtor, and the sale-proceeds received by the creditor, that was a proceeding sufficient to keep the decree alive. But in *Chowdhry Sheikh Wahed Ali v. Mullick Enayet*, 12 B. L. R. 500 : 20 W. R. 31, it has been held that a confirmation of sale in execution is a proceeding sufficient to keep the decree alive. See also *Govind Chunder v. Jukoorul Nissa*, 18 W. R. 156. In *Mullick Enayet v. Wahed Ali*, 13 W. R. 315, it has been held that where the decree-holder takes no step whatever to cause an execution sale to be confirmed, the confirmation of the sale by the Court cannot be regarded as a proceeding on his part towards enforcing the decree.

**Stamp in a suit to set aside an auction-sale.**—In a suit to set aside an auction-sale, the plaint must be stamped as if the suit were for the recovery of the property.—*Drapu Chowdhry v. Ishan Chunder*, 9 C. L. R. 231.

**93.** Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid. [S. 315.]

Return of purchase-money in certain cases.

## COMMENTARY.

**Alterations.**—This corresponds to S. 315, C. P. Code, 1882, with some alterations and omissions.

The words "or when it is found that the judgment-debtor had no saleable interest in the property which is purported to be sold, and the purchaser is, for that reason, deprived of it," which occurred in the latter part of the first paragraph of S. 315 have been omitted. The reason for the omission seems to be that those words were the subject of discussion in several cases (5 A. 677 (F. B.), 22 B. 783, 5 C. W. N. 240, 7 C. W. N. 105, and 10 C. W. N. 274), and in those cases it was held that a purchaser at an execution sale was not limited to the special procedure in the execution department mentioned in S. 315 of the old Code, but he was entitled to maintain a separate suit for recovery of his purchase-money. But before a suit can be maintained the two events

must occur: (1) It must be found in some other proceedings that the judgment-debtor had no saleable interest; (2) and the purchaser must be deprived of the property. In the cases quoted above it was held that S. 315 of the old Code is only an enabling section and not prohibitive of an independent action in a Civil Court. In 5 C. W. N. 240 and 7 O. W. N. 105, it was held that S. 315 does not contain any provision barring a civil suit, such as is to be found in S. 47 and Or. XXI, r. 92 of the Code. In the present rule also there is no express provision prohibiting a separate suit for refund of purchase-money. Therefore under the present rule a separate suit for refund of purchase-money is also maintainable. See *Meher Chand v. Milkhi Ram*, A. I. R. 1932 Lah. 401 (F. B.), where the object of r. 93 is also stated.

The last paragraph of S. 315, which ran as follows: "*The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money*" has been omitted as unnecessary in view of S. 36 of the present Code read with r. 30 of Or. XXI.

"The Committee have added words at the commencement of the clause in substitution of the last para. of the section, which thus becomes unnecessary."—*Report of the Special Committee.*

**Scope of the rule.**—We have seen that under r. 91 the auction-purchaser is competent to apply for setting aside an auction-sale on the ground of the judgment-debtor's having no saleable interest in the property sold. This rule entitles him to apply for a refund of the purchase-money on the same ground. But if the judgment-debtor had some saleable interest in the property, however small, no refund can be made under this rule.—*Kunhamed v. Chathu*, 9 M. 437; *Muhammad v. Bachcho*, 27 A 537. *Ngnglinga v. Gururwami*, 128 I. C. 514; (1930) M. W. N. 767; 32 L. W. 299 59 M L J. 232. The auction-purchaser is not entitled to apply for a proportionate refund of the price paid by him.—*Ibid.*

**When a purchaser is entitled to a refund of his purchase-money.**—When a sale of immoveable property is set aside, the purchaser is entitled to recover his purchase-money. If the Court reversing the sale omits to make such order, the purchaser can sue to recover the money from the person who has received it. The suit is not barred by S. 244, C. P. Code, 1882 (S. 47).—*Jotindran Mohan v. Mahomed Basir*, 32 C. 332 (5 C. W. N. 240 referred to). See also *Greesh Chundar v. Lookhoodn Moyee*, 1 W. R. 55; and *Doolhin Hur Nnith v. Baijo Oajha*, 2 Agra 50.

Where the judgment-debtor is found to have no interest in the land sold, the purchaser is entitled to a refund of the money paid to the decree-holder.—*Kunki Moidin v. Tarayil-Moidin*, S M. 101. See also *Tirumalai-sami v. Subramanian*, 40 M. 1009; 45 I. C. 109.

Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by this rule. The effect of rr. 91, 93 and 94 is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale, subject however to the condition that the purchaser may recover his purchase-money when he finds that the judgment-debtor has no saleable interest at all. When the judgment-debtor has a saleable interest, however small, the purchaser at an execution sale purchases at his own risk, and there

being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if the property does not correspond to the description.—*Sundara Gopalan v. Venkata Varada*, 17 M. 228: (followed in *Sonaram Dass v. Mohiram Dass*, 28 C. 235). See also *Nagalinga v. Guruswami*, 128 I. C. 514: (1930) M. W. N. 767: 32 L. W. 299: 59 M. L. J. 232; *Dorab Ally v. Abdool Azeez*, 2 C. L. R. 529 (P. C.): 3 C. 806 (reversing and remanding, 1 C. 55: 24 W. R. 372). For the decision of the High Court on remand, see 6 C. 356. There is no implied warranty of title either by the decree-holder or the Court, in execution sales and the statutory right recognised by Or. XXI, r. 93 is confined to the case where the sale of the property is set aside under Or. XXI, r. 92.—*Dayaldas v. Shankar*, 27 N. L. R. 318: 14 N. L. J. 20: A. I. R. 1931 Nag. 116: 134 I. C. 269. Where the decree-holder auction-purchaser lost one-half of the properties owing to a third rival party successfully establishing his title to the same and it appeared that the judgment-debtors had at no time made any representation regarding their title to the entire property, the decree-holder purchaser could recover one-half of the purchase-money from the judgment-debtors.—*Anand v. Kishan*, 53 A. 496: 29 A. L. J. 228: 132 I. C. 417: A. I. R. 1931 All. 377.

An auction-purchaser who has deposited his money in Court can, if he finds that no interest in the property has passed to him, only apply under Or. XXI, r. 93 before confirmation. *Difference between the old and the new law pointed out.*—*Subbu Reddi v. Ponnambala Reddi*, (1918) M. W. N. 655.

A purchaser at a Court-sale who was afterwards deprived of the property by a person claiming a title paramount, has a right to recover his money by an application under this rule, but has no right to recover it by a regular suit.—*Ram Dayal v. Rampal Singh*, 22 O. C. 42: 51 I. C. 95.

To entitle a purchaser, under this rule, to a refund of the purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property sold, or that the purchaser should have obtained actual possession, and have been deprived thereof.—*Sivarama v. Rama*, 8 M. 99.

This rule empowers the auction-purchaser to require re-payment, but does not impose upon the decree-holder the duty of tendering the money, as soon as the sale is set aside. The decree-holder is not bound to do anything, except pay on demand. The judgment-debtor's action in getting the sale set aside does not therefore injure the decree-holder, until he is compelled to refund the purchase-money to the purchaser, and until then he has no right to call upon the judgment-debtor to pay his debt a second time.—*Ramneedi Venkata v. Ayyanna*, 30 M. 209: 17 M. L. J. 194.

An auction-purchaser sued the decree-holder for interest on the purchase-money and expenses of the sale, the purchase-money having been returned to him under the order of the Court executing the decree without interest and less such expenses. *Held* that the suit was maintainable.—*Raghubar Dayal v. The Bank of Upper India Ltd.*, 5 A. 364 (F. B.).

A decree-holder fraudulently caused the sale of certain property belonging to a minor. The minor brought a suit against the auction-purchaser, and obtained a decree for possession. The auction-purchaser sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held* that he, being

innocent of the fraud, and having purchased in the *bona fide* belief that the property of the minor was saleable, was entitled to recover the purchase-money.—*Makundi Lal v. Kaunsila*, 1 A. 568 (F. B.) (N. W. P. H. C. R. 1874, p. 168 distinguished).

At the Registrar's sale, the auction-purchaser was allowed to apply to set aside the sale on the ground of material mis-description of the property and to get a refund of his purchase-money.—*Aghore Nath v. Administrator-General of Bengal*, 30 C. 469 (5 C. W. N. 593 referred to). The purchaser was allowed to rescind the sale and to a refund of his purchase-money on the ground of deficiency in area.—*Bank of Bengal v. Akhoy Kumar*, 6 C. W. N. 365.

A purchaser at a Court-sale which had been subsequently set aside obtaining an order for refund of the purchase-money, can execute the order as if it were a decree.—*Venkataramanamurthi v. Sundara Ramiah*, 23 M. L. T. 355: 47 I. C. 630.

**Suit for refund of purchase-money, where no saleable interest.**—There is a conflict of authorities on the question whether under this rule (where the judgment-debtor is found to have no saleable interest in the property) the auction-purchaser is competent to bring a separate suit for refund of the purchase-money in addition to the remedy he has under this rule to apply for a refund.

It was held under the old Code that a purchaser at an execution sale can maintain a suit against the decree-holder for recovery of his purchase-money, where it is found that the judgment-debtor had no saleable interest in the property sold, and he is not entitled to the special procedure in the execution department mentioned in S. 315 (r. 93).—*Munna Singh v. Gajadhar Singh*, 5 A. 577 (F. B.) (followed in *Kishun Lal v. Muhammad Safdar Ali*, 13 A. 383; *Gurshidawa v. Gangaya*, 22 B. 783, *Pachayappan v. Narayana*, 11 M. 269; *Hari Doyal v. Sheikh Samsuddin*, 5 C. W. N. 240; *Nityanund v. Juggat*, 7 C. W. N. 105, *Shanto Chandar v. Nain Sukh*, 23 A. 355; *Girdhar Das v. Sidheshwari Prashad*, 40 A. 411: 16 A. L. J. 236: 44 I. C. 697; *Surendra v. Beni Madhab*, 10 C. W. N. 274; *Makar Ali v. Sarfuddin*, 50 C. 115: 70 I. C. 606: A. I. R. 1923 Cal. 85; *Tirumalaisami v. Subramanian*, 40 M. 1009: 45 I. C. 109). It was also held under S. 315 that whether the auction-purchaser proceeded by an application under that section or by a regular suit, he was not entitled to receive back his purchase-money unless the judgment-debtor had no saleable interest at all; if the judgment-debtor had some saleable interest in the property, however small, he could not, by suit, any more than by application, obtain a refund of the purchase-money in proportion to the extent to which the judgment-debtor had no interest.—*Bhagwan Das v. Alla Bakhsh*, 52 P. R. 1919; *Shanto Chandar v. Nain Sukh*, 23 A. 355; *Muhammad v. Bachcho*, 27 A. 537; *Sundara v. Venkata*, 17 M. 223. It was held under the old Code, that the purchaser was entitled to proceed by way of suit even after rateable distribution against those among whom the purchase-money was distributed; *Kishun Lal v. Muhammad*, 13 A. 383; *Girdhar Das v. Sidheshwari*, 40 A. 411: 44 I. C. 697.

Under the present Code an auction-purchaser is not entitled—as he was under the old Code—to bring a regular suit for a return of the purchase-money in cases where the judgment-debtor has no saleable interest in the property; *Nannu v. Bhagwan Das*, 39 A. 114; *Ram Sarup v. Dalpat*,

43 A. 60 : 58 I. C. 105 ; *Mohideen v. Mahomed*, 23 M. L. J. 487 ; *Tirumalaisami v. Subramanian*, 40 M. 1009 : 45 I. C. 109 ; *Subbu v. Ponambala*, (1918) M. W. N. 655 : 49 I. C. 359 ; *Balvant v. Bala*, 46 B. 833 : 67 I. C. 360 : A. I. R. 1922 Bom. 205 ; *Juranu v. Jathi*, 22 C. W. N. 760 : 46 I. C. 783 ; *Banka v. Guru Das*, 28 C. W. N. 20 : 80 I. C. 257 : A. I. R. 1924 Cal. 172 ; *Habibuddin v. Hatim*, 6 L. 283 : 86 I. C. 622 : A. I. R. 1925 Lah. 467 ; *Cassim Singh v. S. S. A. O. Chetty Firm*, 52 I. C. 174 ; *Maung Naung v. Maung Ba Gyi*, 6 R. 468 : A. I. R. 1928 Rang. 272. But he can bring such a suit if he can bring himself within the equitable principles which justify a suit for money had and received to his use.—*Rishikesh v. Manik*, 53 C. 758 : 96 I. C. 64 : A. I. R. 1926 Cal. 971.

A purchaser at a Court-sale who is afterwards deprived of the property by a person claiming a paramount title has no right to sue for refund of the purchase-money from the person to whom it is paid.—*Ram Dayal v. Ram-pal*, 22 O. C. 42 : 51 I. C. 95 ; *Lakshmi Chand v. Chaturbhuj*, 65 I. C. 230 (39 M. 803 followed ; 39 A. 114, 36 A. 529, 37 O. 67 and 35 B. 29, *refd. to*). But see *Bahadur Singh v. Ram Phal*, 5 Luck. 552 : 124 I. C. 641 : 7 O. W. N. 232 : A. I. R. 1930 Oudh 148 (F. B.) which has held that when a person purchases immoveable property at an auction-sale in execution of a decree and subsequently loses the same under the decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such a purchaser is entitled to bring a suit for the recovery of the purchase-money as against the decree-holder. The procedure prescribed by this rule is by summary application within a limited time. So, where a purchaser after confirmation of sale succeeded in establishing his title to the property in a suit under S. 283, C. P. Code, 1882 (r. 63), and then sued for the refund of his purchase-money, *held*, that the suit was maintainable. There is no warranty of title in sales under a decree of a Court.—*Sumer Chand v. Wahid Husain*, 3 A. L. J. 819 : 6 A. W. N. 310. But see *Dewaji v. Amrita Bai*, 52 I. C. 818 : 15 N. L. R. 140.

A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit to set aside the sale and obtained a decree against the purchaser. The auction-purchaser then sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held*, that he being innocent of fraud, and having purchased in the *bona fide* belief that the property of the minor was saleable was entitled to recover the purchase-money, but not the costs.—*Makundi Lal v. Kaunsila*, 1 A. 568 (F. B.) (N. W. P. H. C. R., 1874, p. 168 distinguished).

Fraud or neglect of duty entitles the auction-purchaser to a suit for refund of the purchase-money. Where therefore by gross neglect the decree-holder described the whole field as belonging to the judgment-debtor and the auction-purchaser paid full price in the belief that the whole field was being sold and he was subsequently deprived of the possession of half the field as it did not belong to the judgment-debtor, it was held that he was entitled to be compensated by the decree-holder to that extent.—*Dayaldas v. Shankar*, A. I. R. 1931 Nag. 116 : 134 I. C. 269 : 27 N. L. R. 318 : 14 N. L. J. 20.

A purchaser of an occupancy holding sold in execution of a decree obtained by the mortgagee of the property took possession of it but having

been afterwards ejected therefrom by the landlords, sued to recover the purchase-money with interest. *Held*, that under the present C. P. Code, the suit was incompetent.—*Juranu Mahamad v. Jathi Muhamad*, 22 C. W. N. 760 : 46 I. C. 783. The sale must be set aside before a purchaser can recover back his purchase-money; *Balcant v. Bala*, 67 I. C. 360; *Nannu v. Bhagwan*, 39 A. 114 : 37 I. C. 9; *Banka v. Guru*, 28 C. W. N. 20; *Makar Ali v. Sarfaddin*, 27 C. W. N. 183 : 70 I. C. 606; *Ram Sarup v. Dalpat Rai*, 43 A. 60. When the sale is set aside by reason of irregularities committed by the decree-holder, the purchaser will be entitled to bring a suit for recovery of the poundage-fee and interest on the purchase-money paid.—*Parvathi v. Govinda Sami*, 39 M. 803; *Najibullah v. Jainarain*, 36 A. 529.

Where the judgment-debtor is found to have had no saleable interest, the remedy of the purchaser is not limited to an application under this rule, but he can maintain a suit for refund of the purchase-money even though he did not ask to set aside the auction-sale, *Prasanna v. Ibrahim*, 36 C. L. J. 205 : 41 I. C. 924; *Asadullah v. Karam Chand*, 4 L. 354. The weight of authority however is decidedly against this view (*vide* the cases noted above).

"Any person to whom the money has been paid."—This includes a decree-holder who has obtained a rateable share of the sale proceeds under S. 73, C. P. Code.—*Kishunlal v. Muhammad*, 13 A. 383.

**Appeal and revision.**—An order under this rule for refund is not a decree, and no appeal therefore lies; *Lingam Krishna v. Jogani Venkataswamy*, 33 I. C. 235 : 3 L. W. 105 (1916) 1 M. W. N. 109, but is capable of revision under S. 115; *Kunhamed v. Chathu*, 9 M. 437; *Lingam Krishna v. Jogani Venkataswamy*, 33 I. C. 235 : 3 L. W. 105.

**Limitation.**—Under Art. 181 of the Limitation Act, the period of limitation for an application under this rule is 3 years from the accrual of the right.—*Giridhari v. Sital*, 11 A. 372.

A suit under S. 315 of the old Code brought by an auction-purchaser for a refund of his purchase-money was governed by Art. 120 of the Limitation Act, and the period was 6 years from the accrual of the right.—*Nilakanta v. Imamsahib*, 16 M. 361; *Sidheswari v. Goshain*, 35 A. 419.

"With or without interest."—When a person claims more than he is entitled to, the Court can refuse interest.—*Moulvie Abdul Hye v. Macrae*, 23 W. R. 1; *Nafar Chandra v. Gopal Chandra*, 19 C. L. J. 358. When it is proved that the purchaser has contributed to the loss he has sustained, no interest should be allowed.—*Kunhi v. Tarayil*, 8 M. 101. While setting aside a sale the Court has power under this rule to direct the decree-holder to refund the purchase-money with interest for the period during which the decree-holder had use of the money.—*Maharaj Bahadur Singh v. A. H. Forbes*, 33 C. L. J. 176 (P. O.) : 25 C. W. N. 366. The Court's discretion in the matter must proceed on sound judicial principles.—*Govind Lal v. Punjab National Bank Ltd.*, 30 P. L. R. 439 : 116 I. C. 715 : A. I. R. 1929 Lah. 617.



**94.** Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

### COMMENTARY.

**Alterations.**—This rule corresponds to the first part of S. 316 of the C. P. Code, 1882, with some additions and alterations. The latter part of the old section has been embodied in S. 65 of this Code. *This rule is to be read with S. 65, where all the cases bearing upon this rule have been noted.*

The word "specifying" has been substituted for the word "stating" which occurred in the old Code; and the words, "*such certificate shall bear date the day on which the sale became absolute,*" have been added. These words have been added adopting the view expressed in 30 A. 390. In 3 B. 433 and in 17 B. 229, a contrary view was expressed.

Scope of S. 316 of the C. P. Code, 1882, examined in *Bhawani Koor v. Mathura Prasad*, 7 C. L. J. 1.

**Sale certificate.**—A sale certificate merely records an accomplished fact, and states what has been sold; it does not create title but is merely evidence of title; *Basir Ali v. Hafiz Nasir*, 43 C. 124, 129; *Promotha v. Saurav Dasi*, 24 C. W. N. 1011: 47 C. 1108: 58 I. C. 327.

The right of the purchaser to compensation for deficiency in the area of the property sold, founded upon a condition in the sale notification is not affected by the issue of the sale certificate.—*Shailabala v. Jnanendra Nath*, 57 C. 783: A. I. R. 1930 Cal. 821.

"The Court shall grant a certificate."—The provisions of this rule are mandatory, and a Court has no power to refuse a sale certificate to an auction-purchaser; *Baikunt v. Narinda Sundari*, 38 I. C. 576: 3 P. L. W. 76: 1 P. L. J. 446. The Judge is *functus officio* when he signs the certificate of sale and hands it over to the purchaser. If he directs additional stamps to be affixed on a later occasion he does not act judicially.—*Collector of Ahmednagar v. Rambhau*, 128 I. C. 31: 32 Bom. L. R. 1094: A. I. R. 1930 Bom. 392 (F. B.).

It is duty of the purchaser to bear the expense of the proper stamps for a certificate of sale which the Court has to issue to him.—*Ibid.*

**Construction of sale certificate.**—The certificate of sale is not conclusive as to the property sold at an executinn sale. In order to determine the title of the purchaser, it is to be seen what was actually offered for sale and bid for. What was offered for sale is to be ascertained by the decree, by the order of the Court and the sale proclamation; and if the order has been carried out and the property sold accordingly, that sale and nothing else must be taken to have been confirmed, whatever words of description referring to the transaction may have been inserted in the order confirming it or the certificate stating it.—*Balvant v. Hirachand*, 27 B. 334 (32 W. R. 181 and 408, 14 W. R. 435, and 15 C. 546, referred to and distinguished). See also *Assamatham Nessa v. Lutchmeeput*, 4 C. 142 (F. B.).

Where a purchaser buys property in a Court auction, he buys what the Court purports to sell, and when the Court gives him a certificate that the property which he buys is sold to him without any limitation, it is not open to the Court, in a subsequent proceeding, to go behind the sale certificate and say that what purports to have been conveyed was not conveyed; *Natesa Pather v. Ganapathi*, A. I. R. 1927 Mad. 311: 52 M. L. J. 68.

A certificate of sale issued by a Court is a document of title, and it ought not to be lightly regarded or loosely construed. Where therefore, in pursuance of such a certificate the purchaser is placed in possession of the property described therein, and there is no ambiguity in the words of the certificate, it is not within the competency of the Court, in a suit brought by the judgment-debtor, to construe the certificate by reference to other documents, and to place a limitation upon the extent of the property to which it refers, as to do so would defeat the object of the certificate; *Ramabhadra v. Kadiriyasami*, 44 M. 483 (P. C.): 63 I. C. 708: (1921) M. W. N. 374: 14 L. W. 125.

The terms "right, title and interest of the debtors" as used in the sale certificate and in the order confirming the sale must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place as well as all proceedings leading up to sale.—*Akhoy Kumar v. Bejoy Chand*, 29 C. 813: 7 C. W. N. 54 (7 C. 357 referred to).

Mere inaccuracy of language or misdescription will not vitiate a sale certificate. The intention of the parties must be looked to.—*Moula Buks v. Kuruck Lall*, 7 W. R. 245; *Manson v. Golam Kebria*, 15 W. R. 490; *Taranath v. Joy Soonduree*, 21 W. R. 93.

Where a sale certificate declares the sale of the rights of a particular party in land of which the identity is not in dispute, the mere misdescription of the rights so transferred does not constitute a difficulty in the way of giving the purchaser possession.—*Kuleemooddeen v. Ashraf Ali*, 19 W. R. 276.

The Court is construing a sale certificate refused to go into facts lying behind it for the purpose of contradicting its terms.—*Lalla Bissessur v. Doolar Chand*, 22 W. R. 181; *Pearee Mohun v. Gosto Behary*, 26 W. R. 104.

Where a sale certificate, though containing errors, was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received to show what was intended to be dealt with.—*Maleebun v. Raseeda*, 25 W. R. 401. Reference may be made to the mortgage bond which culminated in the sale for the purpose of identifying the property which was purported to be sold under the sale certificate.—*Promotha v. Nagendra*, 33 C. W. N. 1211.

Variance between proclamation of sale and sale certificate.—Where there is a discrepancy between the descriptions in the sale proclamation of what is to be sold and the certificate of what has been sold, the descriptions in the proclamation of sale are to be taken as of superior authority in dealing with the property whose rights are affected  
A. R. 460; *Thakur Barmha*  
: 41 C. 590; *Rama Chandra*

*v. Haji Kassim*, 16 M. 207. Similarly, where the proclamation stated that the entire interest of five brothers in a mortgaged property was to be sold, and by a mistake on the part of the officer conducting the sale, the sale certificate omitted to mention the names of four of them, it was held that what was sold to the purchaser was the property as described in the proclamation, and not the property as erroneously described in the sale certificate; *Balvant v. Hira Chand*, 27 B. 334; *Christian v. Prasad*, 4 P. 760: 90 I. C. 501: A. I. R. 1925 Pat. 615.

**Statement of jumma in a sale certificate, how far admissible in evidence.**—Any statement as to rent payable for a holding, made by a person in a sale certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission by him or his predecessor in the title, cannot be used as evidence on his behalf, as such a statement does not come within the exceptions to S. 21 of the Evidence Act.—*Ramani Pershad v. Mahanth Adaiya Gossain*, 31 C. 380.

**Amendment of sale certificate.**—A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold.—*Nasiruddin v. Sayidur Rahman*, 19 C. L. J. 209; *Bujha Roy v. Ram Kumar*, 26 C. 529: 3 C. W. N. 374; *Saddo v. Bansi*, 23 A. 476; *Raja of Kalahasti v. Maharaja of Venkatagiri*, 38 M. 387: 25 M. L. J. 198: 21 I. C. 389.

A Court has inherent power to correct a sale certificate, where it appears that the sale certificate includes properties which were not sold, though advertised for sale.—*Gobinda Chandra v. Abhoy Charan*, 12 C. W. N. 1027.

After the confirmation of sale, if it is found by the Court that there was a mistake in its own action, the Court may amend its order and grant a fresh sale certificate.—*Mohesh Chunder v. Hori Mohan*, 7 C. W. N. 388.

Where after the confirmation of sale an error in stating the boundaries given in the sale certificate is discovered, the Court has ample authority, as a Court of justice, equity and good conscience, to rectify the error and to mould the relief accordingly as between the original parties or their representatives in interest; *Nandi Lal v. Jogendra*, 28 C. W. N. 403: 82 I. C. 294: A. I. R. 1924 Cal 881.

No appeal lies against an order granting a review and directing the amendment of a sale certificate to correct the boundaries of the land sold; the only question in such a case being whether the certificate given to the auction-purchaser gives a right description of the property sold, and not one relating to the execution, discharge or satisfaction of the decree within the meaning of S. 244, C. P. Code, 1882 (S. 47).—*Bujha Roy v. Ram Kumar*, 26 C. 529: 3 C. W. N. 374 (1 C. W. N. 658 approved). See also *Mammod v. Locke*, 20 M. 487. No appeal lies from an order refusing to amend a sale certificate.—*Saddo Kunwar v. Bansi Dhar*, 23 A. 476 (26 C. 529, and 18 A. 36 referred to).

No appeal lies against an order refusing to grant a sale certificate to the decree-holder auction-purchaser; the question determined being not one relating to the execution, discharge or satisfaction of the decree. The decree-holder auction-purchaser, is a party to the suit, within the meaning of S. 47.—*Jagannath v. Kartick Nath*, 7 C. L. J. 436 (1 C. W. N. 658 applied; 18 A. 36 not followed; 27 C. 34 followed).

**Registration of sale certificate.**—Section 17 of the Registration Act, Cl. (xii) provides that the registration of a certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer is optional. Under S. 89 of the said Act, a copy of the certificate is to be sent by the Court to the Registering Officer.

A certificate of sale issued by a Court under S. 316, C. P. Code, 1882 (Or. XXI, r. 94), if duly registered, takes effect, under S. 50 of the Registration Act, 1877, against all unregistered incumbrances.—*Ramaraja v. Arunachala*, 7 M. 248 (6 B. 193 followed). But see *Narasayya v. Jungam*, 7 M. 418; and *Maganal v. Shakra Girdhar*, 22 B. 945.

Section 50 of the Registration Act, 1877, affects alike documents which it is optional, as well as those which it is compulsory, to register, and its effect is not modified by the fact that the subsequent registered purchaser buys with full notice of a prior unregistered incumbrance.—*Nallappa v. Ibram Sahib*, 5 M. 73 (5 C. 336 discussed).

**Sale certificate cures all irregularities.**—All irregularities, though material, are cured by the certificate of sale.—*Balkrishna v. Masuma*, 5 A. 142 (P. C.) : 9 I. A. 182 : 13 Ch. R. 232; *Naigar v. Bhaskar*, 10 B. 444.

**What passes at a Court-sale.**—What passes to the purchaser at a Court-sale is the "right, title and interest" of the judgment-debtor, whatever that interest may be; in other words, in the case of a Court-sale there is no warranty of title either by the decree-holder or by the Court. The purchaser buys the property with all risks and all defects in the judgment-debtor's title except as provided by rr. 91 and 93; and in the absence of fraud, his only remedy is to recover back his purchase-money, where it is found that the judgment-debtor had no saleable interest in the property at all, and he cannot by suit or application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest.—*Dorab Ally v. Moheemooddeen*, 5 I. A. 116 : 3 C. 806 (P. C.) ; *Shanto Chandar v. Nain Sukh*, 23 A. 335; *Sundara v. Venkata*, 17 M. 228; *Moitheensa v. Apsa*, 36 M. 194; *Sobhagchand v. Bhaichand*, 6 B. 193.

When in a mortgage suit an interim receiver was appointed and the properties were sold in execution, and the sale was made absolute and a certificate granted to the purchaser, it is the purchaser and not the receiver who is entitled subsequently to sue for possession of the property.—*Abdulla v. B. K. Chatterji*, 9 R. 565.

**Title of purchaser without certificate.**—A purchaser of immoveable property at an execution sale can establish his title by evidence independently of the sale certificate; the sale certificate is not the title but merely the title-deed.—*Tantardhari v. Sundar Lal*, 7 C. L. J. 384 (27 B. 379 and 5 A. 305 followed). See also *Khobhari Singh v. Ram Prosad*, 7 C. L. J. 387; *Braja Nath v. Joggeswar*, 9 C. L. J. 346; *Lakshan Chandra v. Ramdas*, 33 C. W. N. 795 : 118 I. C. 857; A. I. R. 1929 Cal. 374.

A purchaser of immoveable property at a Court-sale, who has been put into possession by the Court, has thereupon a complete title against all persons bound by the decree, notwithstanding that he has no certificate of sale, or one only which has not been registered.—*Shivram Narayan v. Rajji*, 7 B. 254 (21 W. R. 349 followed). See also *Velan v. Kumarasami*, 11 M. 296.

The order confirming a sale of immoveable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale-certificate is not essential.—*Tara Prasad v. Nund Kishore*, 9 C. 842; 12 C. L. R. 448; and *Doorga Narain v. Baney Madhub*, 7 C. 199 (207). See also *Jagan Nath v. Baldeo*, 5 A. 305 (F. B.); *Kalee Das v. Hur Nath*, W. R. (1864) 279; and *Khushal Pana Chand v. Abai*, 12 B. 589.

If it is admitted that the plaintiff purchased immoveable property at a Court-sale, he can recover without producing the certificate of sale.—*Sadagopa v. Jamuna Bhai*, 5 M. 54. See also *Naigar Timapa v. Bhaskar Parmaya*, 10 B. 444; and *Muzaffar Husain v. Ali Husain*, 5 A. 297.

The term "purchaser" includes his representatives.—When a sale in execution has become absolute, the Court can, under this section, grant the certificate prescribed therein to the representatives of a deceased purchaser.—*Re Vinayak Narayan*, 24 B. 120.

**Limitation.**—The provisions of Or. XXI, r. 94, are mandatory, and impose a positive and imperative duty upon the Court in the matter of granting a sale certificate.—*Baikunt Misser v. Narinda Sundari*, 1 P. L. J. 446. The provisions of the Limitation Act do not apply to applications for a sale certificate. If the Court, therefore, fails to issue a sale certificate and the purchaser has in consequence to apply to the Court for a grant of the certificate the application may be made at any time.—*Kylasa v. Ramasami*, 4 M. 172; *Vithal v. Vithojirav*, 6 B. 586.

**Stamp on an application for sale certificate.**—An application by an auction-purchaser for a certificate of sale, need bear no Court-fee stamp, since by S. 316, C. P. Code, 1882 (Or. XXI, r. 94), it is not even required to be in writing.—*Hira Ambaidas v. Tekchand Ambaidas*, 13 B. 670.

See notes under S. 65.

**95.** Where the immoveable property sold is in the occu-

Delivery of prop-  
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pancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. [S. 318.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 318, C. P. Code, 1882, with some verbal changes only. The word "immoveable" has been added before the word "property," the word "where" has been substituted for the word "when" and the word "such" has been substituted for the word "the," after the word "putting." These are the only changes introduced in this rule.

**Scope of the rule.**—The jurisdiction under this rule exists only when immoveable property is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequent to the attachment of such property. A prior mortgagee who purchased property in execution of his own mortgage decree is not a judgment-debtor within the meaning of r. 95—*Gangadhar v. Lakshman*, 125 I. C. 905: 32 Bom. L. R. 431: A. I. R. 1930 Bom. 221.

**"Subsequently to the attachment."**—Or. XXI, r. 95 provides that a purchaser shall be entitled to be put in possession of the property brought by him, if it is in the possession of a person claiming under a title created by the judgment-debtor subsequent to the attachment of the property.—*Coverji Hirji v. Dewsey Bhoja*, 17 B. 718 (722). He is not, however, entitled to obtain summary possession from the lessee *pendente lite* of the judgment-debtor and must bring a suit for possession.—*Santamoney v. Kedar Nath*, 3 C. W. N. 12-n.

**Purchaser of undivided share.**—The purchaser of a share in undivided joint family property, cannot be put in joint possession of the share purchased by him with the other members of the family, his proper remedy is by a suit for partition.—*Balaji Anant v. Ganesh Janardan*, 5 B. 499; *Maruti v. Lila Chand*, 6 B. 564, *Yetumalai v. Srinivasa*, 29 M. 294. See also *Mandavilli Ramarao v. Sivanarayana*, 25 M. L. T. 153: 9 L. W. 81: 49 I. C. 629. The only way of a purchaser of a share in a property getting a valid and effective delivery of possession sufficient to give him a fresh start for limitation is by getting delivery under Or. XXI, r. 95. On general principles possession for the purpose of r. 95 must mean such possession as the nature of the property is capable of. The word possession in Art. 142 of the Limitation Act should not be read to denote 'occupation' or 'detention' merely, it certainly includes constructive possession—*Gulab Khan v. Ataullah*, 5 O. W. N. 372: 110 I. C. 70: A. I. R. 1928 Oudh 251 (F. B). But see *Indrasa v. Sadu*, 5 B. 505-note; and *Coverji Hirji v. Dewsey Bhoja*, 17 B. 718 (721), where it has been held that when the whole right of the family in the property has been sold, the purchaser is entitled to possession of what he has bought, without any necessity for partition.

**Putting the purchaser in possession.**—*Khas* or actual possession is contemplated by this rule. A Court has jurisdiction to issue an order for *khas* possession, although in the first instance it passed an order for giving formal possession.—*Hur Kishore v. Sudoy Chunder*, 17 W. R. 80 (9 W. R. 459; and 12 W. R. 285, followed).

It is not necessary that in every case delivery of possession of the property must be taken through Court. It is possible that by an amicable arrangement possession is given up by the judgment-debtor and in such a case the law does not require that the auction-purchaser should proceed by way of an application under r. 95.—*Jadav Chandra v. Akrur Chandra*, 128 I. C. 244: 51 C. L. J. 560: 34 C. W. N. 1059: A. I. R. 1930 Cal. 596.

The purchaser of an usufructuary mortgage-debt, whether or not he be the decree-holder, cannot get anything more from the executing Court than his sale-certificate. He cannot apply for delivery of possession under this rule, the mode of delivery contemplated in such a case being that prescribed by Or. XXI, r. 79 (3)—*Sinna Pillai v. Karuppatti*, (1932) M. W. N. 292: A. I. R. 1932 Mad. 283.

**Successive applications.**—If one application proves infructuous, another application may be made if it be within the period of limitation prescribed by Art. 167 of the First Schedule of the Limitation Act.—*Raghunandan v. Ramcharan*, 49 I. C. 150 (F. B.).

**Separate suit for possession.**—A decree-holder who at a sale held in execution of his money or mortgage-decree, purchases the property of the judgment-debtor, is in the same position as an ordinary purchaser; and if after confirmation of sale he fails to obtain possession from the judgment-debtor, he may claim possession either under this rule or r. 96 or by a separate suit and S. 214, C. P. Code, 1882 (S. 47) is not a bar to such a suit.—*Bhagwati v. Banwari Lal*, 31 A. 82 (F. B.) (30 A. 72 overruled; 27 C. 34 and 26 M. 740 dissented from; 6 C. L. J. 749 followed). In this Full Bench case all the rulings of the several High Courts have been referred to, considered and discussed. See also *Chotharam v. Mussammatt Karmon Bai*, 8 P. R. 1918; 44 I. C. 169; *Buddhu v. Bhagirathi*, 40 A. 316; *Sasi Bhusan v. Radha Nath*, 19 C. W. N. 835, *Goba Nathu v. Sakha Ram*, 44 B. 977; *Sridhar v. Jogeshwar*, 4 P. L. J. 716. For this purpose there is no distinction between a decree-holder purchaser and a third party purchaser; *Tribeni v. Ramasray*, 10 P. 670; 12 P. L. T. 423; 133 I. C. 337; A. I. R. 1931 Pat. 241 (F. B.); *Chotelal v. Sarwan*, 28 N. L. R. 250; A. I. R. 1932 Nag. 140.

An auction-purchaser, even when he is the decree-holder himself, is not bound under this rule to apply for recovery of possession of the property but may maintain a separate suit for recovery of possession of the property purchased.—*Panchanan v. Sukhamoy*, 50 I. C. 299.

A suit by an auction-purchaser, to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution-proceedings, and that such attempt has been unsuccessful.—*Iewar Pershad v. Jai Narain*, 12 C. 169 (10 C. L. R. 258 explained). See also *Seru Mohun v. Bhagoban Din*, 9 C. 602; *Balwant Santaram v. Babaji Bin*, 8 B. 602; *Kishori Mohun v. Chunder Nath*, 14 C. 644, *Sevu v. Muttu Sami*, 10 M. 53; *Shankar v. Narsingrav*, 22 B. 667; and *Sheo Narain v. Nur Muhammad*, 29 A. 463; 4 A. L. J. 434. Where neither the application nor the writ for delivery of possession specified the particular immoveable property to be delivered and the bailiff purported to give possession of such property, the delivery is without effect and the judgment-debtor's possession continues as before; if the auction-purchaser claims that the property passed to him under the purchase he must establish it in a separate suit.—*Abdul Mokut v. Abdul Rashid*, A. I. R. 1929 Pat. 391.

After formal possession, a suit is maintainable for actual possession, and not barred by S. 47. The limitation applicable is that governing suits and not execution-proceedings.—*Jagan Nath v. Milap Chand*, 28 A. 722; 3 A. L. J. 504.

**Limitation.**—The period of limitation for an application by the purchaser for delivery of possession is three years from the date when the sale becomes absolute, under Art. 180 of the Limitation Act. The period of 3 years is to be counted from the date of confirmation of sale and not from any later date such as the date of the issue of the sale-certificate.—*Anarjan Bibi v. Chandramani*, 54 C. L. J. 241; 134 I. C. 1188. The period of limitation for a suit for delivery of possession is 12 years under Art. 138.

**Effect of formal possession in saving limitations in suits for actual possession.**—Symbolical possession does not amount to dispossession as contemplated by S. 335, C. P. Code, 1882 (Or. XXI, rr. 97, 99, 103).—*Ibrahim Mullick v. Ramjadu*, 30 C. 710.

Where possession of property purchased at an auction-sale in execution of a decree is formally given by the Court under S. 318, C. P. Code, 1882 (Or. XXI, r. 95), although the actual possession may remain with the judgment-debtor, the date of the granting of such formal possession forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit, brought by the auction-purchaser or his representative for possession of the property sold. The period of limitation for such a suit is 12 years from the date when the auction-purchaser obtains symbolical possession.—*Hari Mohan v. Baburahi*, 24 C. 715; *Mangli Prasad v. Debi Din*, 19 A. 499; *Narain Das v. Lalta Prasad*, 21 A. 269; *Jagan Nath v. Milap Chand*, 28 A. 722; 3 A. L. J. 504; *Juggobundhu v. Ram Chunder*, 5 C. 534 (F. B.), *Jeggebundhu Mitter v. Purnanund*, 16 C. 530 (F. B.) (10 C. 402 overruled). (This decision in effect also overrules the case reported in 2 B. L. R. Ap 29 · 24 W. R. 419-note). See also *Mahadeo v. Parashram*, 25 Bom. 358 and *Gopal v. Krishna Rao*, 25 Bom. 275, where it has been further held that Arts. 136, 137 and 138 of the Limitation Act refer to cases where no possession (formal or actual) has been obtained through the Court; Art. 136 applies to a private purchaser from a person not in possession; Art. 137 applies to an auction-purchaser of the rights of a person not in possession; Art. 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale; and Art. 144 applies when an auction-purchaser or his assignee has obtained formal possession, but is disturbed by the judgment-debtor or his heirs who have continued in actual possession.

In cases where the judgment-debtor is in actual possession, the purchaser ought to take actual possession and mere symbolical possession will be of no avail, and it will not give him a starting point for the purpose of limitation in a suit to recover possession.—*Shridhar v. Ganpati*, 43 B. 559, 51 I. C. 72. But see *Bhulu v. Jalindra*, A. I. R. 1923 Cal. 138; 27 C. W. N. 24.

The auction-purchasers having been resisted in obtaining possession of the property purchased by a judgment-debtor, sued for possession of the same was fraudulent and the limitation governing the suit was not Arts. 91 and 95, but Art. 138 of the Limitation Act, 1877—*Uma Shankar v. Kalka Prasad*, 6 A. 75.

Art. 138, and not Art. 136 of the Limitation Act, is applicable to a suit brought by the assignee of an auction-purchaser to obtain possession of the land.—*Arumuga v. Chockalingan*, 15 M. 331. Followed in *Pullayya v. Ramayya*, 18 Mad. 144 (approved in *Sati Prasad v. Jogesh Chandra*, 31 Cal. 681 (F. B.): 8 C. W. N. 476, (F. B.); 23 Cal. 49 overruled). See also, *Venkata Lingam v. Veerasami*, 17 M. 89 (14 C. 644, and 2 C. 145 followed).

See also notes under Or. XXI, r. 96.

**Application for possession is a step-in-aid of execution.**—An application by a decree-holder to be put in possession of the property which he purchased in execution of his decree, is a step-in-aid of execution within



the meaning of Art. 182 (5) of the Limitation Act.—*Sariatoolla v. Raj Kumar*, 27 C. 709; 4 C. W. N. 681. See also *Moti Lal v. Makund Singh*, 19 A. 477; *Bhagwati v. Banwari*, 31 A. 82, (F. B.); and *Prem Krishna v. Juramoni*, 13 C. W. N. 694 (10 C. W. N. 23 followed; 27 Cal. 709 referred to).

Proceedings taken by a purchaser decree-holder under this rule, whether comes within the meaning of S. 47.—Section 47 of the C. P. Code has no application to a suit brought by a decree-holder (who has with the Court's permission purchased the judgment-debtor's property for recovery of possession of that property on the strength of the sale to him). Nor is such a suit barred because the plaintiff had failed to avail himself of the summary remedy provided by r. 95.—*Chotha Ram v. Karmon Bai*, 8 P. R. 1918; 44 I. C. 169. See also 5 C. W. N. 103 (F. B.).

The effect of objection being disallowed.—The word "disallowed" in this rule has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under this rule are taken.—*Mahomed Hossein v. Parundur Mahto*, 11 C. 237.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of the sale was not legally saleable, is not a matter which can be entertained under this rule so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it.—*Ram Chhaibar v. Bechu*, 7 A. 641.

An application by an auction-purchaser to set aside a sale on the ground of his having been deceived as to the extent of the estate sold, does not fall within the provisions of this rule or r. 91, and in the absence of a case falling within those rules, r. 92 requires that the sale should be confirmed.—*Birj Mohun v. Rai Uma Nath*, 20 C. 8 (P.C.). See also *Khetter Nath v. Faizuddin*, 24 C. 682, where it has been held that, unless a sale is set aside under r. 89 or r. 90 the Court is bound to confirm the sale under r. 92.

The confirmation of a sale is no bar to an application by the judgment-debtor to have it declared that in execution of the decree the property which had been sold could not be sold; that he had no disposing power in it, and therefore the sale passed no interest to the purchaser, and the enquiry which should have to be made upon an application like this would be an enquiry under the provisions of S. 244, C. P. Code, 1882 (S. 47), uncontrolled by rr. 90 and 93.—*Durga Churn v. Kali Prosenno*, 3 C. W. N. 586; 26 C. 727 (8 A. 146 and 24 C. 355 referred to).

Appeal against orders under this rule.—The Patna High Court has held that no appeal lies from an order under this rule; *Haji Abdul Ghani v. Raja Ram*, 1 P. L. J. 232 (F. B.); *Ramkumar v. Ramcharan*, 9 P. 715; 126 I. C. 849; A. I. R. 1930 Pat. 311. The decisions of the Calcutta High Court are conflicting on this point; in some cases it was held that an appeal lay (*Madhusudan v. Gobinda*, 27 C. 34; *Sariatoolla v. Raj Kumar*, 27 C. 709), while in others it was held that it did not lie (*Ram Narain v. Bandi Pershad*, 31 C. 737; *Hari Charan v. Mon Mohan*, 18 C. W. N. 27; *Sasi Bhusan v. Badha Nath*, 19 C. W. N. 835). In the Bombay High Court it has been held that an appeal lies; *Sadashiv v. Narayan*, 35 B. 452.

Revision.—Where the decree-holder or auction-purchaser is resisted in taking possession, and he applies again for delivery of possession without

making an application under r. 97 and such application is refused by the lower Court: *Held*, that the High Court will not interfere in revision where the party has another remedy.—*Raghunandan v. Ramcharan*, 4 P. L. J. 94: 49 I. C. 150 (F. B.).

**96.** Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser. [S. 319.]

### COMMENTARY

**Alterations.**—This rule corresponds to S. 319 of the C. P. Code, 1882, with some verbal alterations.

The words "*on the application of the purchaser*" have been added, after the words "*Court shall*"; the word "*thereof*," which occurred in the old section, after the word "*delivery*," has been omitted; and the words "*or other customary mode*" have been substituted for the words "*or in such other mode as may be customary*." These are the only changes introduced by this rule.

**Delivery of possession to purchaser.**—Symbolical possession is contemplated by this rule. Such symbolical possession is given only in cases when the party in actual possession is entitled under this rule to remain in such possession. It should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, *i. e.*, where he gets no possession at all.—*Govindasami v. Pethaperumal*, 44 I. C. 839.

**Possession otherwise than by Court.**—Section 264 of Act VIII of 1859 (which corresponds with this rule) did not limit the applicant to any particular manner of obtaining possession; and it contained nothing to prevent the purchaser at an execution sale from obtaining possession, if he could, without the assistance of the Court.—*Obhaya Churn v. Rajendro Coomar*, 22 W. R. 406.

Possession actually taken by a person having a right to it is not the less effective, as perfecting his title, by reason of an irregularity in taking it. Subsequentuster will give rise to a new cause of action.—*Lillu v. Annaji*, 5 B. 387. See also *Bandu v. Naba*, 15 B. 238. See also *Saligram v. Meheenalal*, 2 Agra 235.

"A certificate in respect thereof has been granted."—It is not incumbent on the Court to put a purchaser into possession until he has his certificate of sale.—*Tukaram v. Satcaji Khanduji*, 5 B. 206; *Basapa v. Marya*, 3 B. 433.

"Order delivery to be made."—Under Ss. 318 and 319, C. P. Code, 1882 (Or. XXI, rr. 95, 96), the Court executing the decree can only deliver

possession in accordance with and over the property specified in the sale-certificate. Those sections do not contemplate an enquiry into the question of specific shares of property held by the several judgment-debtors and not set out either in the sale proclamation or sale certificate; and the Court has therefore no jurisdiction to direct delivery of possession contrary to the terms of the sale-certificate.—*Ghulam Shabbir v. Dwarka Prasad*, 18 A. 163.

Delivery of possession under r. 95 and dispossession of a tenant of the judgment-debtor thereunder, is not dispossession in due course of law within the meaning of S. 9 of the Specific Relief Act.—*Muluk Patoni v. Bharat Chandra*, 12 C. W. N. 694.

**Effect of delivery of formal possession on the question of limitation.**—A formal possession given by a Civil Court under an execution, operates in point of law and fact as a complete transfer of possession as between the parties to suit; but such possession has no such operation as against third persons who are not parties to the suit.—*Lokessur Koer v. Purgun Roy*, 7 C. 418; *Dhondiba Krishnaji v. Ram Chandra*, 5 B. 554; *Runjit Singh v. Bunwari Lal*, 10 C. 993 (5 C. 534 (F. B.) explained). See also *Krishna Bhupati v. Ramamurti*, 18 M. 405. But a third party will be affected, if such delivery of possession takes place in his presence and to his knowledge and he does not obstruct.—*Kocherlakota v. Vadrevu*, 27 M. 262. But see *Mahadev v. Janu*, 36 B. 373 (F. B.) : 14 Bom. L. R. 115.

Where possession of a property purchased in an execution sale is formally given by the Court under rr. 95 and 96, although the actual possession may remain with the judgment-debtor, the date of granting such formal possession forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit for possession of the property sold, brought by the auction-purchaser or his representative.—*Mangli Prasad v. Debi Din*, 19 A. 499; *Narain Das v. Lalta Prasad*, 21 A. 269; *Hari Mohan v. Babur Ali*, 24 C. 715; *Jogjobundhu v. Purnanund*, 16 C. 530 (F. B.) (10 C. 402 overruled); *Nasiruddin v. Sayyidur Rahman*, 19 C. L. J. 209; *Jogjobundhu v. Ram Chunder*, 5 C. 534 (F. B.); *Umbika Churn v. Madhub*, 4 C. 870; 4 C. L. R. 35; *Shama Churn v. Madhub Chundra*, 11 C. 93; *Gopal v. Krishna Rao*, 25 B. 275; *Mahadeo v. Parashram*, 25 B. 359. By securing formal possession the purchaser merely starts a fresh period of limitation and becomes entitled to seek actual possession of his share by demanding partition; if he does not demand partition within 12 years, his right to possession is barred.—*Niranjay Lal v. Jhamman Lal*, 124 I. O. 767 : A. I. R. 1931 All 234. Symbolical possession granted in execution proceedings when actual possession should have been delivered, puts an end to adverse possession and serves to give a fresh starting point for purposes of limitation.—*Surja v. Mulchand*, 126 I. C. 526 : A. I. R. 1930 Lah. 823. But symbolical possession given under this rule does not, as against third parties, entitle the person to whom such possession has been given to count a fresh period of limitation from the date of the possession.—*Doyanidhi v. Kelai Panda*, 11 C. L. R. 395; *Kisori Lal v. Lala Shib Lal*, 1 C. W. N. 343; *Ram Chandra v. Ravji*, 20 B. 351 (F. B.); *Narain Das v. Lalta Prasad*, 21 A. 269.

See also notes under Or. XXI, r. 95.

**Limitation for an application for delivery of possession under this rule.**—See notes under Or. XXI, r. 95.

An application under this rule is a step-in-aid of execution.—*Prem v. Juramoni*, 13 C. W. N. 694.

Appeal from orders under this rule.—See notes under Or. XXI, r. 59.

### RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.

**97.** (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. [Ss. 328 & 334.]

### COMMENTARY.

**Alterations.**—This rule lays down the provisions of Ss. 323 and 334 of the C. P. Code, 1832. The provisions of those two sections, which were almost similar, have been amalgamated in this rule in a more concise form. Section 323 of the C. P. Code, contained the procedure which was to be followed in cases of obstruction or resistance to delivery of possession to the decree-holder; and S. 334, C. P. Code, contained the procedure in case of obstruction or resistance to the auction-purchaser in obtaining possession of immoveable property. But as the procedure in both the cases was almost similar, therefore the provisions of the above two sections have been embodied in this rule in an amended form, the retention of two separate sections being considered unnecessary. The wordings of the old sections have been changed, and they have been framed in such a way as to include the provisions contained in both the sections.

**Comparison of rr. 97 to 103 with rr. 58 to 63.**—Rules 58 to 63 and rr. 97 to 103 run on parallel lines. The former sections relate to the objections with regard to attachment of property at the instance of a claimant having some interest in or possession of the property while the latter relate

person other than the judgment-debtor. As the former set of rules relates to the attachment of the property, rule 63 refers to a suit to establish the right which the plaintiff claims to the property in dispute. As the latter set of rules relates to possession, rule 103 refers to a suit to establish the right of the plaintiff to the property. Though the

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**Scope of the rule.**—This rule provides a summary remedy but it does not preclude an aggrieved party from proceeding by way of a regular suit.—*Ballaba v. Gulab*, 57 I. C. 177. The rule does not apply where it is clear from the record that the investigation into the rights of the persons who had offered resistance had been started by the Court *suo moto*, on the receipt of a report from the *Nazir* and not on any application oral or written made by the decree-holder.—*Mt. Tala Bibi v. Nur Din*, 103 I. C. 614: A. I. R. 1928 Lah. 672. The Court cannot, of its own motion, make any investigation into any matter relating to the resistance or obstruction to possession under r. 97 or dispossession under r. 100. While the remedy is optional, the person concerned must complain, before the Court can make an investigation and r. 103 shows that the order under rr. 93, 99 or 101 becomes conclusive only after such investigation as follows an application under rr. 99 or 100. If there is no application, there can be no investigation or order.—*Milkh v. Basant*, 132 I. C. 844: A. I. R. 1931 Lah. 686. When rr. 97 and 98 contain definite provisions as to investigations to be made by the Court, the Court's action in staying the proceedings on the application of the obstructor that he was prosecuting a suit or appeal with respect to the property in dispute, amounts to a refusal of jurisdiction and cannot be justified under S. 151.—*Mahboob Begum v. Ghulam*, 119 I. C. 488: A. I. R. 1929 Lah. 694. It is only the decree-holder or auction-purchaser who can make an application under r. 97.—*Milkh v. Basant*, 132 I. C. 844: A. I. R. 1931 Lah. 686. Rule 97 applies only where the decree-holder, having obtained a general order of the character specified in r. 96, meets with resistance from any particular person. Then only an application under r. 97 is contemplated. Merely because an amicable delivery of the property is refused, the summary procedure under r. 97 cannot be resorted to. The dismissal of a mortgagee-purchaser's application for possession, where it is not preceded by a general order directing delivery of possession, does not fall under r. 97 so as to impose upon him the necessity of bringing a suit under r. 103 within one year from the order of dismissal (46 A. 693 *dissented from*).—*Kiran Sashi v. Official Assignee of Calcutta*, 36 C. W. N. 965.

**"Holder of a decree for the possession of immoveable property."**—A decree passed under S. 9 of the Specific Relief Act is a decree for possession within the meaning of r. 97, and there is nothing in that rule which prevents its being applicable to such a decree; *Banjoisi v. Sarasamman*, (1926) M. W. N. 163: 92 I. C. 61: A. I. R. 1926 Mad. 353.

**Applicability of the rule.**—This rule does not apply unless the auction-purchaser has made an attempt to obtain possession of the property either through Court or not of Court, and he is resisted or obstructed in obtaining possession; *Sobha v. Tursi*, 46 A. 693, 696: 83 I. C. 923: A. I. R. 1924 All. 495.

Where the judgment-creditor auction-purchaser alleged obstruction by the judgment-debtor and applied for delivery of possession, *held*, that the application was one under r. 97 and not under r. 95.—*Hira Lal v. Ram Chandra*, 54 B. 479: 125 I. C. 703: A. I. R. 1930 Bom. 375. A decree for ejectment against a lessee can be executed against the sub-lessee because he is bound by the decree; it is not necessary to institute a separate proceeding under r. 97 against the sub-lessee.—*Yusuf v. Jyotish Chandra*, 35 C. W. N. 1182. See also *Appa Rao v. Venkappa*, 132 I. C. 301: A. I. R. 1931 Mad. 534.

Rule 97 does not require any application in writing and presumably an oral application or an application which implies a prayer for an investigation under the rule would give jurisdiction to the Court to hold an investigation.—*Gulab v. Chhuttan*, 130 I. C. 520 : A. I. R. 1931 Lah. 13.

**Regular suit.**—This rule does not make it obligatory on a decree-holder or purchaser, who is obstructed in obtaining possession of the property, to pursue his remedy under this rule, and the failure of the decree-holder or purchaser to avail himself of the remedy under this rule does not prevent him from proceeding by a regular suit.—*Balvant v. Babaji*, 8 B. 602; *Trimbak v. Narayan*, 8 B. 431. But if he applies for the summary remedy under this rule and fails, the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r. 103. Such a suit must be brought within one year from the date of the order.—*Sobha v. Tarsi*, 46 A. 693 : 83 I. C. 923 : A. I. R. 1934 All. 495.

**Limitation.**—The application under this rule has to be filed within 30 days from the date of the resistance or obstruction as provided by Art. 167 of the Limitation Act.

**Fresh application for delivery of possession.**—It has been held by the High Courts of Madras and Patna that where a decree-holder or auction-purchaser, who is obstructed or resisted in obtaining possession, omits to apply under this rule within 30 days from the date of resistance or obstruction, he is entitled to make a fresh application for delivery of possession.—*Muttia v. Appasami*, 13 M. 504; *Raghuveeran v. Ram Charan*, 4 P. L. J. 91 : 49 I. C. 150 (F. B.); *Ammu Kovilamma v. Palakkuzhu*, (1929) M. W. N. 236. On the other hand, it has been held by the High Courts of Bombay and Allahabad that he is not entitled to make a fresh application and that his only remedy is by a regular suit; *Vinaykrav v. Devrao*, 11 B. 473; *Kesri v. Abul Hasan*, 26 A. 365.

**Sub-rule (2).**—A Court has no jurisdiction to proceed with an enquiry which results in an order under r. 98 without giving notice to the obstructor.—*Barkat Ali v. Fattu*, 10 L. L. J. 68 : 106 I. C. 491 : A. I. R. 1923 Lah. : 215.

**98.** Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days. [Ss. 329, 330 & 334.]

### COMMENTARY.

**Alterations in the rule.**—This rule embodies the provisions contained in Ss. 329, 330 and 334 of the old Code, in a concise form. Section 329 of the old Code contained the procedure in cases where the obstruction or resistance

was occasioned by the judgment-debtor or by some other person at his instigation ; and S. 330 of the old Code contained the procedure which was to be adopted in cases where the judgment-debtor or some person at his instigation and without any just cause insisted and continued to offer obstruction or resistance to the delivery of possession.

The words "*without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction*" which occurred in S. 330 have been omitted from this rule, probably on the ground that retention of those words are unnecessary, as independently of those words it would be an offence under the I. P. Code. The words "*to be detained in the civil prison*" have been substituted for the words, "*commit the judgment-debtor or such other person to jail*" which occurred in S. 330.

**Resistance or obstruction by judgment-debtor—Inst cause.**—This rule contemplates two cases, namely, where the obstruction is occasioned, *without any just cause*, (i) by the judgment-debtor, or (ii) by some other person at his instigation. Where the obstruction is caused by a person other than the judgment-debtor, the Court has no jurisdiction to pass an order under this rule, unless it is satisfied that the person was acting at the instigation of the judgment-debtor.—*Eera v. Gubbay*, 47 C. 907 : 60 I. C. 969; *Mancharam v. Fakirchand*, 25 B. 478, 486. An application to remove obstruction caused to delivery of possession to a decree-holder purchaser, by a purchaser from the judgment-debtor of the attached property after attachment, must be dealt with under this rule.—*Kuppana v. Kumara*, 34 M. 450 : 7 I. C. 418. Where the auction-purchaser, who is not the decree-holder, sells the property purchased to one of the judgment-debtors, it is a just cause for the vendee-judgment-debtor within r. 98.—*Periyaya v. Arulappan*, 111 I. C. 551 : A. I. R. 1928 Mad. 806. A just cause will be when the parties had agreed that the judgment-debtor should continue in possession on his paying a certain amount to the purchaser. Refusal of an order under r. 98 on that ground, is conclusive by reason of Or. XXI, r. 103, and the only remedy of the aggrieved party was to institute a suit to recover possession.—*Hiralal v. Ram Chandra*, 54 B. 479 : 125 I. C. 703 : 32 Bom. L. R. 619 : A. I. R. 1930 Bom. 375. The provisions of r. 98 and succeeding rules cannot help tenants of the judgment-debtors who have no occupancy rights and who are, therefore, bound by a decree for possession against the judgment-debtor (*following* 46 B. 526 and 46 B. 887 : 47 C. 907 *not folld*)—*Appa Rao v. Venkappa*, A. I. R. 1931 Mad. 534 : 132 I. C. 301.

"**Is resisted or obstructed**"—No particular kind of resistance or obstruction is necessary, but there must be some overt act of opposition to the Court's officers on behalf of some one who is actually present.—*Mancharam v. Fakir Chand*, 25 B. 478, 485. *See also Mahabir Prasad v. Parma*, 14 A. 417.

"**In obtaining possession.**"—"Possession" is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant.—*Mancharam v. Fakir Chand*, 25 B. 478 : 3 Bom. L. R. 53. *See also Brajabala v. Gurudas*, 33 C. 487 : 3 C. L. J. 293.

**Renewal of resistance or obstruction to execution—Fresh cause of action.**—A decree-holder who is resisted in the execution of the decree for ejectment may apply for possession again, and if again resisted may

complain against the second resistance.—*Baranagore Jute Factory Co., Ltd. v. Raj Kumar*, 13 C. W. N. 72; (11 B. 473 referred to; 5 M. 113 and 18 A. 233, referred to on the question of limitation).

**Appeal**—An order allowing or refusing delivery of possession after an execution sale is not an order under S. 47, C. P. Code even when the decree-holder is the auction-purchaser and as such no appeal lies. A second appeal lies to the High Court against a decree of the appellate Court passed without jurisdiction.—*Aduram Haldar v. Nakuleswar Rai*, 29 C. L. J. 48: 49 I. C. 137. An order passed against the decree-holder auction-purchaser under Or. XXI, r. 98 is not appealable, even if questions relating to execution are decided therein; *Surendra v. Satyendra*, 92 I. C. 544: A. I. R. 1926 Cal. 985.

An order made under Or. XXI, r. 97 is not appealable to the District Court and is consequently not open to second appeal.—*Meghu Singh v. Basudeva Jha*, 52 I. C. 333. See also *Ram Kumar v. Ram Charan*, 5 P. 775: 126 I. C. 849 A. I. R. 1930 Pat. 311

**99.** Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. [S. 321, para. 1.]

### COMMENTARY.

**Scope and applicability.**—Or XXI, r. 99, by its wording implies that when the Court is not satisfied that the resistance or obstruction was occasioned by a person claiming in good faith to be in possession of property on his own account, i.e., if it is not satisfied with the claimant's good faith or that he is in possession on his own account the Court shall allow the application.—*Ramaswami v. Shanmuga*, 109 I. C. 894: A. I. R. 1928 Mad. 909.

**Presidency Small Cause Court.**—A Small Cause Court has jurisdiction, in execution of a decree in ejectment, to act under this rule and remove any improper obstruction to the carrying out of its own order; *Ghouse v. Mohideen*, 45 M. L. J. 66: 73 I. C. 985: A. I. R. 1924 Mad. 74.

**Appeal.**—No appeal lies against an order passed under this rule.—*Talia Bibi v. Nur Din*, 109 I. C. 614: A. I. R. 1928 Lah. 672.

**Alterations in the rule.**—This rule corresponds to para. 1 of S. 331 of the C. P. Code, 1882, with some alterations and omissions. The words "the Court shall make an order dismissing the application" have been substituted for the words "the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and claimant as defendant," which occurred in the old section. The second, third and fourth paras of S. 331, which ran as follows, have been omitted:—

"and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code, or any other law for the



punishment of such resistance or obstruction, proceed to investigate the claim in the same manner, and with the like power, as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V.

" and shall pass such order as it thinks fit for executing, or staying execution of the decree.

" Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise."

**Scope of the rule**—The object of the omission is that there will now only be a summary enquiry with regard to the claims of third parties; and they have been allowed the privilege of bringing a regular suit against any order that may be passed against them under this rule (*Vide* r. 103). Under S. 331 of the old Code, a claim by a third party had to be tried as a regular suit and the order passed by the Court was a decree and was appealable. But under rule 103, the order passed under this rule shall be conclusive, subject to the result of the regular suit.

**Resistance by person other than the judgment-debtor**—Where in a suit brought by a plaintiff against two defendants, a decree is passed, by consent, against one of them only, the other defendant is not a judgment-debtor. He is a "person other than the judgment-debtor" within the meaning of this rule; *Jathavedan v. Kunchu*, 30 M. 72.

A *pro forma* defendant in possession of the property decreed and resisting delivery of its possession to the decree-holder is not a judgment debtor and his claim should be enquired into under this rule; *Har Nihal v. Shamji Mal*, 21 P. W. R. 1910; 5 I. C. 809; 14 P. R. 1910.

Where a person is entitled to the possession of a share after partition, and a Commissioner is appointed to partition the share and to put him in possession of his share, resistance to such Commissioner is resistance within the meaning of this rule.—*Kali Kumar v. Brahmananda*, 7 C. L. J. 98 (16 M. 127 followed).

Rule 99 contemplates an application by the decree-holder; a third party resisting the delivery of possession may apply under r. 100.—*Sukhan Singh v. Baij Nath*, 12 C. W. N. 115.

"On his own account."—A tenant of the judgment-debtor is not a person claiming on his own account and cannot obstruct the judgment-debtor's landlord in his obtaining possession.—*Jafferji v. Miyadin*, 46 B. 526; 64 I. C. 692; A. I. R. 1922 Bom. 273; *Javram v. Nawroji*, 46 B. 887; 65 I. C. 212; 23 Bom. L. R. 1316. But if the decree-holder landlord knew that the sub-tenant was in possession of the premises at the time of his suit and did not choose to make him a party, he cannot claim possession against him in execution proceedings, but should seek his remedy by suit; *Ezra v. Gubbay*, 47 C. 907; 60 I. C. 969. This case has not been followed in *Appa Rao v. Venkappa*, A. I. R. 1931 Mad. 534, noted under r. 98. The resistance by the wife of the judgment-debtor claiming in good faith to be in possession on behalf of her minor son not bound by the decree against the father, is resistance by a person claiming on his own account; and an order under r. 99 dismissing the application of the decree-holder is not one falling

within the scope of S. 47 and so not appealable, the remedy of the decree-holder in such a case being that indicated in r. 103.—*Dwipal Chandra v. Jiban Debi*, 58 C. 808: 133 I. C. 335: 35 O. W. N. 286: A. T. R. 1931 Cal. 574.

"Claiming in good faith to be in possession of the property."—The word "possession" as used in this rule is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant. Where premises sought to be recovered in execution are in occupation of tenants and the landlord of such tenants obstructs the officer executing the decree, the claim of such landlord may be investigated under this rule.—*Mancharam v. Fakir Chand*, 25 B. 478 (14 B. 627, 22 B. 967 and 15 W. R. 70, referred to).

The investigation of claims under this rule is not limited to the fact of possession. Any question of title arising between the contending parties in connection with their right of possession is to be investigated as in an ordinary action on *Khan*, 14 B. 627 (referred to in *Mancharam*, Bom. L. R. 58; followed in *Mahip Rai v. Dwarka Rai*, 27 A. 453 (22 B. 967, followed; 10 C. 50, not followed) and distinguished in *Mahomed Isuf v. Bashotappa*, 27 B. 302).

An investigation under this rule is limited to the fact of possession, and is no bar to a subsequent suit brought to try the title to the land in dispute.—*Chinna Sami v. Krishna*, 3 M. 104.

In a proceeding under this rule, the onus is on the plaintiff to establish a *prima facie* case of possession, and it is then incumbent on the claimant to answer that case and show, if possible, a better title.—*Rakhal Churn v. Watson & Co*, 10 C. 50 (not followed in *Mahip Rai v. Dwarka Rai*, 27 A. 453; in *Mancharam v. Fakir Chand*, 25 B. 478, p. 490; 3 Bom. L. R. 58 and in *Bapujirao v. Fatesing*, 22 B. 967). In all these cases a contrary view has been taken; but they have been overridden by the present rule.

**100.** (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by  
decree-holder or  
purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. [Ss. 332 & 335.]

**101.** Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property. [Ss. 332 & 335.]

*Bona fide* claim-  
ant to be restored  
to possession.

## COMMENTARY.

**Alterations.**—These two rules correspond to Ss. 332 and 335 of the C. P. Code, 1832. The provisions contained in those sections have been summarized in these two rules with several alterations and omissions. The language of the old sections has been changed, but the procedure under the old and the new law is the same.

The last paras. of Ss. 332 and 335 have been omitted from these rules and have been inserted in rule 103.

**Rules 100 and 101.**—These rules are to be read together.

**Object and scope of the rules.**—These two rules refer to events which may arise subsequent to the delivery of possession; and the preceding rules lay down the procedure to be adopted in cases of resistance or obstruction in the course of delivery of possession. The scope of enquiry under this rule is the same as that of an enquiry under Or. XXI, r. 58.—*Bhola Nath v. Hara Duari*, 36 C. W. N. 1034. An unsuccessful applicant in a case under Or. XXI, r. 58 is not competent to apply under Or. XXI, r. 100. His only remedy is the institution of a regular suit under Or. XXI, r. 63.—*Ibid.*

Under these rules if any person other than the judgment-debtor is dispossessed in delivering possession either to the decree-holder or to the auction-purchaser, then he may by an application under these rules obtain an order for restoration of possession, if he can satisfy the Court that he is in *bona fide* possession of the property on his own account, etc. His remedy is two-fold: he can either apply under this rule or bring a regular suit or he may do both, that is, if he becomes unsuccessful in an application under these rules, he can bring a regular suit under rule 103.

The object of rules 97, 99 and 100 is to give power to the Court where an attempt has been made to deliver possession and there is resistance or obstruction to give, after enquiry, a quick summary decision which should protect the public peace, prevent obstruction and terminate the execution proceeding subject to the result of a regular suit.—*Sarodah Pershad v. Roy Dhunput Singh*, 19 W. R. 219; *Mt. Zuhoorun v. Syad Mahomed*, 18 W. R. 87; *Srinath v. Annoda Prosad*, 1 C. W. N. 192.

In a proceeding under r. 100, the Court cannot go behind the original decree and hold that it is collusive.—*Jaisri Lal v. Dukhlal*, 127 I. C. 564; A. I. R. 1930 Pat. 416. Such questions as the validity of the original decree, *lis pendens*, and whether the opposite party derives title by *kabala* or compromise decree, are questions which are outside the scope of decision in summary proceedings under this rule.—*Ibid.* The rule says in effect that a person cannot get execution against another person who is not the judgment-debtor in the suit.—*Bhim Naik v. Chakradhar*, 34 C. W. N. 577; A. I. R. 1930 Cal. 348; 127 I. C. 552.

"Is dispossessed."—Delivery of actual possession alone can constitute dispossession under this rule. A landlord who is in possession through his tenant may be said to be dispossessed within the meaning of this rule if the decree-holder or purchaser takes delivery of actual possession of the land from the tenant.—*Brajabala v. Gurudas*, 33 C. 497. Rules 100 and 101 are not confined to cases of exclusive possession alone but are applicable to cases of

joint possession (17 Bom. 718 diss.).—*Indubhushan v. Haricharan*, 58 C 55 : 132 I. C. 631 : A. I. R. 1931 Cal. 385. It is wrong to order restitution of a specific share in the property.—*Ibid*.

"He may make an application."—The applicant's remedy is twofold. He may either apply under this section for restoration of possession or bring a regular suit to establish his title. Or he may do both, that is, if he does not succeed by an application under this rule, he can institute a regular suit under r. 103. While the remedy is optional, the person concerned may make an application under this rule. If there is no application, there can be no investigation or order.—*Milki v. Basant*, 132 I. C. 844 : A. I. R. 1931 Lah. 686.

Dispossession of third person by decree-holder or auction-purchaser.—For the meaning of the word "judgment-debtor" within the meaning of this section, see *Vasudeva Upadhyaya v. Visvaraja Tirthasami*, 19 M. 331 and *Jathavedan v. Kunchu Achan*, 30 M. 72 : 16 M. L. J. 433

"Judgment-debtor" includes representatives of the judgment-debtor and all persons who are bound by the decree.—*Bhikkia v. Birj*, 2 P. L. J. 478.

Rule 99 contemplates an application by the decree-holder, and a third party resisting the delivery of possession of property to a decree-holder cannot apply under that rule for the investigation of his claim, but he may do so under r. 100, after he has been dispossessed.—*Sukhan Singh v. Baij Nath*, 12 C. W. N. 115.

A decree in a possessory suit under S. 9 of Act I of 1877 is a decree within the meaning of rule 100; and any person dispossessed in execution of such a decree can apply under this rule to recover possession of the land.—*Brahma Mays v. Barkat Sirdar*, 4 B. L. R. 94 (F. B.) : 12 W. R. 25 (F. B.) ; *Contra in Gobind Chunder v. Gobind Ghose*, 7 W. R. 171

Possession by receipt and enjoyment of rent is as good in law as actual occupation and this rule is not restricted to cases of personal occupation.—*Bhyrub Sircar v. Sham Manjee*, 15 W. R. 70 (approved in *Mancharam v. Fakirchand*, 25 B. 478 ; referred to and followed in *Brajabala v. Gurudas*, 33 C. 487 : 3 C. L. J. 293). Present possession does not mean right to possession on redemption, ; *Baliram v. Narayan*, 54 I. C. 276.

Possession through a mortgagee is sufficient to bring a claim under this rule.—*Asgur Ali v. Asgur Ali*, 20 W. R. 373 (referred to and followed in *Brajabala v. Gurudas*, 33 C. 487 : 3 C. L. J. 293).

A mortgagee, who is in possession of the mortgaged property under the mortgage, is in possession "on his own account" within the meaning of this rule.—*Shafiuddin v. Lochan Singh*, 2 A. 94.

A mortgagee from a tenant is in possession on his own account.—*Kedar Nath v. Saday Chandra*, 19 C. L. J. 13.

... occupants of an  
... dispossession of  
... under this rule.—  
*Collector of Bogra v. Krishna Indra Roy*, 2 B. L. R. 301 : 11 W. R. 191  
(followed in *Brajabala v. Gurudas*, 33 C. 487 : 3 C. L. J. 293).

A party dispossessed of land under colour of a decree to which he was not a party, is entitled to an investigation under r. 100 and if his title is established to a decree.—*Hassun Ali v. Naib Ahmed*, 11 W. R. 146.

A person dispossessed of his land in execution of a decree of a Civil Court against a third party should proceed for the alleged obstruction of his possession, not by a suit in the Mamlatdar's Court, but by an application under r. 100, or by a regular suit.—*Gulabbhai Gopalji v. Jinabhai Ratanji*, 13 B. 213. See also *Ram Chandra v. Ravji*, 20 B. 351.

A non-transferable occupancy holding was purchased by a person in execution of a decree and possession obtained. It was subsequently attached by the landlord in execution of his decree against the recorded tenant for necessary rent. *Held*, that the purchaser was not bound by the decree of the landlord and he was not a judgment-debtor within the meaning of r. 100. He was in possession of the property on his own account as required by r. 101, and so he has a right to proceed under r. 101 (following 53 C. 913, and dissenting from 2 P. L. J. 478).—*Narayan v. Jharu*, A. I. R. 1923 Cal. 792.

Where the tenants of the judgment-debtor were dispossessed much later than the date of the delivery of possession to the decree-holder, Or. XXI, rr. 98 and 100 do not apply, the tenants have their general remedy in law if they have been wrongfully dispossessed, and the Court has no jurisdiction to pass orders under r. 100.—*Appa Rao v. Venkappa*, 132 I. C. 301 : A. I. R. 1931 Mad. 534.

An application can be made under Or. XXI, r. 100 for disturbance of possession by the landlord put in possession under S. 26-F of the B. T. Act as under Cl. (6) of S. 26-F it is the intention of the legislature to put the landlord in the position of the auction-purchaser as regards his rights and liabilities.—*Rishee Case v. Jarilal*, 36 C. W. N. 790.

**Dispossession under order of Collector.**—A person who has been dispossessed under an order made by the Collector, to whom execution proceedings have been transferred, should apply to the Collector and not to the Court complaining of such dispossession. This rule has no application when execution has been transferred to the Collector; *Ragho v. Hanmati*, 37 B. 489 : 19 I. C. 903.

**Cases not falling within the scope of this rule.**—An objector who did not claim to be in possession "on his own account or on account of some person other than the defendants," but whose sole ground of intervention was that he held a *bona fide* title derived from the defendants, was not entitled to be heard under S. 230 of Act VIII of 1859 (now r. 100).—*Eusuf Ali v. Shib Shunkur*, W. R. (1864) 384.

A mortgagee under a mortgage from the judgment-debtor after attachment is a representative of the judgment-debtor within the meaning of S. 47. This rule has no application to such a case.—*Narayanasami v. Seshapier*, 17 M. L. J. 321 ; but see *Kedar v. Saday*, 19 C. L. J. 13.

**"Was in possession on his own account."**—A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the

family.—*Cooverji v. Dewsey*, 17 B. 718. But see *Radhagobinda v. Raghu Nath* 18 C. W. N. 695, where it has been held that a person in joint possession, with the judgment-debtor, as a member of the family or otherwise is in possession on his own account and entitled to intervene under this rule. See also *Ramkishun v. Damodar*, 75 I. C. 856.

A person who purchased a non-transferable holding from the recorded tenant, cannot apply under this rule, when the landlord decree-holder takes possession under a sale in execution of his rent decree obtained against the recorded tenant.—*Panchratan v. Ram Sahay*, 43 I. C. 969 : 3 P. L. J. 579 ; nor is a purchaser *pendente lite* entitled to apply under this rule.—*Kanaka-sabai v. Rajagopal*, 42 I. C. 523 ; *Shohari Kurmi v. Phani Nath*, 117 I. C. 308 ; A. I. R. 1929 Pat. 227. But see *Narayan v. Jheru*, A. I. R. 1928 Cal. 792 : 115 I. C. 36, noted *ante*. Where however, the person purchased the holding in execution of a decree against the tenant ; *Pudma Chandra v. Manobini*, 53 C. 913 : 99 I. C. 718 : A. I. R. 1927 Cal. 156.

Questions for trial for the nature of evidence required under this rule.—Where an application is made by a party on the ground that he was in possession and that he has been dispossessed in execution of a decree, the Court should in the first instance examine the applicant.—*Obhoy Churn v. Rajendro Coomar*, 16 W. R. 289

When a person making a claim to certain property under r. 100 has been allowed to bring a suit under that section to try his right to the property, it is sufficient in the first instance for him to prove his possession, without proof of title ; but if he takes this course, it is open to the defendant to show that although possession may be with the plaintiff, yet he (defendant) has a better title.—*Dilbassee Koonuaree v. Gunga Pershad*, 5 C. 278 (5 B. L. R. 708 explained).

It was held under the old Code, in some cases that the question of title might be gone into, as well as the question of possession.—*Yusan Khatun v. Ram Nath*, 7 B. L. R. Ap. 26 : 15 W. R. 327 ; *Radha Pyari v. Nabin Chandra*, 5 B. L. R. 708 : 13 W. R. 80 (F. B.) (followed in *Abdoos Sobhan v. Brahma Deo*, 14 W. R. 140). See also *Nugendur Chander v. Ram Comul*, 3 W. R. 213 ; *Jadunath v. Kali Prasad*, 6 B. L. R. Ap. 55 : 14 W. R. 358 ; and *Ajoo Khan v. Kisto Pershad*, 8 W. R. 477. But see *Shafuddin v. Lochan Singh*, 2 A. 94, where it has been held that a person claiming under r. 100 need not prove his title, but only the fact of possession. See also *Kedar Nath v. Saday Chandra*, 19 C. L. J. 13 in which it has been held that no question of title can be gone into in a proceeding under r. 101.

Where the applicant complains that he has been dispossessed in execution of a decree to which he was not a party, and there are reasonable grounds for thinking that his claim is *bona fide*, it is the duty of the Court to treat the case as a regular suit between the claimant as plaintiff and the decree-holder and judgment-debtor as defendants.—*Luleet Narain v. Keshub Deb*, 15 W. R. 209 ; *Banee Madhub v. Nund Lall*, 22 W. R. 123 ; *Yusan Khatun v. Ram Nath*, 7 B. L. R. Ap. 26 : 15 W. R. 327 ; *Ajoo Khan v. Kisto Pershad*, 8 W. R. 477 ; *Sahoo Gokul Pershad v. Zynub*, N. W. P. 176 (Ed. 1873), 255.

If there are several applications, each application should be tried separately.—*Sharada Moyee v. Nobin Chunder*, 11 W. R. 255.

**Burden of proof in a claim case under this rule.**—The onus of proving his case is on the applicant.—*Mahomed Ausur v. Prokash Chunder*, 8 W. R. 8; *Woodoy Tara v. Abdool Gunce*, 12 W. R. 16; *Judonnath v. Kalee Pershad*, 14 W. R. 353; *Brindabun Chunder v. Tarachand*, 20 W. R. 114.

The applicant must prove whether or not the judgment-debtor was in possession at the date of the sale. Mere proof that he was in possession at some time prior to 12 years before suit does not discharge him from the onus.—*Nasruddin v. Sayulur Rahman*, 19 C. L. J. 209; *Mohima Chunder v. Mohesh Chunder*. 16 I. A. 23; 16 C. 473 (P. C.). Where the tenants of the judgment-debtor was dispossessed much later than the date of delivery of possession.

It is a serious irregularity to ask the decree-holder to begin his case and examine his witnesses and then to examine the witnesses of the claimant, it justifies interference in revision.—*Appa Rao v. Venkappa*, 132 I. C. 301; A. I. R. 1931 Mad. 534.

**Ex parte order for delivery of possession.**—Order IX, r. 13 does not apply to execution proceedings, and a party against whom an order under r. 101 is passed even though it be *ex parte*, can only seek his remedy by way of a suit under r. 103.—*Harī Charan v. Manmatha*, 41 C. L. See also *Jugulkishore v. Bachinder Mohan*, 52 I. C. 416, where it was held that Or IX, r. 9 has no application in the case of proceedings under rr. 100 and 101. The Court has no inherent power to set aside on sufficient cause being shown, either an order dismissing for default an application under Or. XXI, r. 97 or r. 100, or an order allowing such an application *ex parte*.—*Alaga-sundaram v. Pichuvier*, A. I. R. 1929 Mad. 757 (F. B.); 57 M. L. J. 381.

**Limitation**—Under Art 165 of the Limitation Act, an application under this rule must be made within 30 days from the date of the dispossession; *Abdul Karim v. Islamunnissa*, 38 A. 339; 14 A. L. J. 401; 34 I. C. 231; *Indubhushan v. Haricharan*, 58 C. 55; A. I. R. 1931 Cal 385; 132 I. C. 631.

Where the claimant preferred his petition within 30 days of dispossession bringing the judgment-creditor and the auction-purchaser on record but failed to bring the sub-purchaser on record till he had notice of the sub-purchase and after 30 days, held, that the petition was not barred by limitation.—*Indubhushan v. Haricharan*, 58 C. 55; 132 I. C. 631; A. I. R. 1931 Cal. 385.

**Dismissal of application for default.**—It was held by the Patna High Court in *Satyanarain v. Govind*, 3 P. L. J. 250; 43 I. C. 951, that a party not bound by a decree may, under Or. IX, r. 9, obtain a re-hearing of a claim made by him under this rule, which has been dismissed for default; but the same High Court took a contrary view in *Bhubaneswar v. Tilakdhari*, 49 I. C. 617 (F. B.); 4 P. L. J. 135.

Where a claim case is disposed of *ex parte* on default on the part of one or other of the parties without an investigation of the matter in accordance

with the provisions of r. 100: held, that the remedy by way of suit under r. 103 is not the remedy for dismissal by default, and the Court may restore the case under S. 151 of the Code but should hear the opposite party. — *Nabu Sahu v. Kamdev*, 47 C. L. J. 87.

**Appeal.**—No appeal lies from an order made under Or. XXI, r. 101, C. P. Code.—*Musst. Golabi Bibi v. Aslam Khan*, 57 P. R. 1917: 91 P. W. R. 1917: 101 P. L. R. 1917: 41 I. C. 891; *Bai Mani v. Ranchodlal*, 25 Bom. L. R. 147: 72 I. C. 256: A. I. R. 1923 Bom. 214. It has been held by the Madras High Court that where an application is contested between persons who were parties to the suit or representatives of parties, the case falls within S. 47, and an appeal lies from the order; *Appia v. Kattuvava*, 41 M. L. J. 54: 63 I. C. 730; *Meyyappa v. Chidambaram*, 39 M. L. J. 603: 61 I. O. 349; *Veyindra v. Maya*, 43 M. 696: 58 I. C. 501. See *Dwipal-chandra v. Jeeban Debi*, 53 C. 808: 35 C. W. N. 286: A. I. R. 1931 Cal. 574: 133 I. C. 335.

**Revision.**—Where an application is brought in revision against an order restoring a purchaser from the judgment-debtor of a non-transferable occupancy holding to possession, the High Court will not interfere in revision because there is the remedy by way of suit.—*Bhim Naik v. Chakradhar*, 34 C. W. N. 577: A. I. R. 1930 Cal. 348: 127 I. C. 552. But see *Indubhushan v. Hari Charan*, 58 C. 55: A. I. R. 1931 Cal. 385: 132 I. C. 631, which has held that the power conferred upon any party by r. 103 to institute a suit does not restrict the High Court from using its revisional powers to correct the errors or illegalities of subordinate Courts in proceedings under r. 101.

**102.** Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. [S. 333.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 333, C. P. Code, 1882, with some modifications. The words "to resistance or obstruction in execution of a decree for the possession of immoveable property by a person," have been added after the words "shall apply," and the words "or to the dispossession of any such person" have also been added after the words "was passed." The word "passed" has been substituted for the word "made" which occurred in the old section.

**Transferee pendente lite.**—Where such a transferee pays off a prior usufructuary mortgage and enters into possession of the property and resists the decree-holder in obtaining possession, he cannot be treated in relation to his position as a purchaser from the judgment-debtor. — *Fa . . . . .* A. I. R. 1926 Oudh 610.



**103.** Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property ; but, subject to the result of such suit (if any), the order shall be conclusive.  
[Ss. 332 & 335, LAST PARA.]

Orders conclusive  
subject to regular  
suit.

### COMMENTARY.

**Alterations.**--This rule corresponds to the last paras. of Ss. 332 and 335 C. P. Code of 1882, with some modifications.

**Scope and effect of an order under this rule.**--This rule does not apply unless an order under rr. 98, 99 or 101 has been made.—*Hargopal v. Chandu Lal*, 69 I. C. 557. A person against whom an order is made under rr. 98, 99 or 101, may institute a suit to establish the right which he claims to the present possession of the property ; but he is not bound to proceed under the foregoing rules. If he proceeds under those rules and becomes unsuccessful, he must bring a regular suit within one year and the order, unless set aside by a regular suit within the statutory period, becomes final and conclusive. The provisions of Or. XXI. rr. 97 to 103 are of a restrictive nature and strict compliance with them is necessary. They take away the common law right of the decree-holder or the persons who offer resistance in their own rights to have their respective claims adjudicated upon in a regular civil suit and therefore they must be strictly construed and if in a particular case it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequences barring the suit cannot legally flow therefrom.—*Talia Bibi v. Nur Din*, 103 I. C. 614; A. I. R. 1928 Lah. 672

An order rejecting a claim petition under Or. XXI, r. 100, not being appealed against within one year, acquires the force of a decree.—*Achuta v. Mammavu*, 10 M. 357 (8 M. 506 followed). The order intended to become final under this rule is an order which is passed after enquiry into the matter of resistance ; but if the Court declines to pass an order under r. 97 or r. 100 and refers the claimant to a separate suit, then Art. 11-A of the Limitation Act has no application.—*Mecrudin v. Rahisa Bibi*, 27 M. 25 (12 C. 550 referred to).

This rule does not apply to an order dismissing an application for default of prosecution because it is not an order made after investigation.—*Sarat Chandra v. Tarini Prasad*, 34 C. 491; 11 C. W. N. 487. See also *Bhimrao v. Martand*, 45 I. C. 102; *Wamandhar v. Kamta Prasad*, 22 N. L. R. 94; 97 I. C. 178; A. I. R. 1926 Nag. 423.

There must be an enquiry before a valid order under this rule can be made.—*Gouri v. Sita*, 14 C. W. N. 346. See *Milkhi Ram v. Basant*, 132 I. C. 844; A. I. R. 1931 Lah. 686.

Order XXI, r. 103, which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions of S. 47.—*Badami Seshiah v. Katti Chinna*, 52 I. C. 928; nor does it make any

difference that the party did not profer an objection under Or. XXI, r. 58.—*Mahammad Hayab v. Ghulam Nabi*, 133 I. C. 201: 32 P. L. R. 390: A. I. R. 1931 Lah. 598.

In a suit under this rule, not only the question of possession, but also the right or title on which the claim of possession is based should be gone into; *Unni Moidin v. Pocker*, 44 M. 227, and such right to possession may be established without showing that the plaintiff was in possession at the date of the dispossession or summary order.

**Period of limitation for a suit to establish right**—A party against whom an order under Or. XXI, r. 101 is made, must bring his suit to establish the right which he claims within one year from the date of the order, otherwise the suit will be barred by Art. 11-A of the Limitation Act, 1909.—*Bhimappa v. Irappa*, 26 B. 146. See also *Mahadev v. Babi*, 26 B. 730; *Ram Singh v. Kundan Singh*, 96 P. W. R. 1916: 103 P. L. R. 1916: 36 I. C. 211. The suit is not confined to a suit for possession of the property. It is a suit to establish a right which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his title. In either case the suit must be brought within one year under Art. 11-A of the Limitation Act.—*Lakshman v. Dattatraya*, 53 B. 663: 31 Bom. L. R. 765: A. I. R. 1929 Bom. 379. The fact that there was a pending suit regarding the title to the property in which he had set up his title does not absolve him from the obligation under S. 103; *Kumaram Unni Achan v. Kunhikrishnan*, 75 I. C. 814. In *Bhiku v. Sugat Ali*, 29 C. 25, it has been held that if an objection under Or. XXI, r. 100 is rejected, the objector is not precluded from instituting a suit to enforce his mortgage lien over the property, more than a year after the date of the order. A suit to establish a mortgage lien over property is not a suit to establish a right to the property. Where an application is dismissed for default on the petitioner applying to withdraw his petition for want of evidence, the opposite party being present, held, that there was no enquiry within the meaning of Or. XXI, r. 100, and the suit was not barred by one year's limitation.—*Sarat Chandra v. Tarini Prasad*, 34 C. 491: 11 C. W. N. 487. See also *Kunj Behari v. Kandh Prasad*, 6 C. L. J. 362, where it has been held that merely because the claimant does not adduce evidence or is absent, it does not follow that there are no materials before the Court to enable it to enquire into the matter. If the Court does not enquire into it and dismisses the application, the order is made upon investigation.

**Suit by auction-purchaser for possession upon a different cause of action.**—The provisions of this rule do not apply to a suit brought by an auction-purchaser against the opposite party for possession, not under his 'auction-purchase, but upon a different title altogether. In such a case the suit need not be brought within one year from the date of the decree as required by Art. 11-A of the Limitation Act; *Ambica v. Ram Prasad*, 30 C. W. N. 163: 90 I. C. 575: A. I. R. 1926 Cal. 377.

**Amount of Court-fee payable in a suit under this rule.**—An auction-purchaser who was resisted in obtaining actual possession, and whose application under Or. XXI, r. 100 was rejected, brought a suit against the person in possession, for a declaration of his right to the property and to be

put in actual possession thereof. *Held*, that the suit was properly stamped with a Court-fee stamp of Rs. 10.—*Pirya Das v. Vilayat Khan*, 22 A. 384 (9 B. 20 referred to).

**Order XXI, rr. 123 and 124 of the Allahabad High Court.**—Rules 123 and 124 apply to the appointment of watchmen or guards otherwise known as '*Sahanas*' who are usually appointed to guard standing crops in the fields or crops which have been cut and stacked and similarly to guard other places where attached goods have been kept. Rule 123 (old r. 123) is the only rule which applies to the cases where moveables like ornaments are attached and for which some arrangement is necessary for their safe custody.—*Shakir Husain v. Chandoo Lal*, 134 I. C. 835: 29 A. L. J. 865: A. I. R. 1931 All. 567 (F. B.).

Although a '*Sahana*' would not be a surety, a *sapurdar* who has given an undertaking to produce the goods when ordered by the Court is a surety although the undertaking is not given to the Court directly but through the attaching officer and by such an undertaking he becomes liable under S. 145.—*Ibid*.

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## ORDER XXII.

### DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

No abatement by  
party's death if  
right to sue sur-  
vives.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. [S. 361.]

### COMMENTARY.

**Alterations.**—This rule exactly corresponds to S. 361 of the old Code. The illustrations attached to the old section have, however, been omitted by the Select Committee as they seemed too obvious to serve any useful purpose.

**Scope.**—Order XXII is confined to the question of the continuance of the suit by virtue of the devolution of the deceased's right to sue on other persons during the pendency of the suit. But there may be cases in which the suit can be continued by other persons who have an independent right to sue on the same cause of action.—*Lachman v. Bansi*, 12 L. 275 : 131 I. C. 98 : A. I. R. 1931 Lah. 79. Non-compliance with the procedure laid down in Or. XXII would not involve a want of jurisdiction but would be a mere irregularity so long as the decree is passed between living persons.—*Thakur Prasad v. Kanhya Lal*, 133 I. C. 303 : A. I. R. 1931 All. 746.

**"Right to sue."**—This means the right to seek relief by legal proceedings. It is the right to institute a suit claiming the same relief which the deceased plaintiff claimed at the time of his death.—*Gopal v. Ram Chandra*, 26 B. 597, *Sarat Chandra v. Nani Mohan*, 36 C. 799. The cause of action in the original and revived suits must be the same, and no fresh cause of action can be imported into the revived suit.—*Sham Chand Giri v. Bhayaram Panday*, 22 C. 92. See also *Umrao Begum v. Irshad Husain*, 21 I. A. 163 : 21 C. 997 (P. C.).

An application under Or. XXII, r. 1 C. P. Code to be brought on record as the legal representative of the deceased plaintiff could not be rejected on the ground that there was no cause of action which would "entitle" as specified in Or. XXII, r. 1, to obtain relief by means of legal proceedings.—*Manjappa*, 2 Mys. L. J. 1.

The continuance of a suit depends, not on the qualification of the person claiming to be the representative of the deceased, but on the nature of the suit. The test is whether the reversioners could have been joined as plaintiffs in the action brought by one through whom they claim. If they could, then, on the death of the latter, they would be entitled to continue the suit begun by him, otherwise not.—*Abdullah Shah v. Zainab Bibi*, 134 I. C. 771 : A. I. R. 1931 Lah. 293.

**Cases where the right to sue survives and where it does not.**—In order to understand what is meant by the expression "right to sue survives"

it is necessary to look into the provisions of S. 306 of the Indian Succession Act, XXXIX of 1925 (which corresponds to S. 89 of the Probate and Administration Act) and S. 37 of the Indian Contract Act. Section 306 of the Succession Act says: "All demands whatsoever, and all rights to prosecute or defend any action or proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code or other personal injuries not causing the death of the party; and except cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

It is clear from the above that the right to sue does not survive in suits for defamation, assault or other personal injuries not causing the death of the party and in cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Section 37 of the Contract Act says: "Promises bind the representatives of the promisors in case of the death of such promisors before performance unless a contrary intention appears from the contract." Where it appears from the terms of the contract itself that the obligation must end with the death of the promisor, the right to sue does not survive against his representative because the obligation is determined by the death of the promisor. Generally speaking all contracts which involve the exercise of special or personal skill are not binding on the representatives of the promisors. See illustration (b) to S. 38, Indian Contract Act.

Suits for damages for breach of contract, suits on promissory notes, suits for recovery of debts, suits on mortgages, and suits for wrong done to property are suits that do not abate on the death of the plaintiff or defendant.

A suit for damages for malicious prosecution and obstruction of a right of way abates on the death of the defendant in the absence of any allegation that the estate of the wrong-doer was benefitted thereby; *Ma Shwe Thit v. Maung Po Aung*, 65 I. C. 66: (1931) 4 U. B. R. 73.

In a suit for damages for malicious prosecution, if the plaintiff dies before trial, the right to sue or the cause of action survives to his legal representatives, as such a suit falls within the scope of S. 89 of the Probate and Administration Act—*Krishna Behari Sen v. The Corporation of Calcutta*, 31 C. 993: 8 C. W. N. 745 (confirming in appeal 31 C. 406: 8 C. W. N. 329). On the other hand, it has been held by the High Courts of Bombay, Madras, Patna and Allahabad that the right to sue does not survive and that the suit abates on the original plaintiff's death; *Haridas v. Ramdas*, 13 B. 677; *Rustomji v. Nurse*, 44 M. 357: 62 I. C. 260 (F. B.); *Murugappa v. Ponnusami*, 44 M. 828: 62 I. C. 757; *Palaniappa v. Raja of Ramnad*, 49 M. 208: 92 I. C. 366: A. I. R. 1926 Mad. 243; *Punjab Singh v. Ramautar*, 4 P. L. J. 676: 52 I. C. 348; *Mahtab Singh v. Hub Lal*, 48 A. 630: 98 I. C. 590: A. I. R. 1926 All. 610. But if a defendant after appealing to set aside the decree dies before the hearing, his legal representative is not debarred from prosecuting the appeal.—*Gopal Ganesh v. Ramchandra Sadashiv*, 26 B. 597 (followed in *Paraman Chetty v. Sundararaja Naick*, 26 M. 499).

In a suit for damages by way of compensation for personal injury the Court granted findings against the tort-feasor and awarded damages. The tort-feasor appealed both against the finding and the award, and the plaintiff put in

## r. 1.

cross-objections being aggrieved by the ——— The tort-  
feasor died pending appeal. *E* d (relying  
on 34 M. 76 and 62 P. R. 1. *Ali, A. I. R.*  
1929 Lah. 807.

A suit in which the plaintiff alleges that he entrusted the defendant with a box with valuable securities in it for safe custody and that the contents were missing when the box was returned, is one to recover the specific articles. If because the articles no longer exist, the Court gives a decree for their value, it is not a claim for an unliquidated and uncertain sum of money. The suit does not abate on the death of the defendant. One of the exceptions to the maxim *actio personalis moritur cum persona* is the case in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or monies.—*Brij Nath v. Lakshmi Narain*, 137 I. C. 217 : 9 O. W. N. 239 : A. I. R. 1932 Oudh 165.

An action to recover damages for breach of a contract of marriage abates on the death of the plaintiff; *Hiralal v. Nanabhai*, 44 B. 446 : 55 I. C. 624. A suit to establish the plaintiff's right to the office of a *mahant* abates on his death, because the right claimed is a personal right to an office; *Sham Chand v. Bhayaram*, 22 C 92. There is a conflict of authorities on the question whether the right of pre-emption under the Mahomedan Law does or does not abate at the pre-emptor's death; *Sayyad Jiaul v. Sitaram*, 36 B. 144; *Muhammad v. Niamatunnissa*, 20 A. 88; *Yusuf Ali v. Dalkuar*, 20 A. 148.

During the pendency of a suit by a Hindu widow for possession of her husband's estate she died. Held that the cause of action survived on the death of the plaintiff and therefore the suit did not abate.—*Parbutty v. Higgin*, 17 W. R. 475 : 8 B. L. R. Ap. 98.

Where a Hindu mother who sued to restrain an encroachment on the share allotted to her on partition and agreed to sell her interest to the defendants at the value to be found on arbitration, died after the award but before the decree, it was held that the right of action on the award survived to her sons.—*Denomoyee v. Chooneymoney*, 4 C. W. N. 280 (affirmed on appeal in 28 C. 155 : 5 C. W. N. 242).

A reversioner's suit for a declaration that an alienation made by a Hindu widow is invalid, abates on the death of the plaintiff, and it cannot be continued by the next reversioners; *Sakyahani v. Bhavani*, 27 M. 588; *China Veerayya v. Lakshminarasamma*, 37 M. 406 : 22 M. L. J. 375; *Lachhman v. Bansilal*, 12 L. 275 : 131 I. C. 98 : 31 P. L. R. 973 : A. I. R. 1931 Lah. 79. But it has been held by the Privy Council that a suit brought by the presumptive reversioner for a declaration that an alleged adoption is invalid, is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner, the next presumable reversioner is entitled to continue the action begun by the deceased; *Venkatarayana v. Subbammal*, 38 M. 406 : 42 I. A. 125 : 29 I. C. 298 : 19 C. W. N. 641.

If a suit is instituted by a Hindu widow or the owner of a limited estate, which suit is in the interests of the estate of the last holder, then the reversioners will be entitled to continue the claim on the death of the plaintiff having only a limited interest. Where however the plaintiff brings

the suit in order to enforce his or her personal rights or claims to a definite end, then the reversioners cannot be allowed to continue the suit.—*Mt. Manglan v. Hira Singh*, 32 P. L. R. 712 : A. I. R. 1931 Lah. 675. See *Abdullah Shah v. Mt. Zainab Bibi*, 134 I. C. 771 : A. I. R. 1931 Lah. 293.

Where an agent who sues on behalf of an undisclosed principal dies pending suit, the suit (if it can be continued at all) can be continued by the agent's representatives, and not by the principal.—*Periannan Chettiar v. Rengach Reddy*, 17 M. L. J. 116.

Where a testamentary guardian applies to be appointed guardian under this rule and dies pending the proceedings, the application abates, and as his claim was based on a personal trust, his representatives are not entitled to continue the proceedings; *Gangabai v. Khashabai*, 23 B. 719. Where, however, the claim is not based on a personal trust, the proceedings can be continued by the legal representative of the deceased; *Palaniandi Chetti v. Adaikalam*, 47 M. 459 : 46 M. L. J. 179 : 84 I. C. 613 : A. I. R. 1924-Mad. 484.

The right to the grant of letters of administration is a personal right and does not survive to the heir of the residuary legatee of the testatrix; *Hari Bhusan v. Manmatha*, 45 C 862. 51 I. C. 76 ; *Sarat Chandra v. Nani*, 36 C. 799 : 3 I. C. 995 ; *Sachindranath v. Bepin*, 35 C W. N. 1028. Where, pending a suit filed by a partner on behalf of a firm he dies, there is no question of abatement at all; *Bansidhar v. Debi Prasad*, 93 I. C. 144 : A. I. R. 1926 All. 351.

Against an order of Court appointing a particular person as guardian of a minor, the minor's paternal uncle who opposed the appointment in the lower Court, preferred an appeal. On the death of the appellant pending the appeal, his son sought to continue the appeal and objection was taken that the right to sue did not survive and the appeal abated. Held that the appeal did not abate and could be prosecuted by the son of the deceased appellant; *Palaniandi Chetti v. Adaikalam*, 46 M. L. J. 179 : 47 M. 459 : 84 I. C. 613 : A. I. R. 1924 Mad. 484.

If a defendant is dead at the time of the institution of the suit, the plaintiff cannot go on with the suit by applying for the substitution of the deceased defendant.—*Kristadas Law v. Kumar Khirada Kanta*, 51 I. C. 160.

A suit by a Hindu mother for a share at a partition among her sons under the Dayabhaga School, abates on her death.—*Tripura v. Dakhina*, 5 C. L. J. 310 : 11 C. W. N. 698.

A suit for a personal injunction abates when the person against whom the suit is brought dies.—*Jesiam v. Sami*, 7 M. L. J. 195 : 5 I. C. 937.

The right to an office as *mahant* is a personal one and on the death of the person claiming it that right comes to an end; a suit by a person to establish the right abates on death.—*Gulzar v. Sardar Ali*, 12 L. 1 : 125 I. C. 891 : 32 P. L. R. 197 : A. I. R. 1930 Lah. 703.

A representative suit brought with the permission of the Court under Or. I, r. 8 by some persons which could be brought by any one of them does

not abate on the death of one of them.—*Balu v. Ram Rikh*, 120 I. C. 543 : A. I. R. 1930 Lah. 292.

An appeal preferred by the creditors of an insolvent against an order of adjudication abates on his death, as the right to sue does not survive.—*Narain v. Gurbaksh*, 9 L. 306 : 107 I. C. 291 : A. I. R. 1928 Lah. 119.

**Abatement of right to sue in forma pauperis**—The right to make an application to sue *in forma pauperis* is a personal right and does not survive to the heirs of the pauper : *Jatindra Nath v. Sourindra Nath*, 64 I. C. 63.

**Decree passed after death of a party.**—A decree passed after death of a party to the suit or appeal is not an absolute nullity ; such a decree is not void nor is it open to collateral attack, but it is erroneous and liable to be set aside. The mistake can be rectified by the Court setting aside the proceedings taken after the death of the deceased party and re-trying the case from the stage reached immediately preceding the death.—*Tota Ram v. Kundan*, A. I. R. 1928 Lah. 784 : 112 I. C. 704.

**No abatement by reason of the death of the plaintiff after decree.**—A suit which has terminated in a decree cannot abate by reason of the death of the plaintiff after the passing of the decree : *Mulchand Kalwar v. Gobind Singh*, 59 I. C. 939.

**Death of either party pending appeal.**—Where during the pendency of an appeal against a decree in favour of the plaintiff in a suit in which the right to sue would not survive if the plaintiff died before decree, either party dies, the appeal does not abate : *Muhammad v. Khushalo*, 9 A. 131 (F. B.) ; *Gopal v. Ramchandra*, 26 B. 597 ; *Paramen v. Sundararaja*, 26 M. 499. But if the plaintiff's suit is dismissed, and the plaintiff has appealed from the decree, and either party dies pending the appeal, the appeal will abate : *Gopal v. Ramchandra*, 26 B. 597 ; *Sakyahani v. Bhavani*, 27 M. 588 ; *Josiam v. Sawmi*, 34 M. 76 ; *Saklat v. Bella*, 2 R. 91 : A. I. R. 1924 Rang. 217.

**Abatement of an application for execution.**—There can be no abatement of an application for execution. Rule 16 of Or. XXI applies only to suits and there is no other rule barring the execution of a decree by the executing Court when an execution petition is already pending.—*Mohan Singh v. Jagat Singh*, 50 A. 621 : 26 A. L. J. 417 : 109 I. C. 412 : A. I. R. 1928 All. 299.

## 2. Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[S. 362]



## COMMENTARY.

**Alterations.**—This rule corresponds to S. 362, C. P. Code, 1882, with this modification that the word "where" has been substituted for the words "where" and "if."

"To the surviving plaintiff or plaintiffs alone."—There can be no abatement under this rule when there are more plaintiffs or defendants than one, and any one of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone. In such a case no application by any party is necessary but it is made innumbent on the Court to cause an entry to that effect to be made on the record without any application; *Nankoo v. Bhagelu*, A. I. R. 1929 All. 347; 27 A. L. J. 618; 116 I. C. 746. The word "survive" in r. 2 is not used in the technical sense and it is not meant to apply only to such legal representatives as have acquired the rights of the deceased by survivorship such as trustees and executors and not by inheritance; the word is used simply in its ordinary sense of outliving. Thus if during the pendency of the appeal one of the parties to it dies but all his nearer heirs are already on the record, it is not necessary to apply under Or. XXII, r. 4 to join the legal representatives as parties, but the Court need only make an entry under Or. XXII, r. 2—*Lalaram v. Tikamdas*, 119 I. C. 537; A. I. R. 1929 Sind 225.

A Mahomedan appellant died leaving sons and daughters. The sons applied to be brought upon the record, but they did not bring their sisters upon the record along with themselves, held that they not having done so, the appeal abated.—*Haider Husain v. Abdul Ahad*, 30 A. 117; 5 A. L. J. 62.

A, B, and C, members of a joint Mitakshara family, sued for a declaration of their right, after refusal of their application for registration of names under the Land Registration Act, and obtained a decree. During the pendency of the appeal against the decree, A died, and more than six months after, the appellant applied to have B and C noted as legal representatives who had taken the estate by survivorship. Held that the application was governed by this rule, which is not limited in its application to cases, in which the right of suit survives against the surviving defendants, by reason of some circumstance antecedent to the suit.—*Shamanund v. Rajnarain*, 11 C. W. N. 186; 4 C. L. J. 568.

Where the deceased plaintiff was a joint occupancy tenant with his co-plaintiffs, and his rights in the tenancy lapsed to his co-tenants who were already on the record, it was not necessary to implead the heirs of the deceased plaintiff.—*Saru Khan v. Jan Mohammad*, 105 I. C. 313; A. I. R. 1928 Lah. 43.

Where the plaintiff sued six vendees for the pre-emption of a house, and it appeared that one of the defendants was dead even before the suit was lodged and that his interest had devolved on the other five persons; held, that the suit could be proceeded with after striking off the name of the deceased.—*Hazari Sher v. Mt. Mohammadi*, 30 P. L. R. 259; 117 I. C. 899; A. I. R. 1929 Lah. 440.

One of the several defendants preferred a second appeal, the other defendants not having joined. The appellant died and no legal representative was brought on record in time. The co-defendants contended that they were

*pro forma* respondents in the second appeal, that the right to sue survived to them and that there was no abatement; *held*, that the co-defendants were not appellants, that Or. XXII. r. 2 did not apply and that the appeal abated.—*Suba Gobind v. Anar Koer*, 53 A. 521: 29 A. L. J. 266: 131 I. C. 877: A. I. R. 1931 All. 349.

If the right to sue survives against the surviving respondents, even by reason of any cause which arises after the institution of the suit or the appeal, *e. g.*, the purchase of the interest of the deceased by them during the pendency of the appeal, the case would fall within the purview of Or. XXII. r. 2; *Jhingi Ram v. Musst. Rupan Bai*, 102 I. C. 436: A. I. R. 1927 Lah. 501.

"Against the surviving defendant or defendants alone."—If the defendants in a suit are jointly and severally liable to the plaintiff, the suit does not abate merely because one of the defendants has died and his legal representatives have not been brought upon the record.—*Jwala Prasad v. Kopeva Munda*, 59 I. C. 890.

Where after the passing of a preliminary decree in a mortgage suit, the mortgage being executed by the members of a Hindu joint family, one of the mortgagors-defendants died and a final decree was passed without bringing on record the legal representatives of the deceased, *held*, that Or. XXII. r. 2 applied and that the suit did not abate as against the other members of the family who were already on record.—*Shridhar v. Madappa*, 32 Bom. L. R. 698: 127 I. C. 834: A. I. R. 1930 Bom. 867.

A legatee who has received assent of the executor to the legacy can bring and maintain an action in his or her own right. Where therefore both the executor and the legatee are plaintiffs and no legal representative of the executor is brought on record after the executor's death, the appeal does not abate against the legatee though it abates against the executor.—*Watkins v. Watkins*, 121 I. C. 177: A. I. R. 1930 Lah. 138.

Rule 2 contemplates cases where the right to sue survives against the surviving defendant in his own capacity and not as the legal representative of the other defendant. Where the right to sue survives against the surviving defendants in their capacity as representatives of the deceased defendant the case comes under r. 4 and an application for substitution within the period of limitation is necessary.—*Walayatunnissa v. Chalakhi*, 10 P. 341: 12 P. L. T. 28: A. I. R. 1931 Pat. 164: 132 I. C. 100. See also *Lilo v. Jhagru*, 3 P. 853: 85 I. C. 25: A. I. R. 1925 Pat. 123; *Basist v. Modnath*, 7 P. 285: 108 I. C. 552: A. I. R. 1928 Pat. 250. But see *Shamanund v. Rajnarain*, 11 C. W. N. 186 and the notes under the preceding heading, and the notes under heading "On an application made in that behalf" in r. 4, *post*.

"The suit shall proceed."—The word "suit" includes an appeal; see r. 11.

3. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

of the deceased plaintiff to be made a party and shall proceed with the suit. [Ss. 363 & 365.]

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. [S. 366, PARA. 1.]

### COMMENTARY.

**Alterations in the rule.**—The provisions contained in Ss. 363, 365 and 366 of the C. P. Code, 1882, have been embodied in this rule with several alterations and omissions :—(1) The words "*so far as the deceased plaintiff is concerned*" in sub-rule (2) are new. (2) The words "*the suit shall abate*" in sub-rule (2) have been substituted for the words "*the Court may pass an order that the suit shall abate*" which occurred in S. 366 of the Code of 1882. Under the present Code it is not necessary to make an order that the suit shall abate, as it abates *ipso facto* if no application is made under sub-rule (1) within the time limited by law (90 days); *Ram Gopal v. Har Kishen*, 88 I. C. 478 : A. I. R. 1925 Lah. 598; *Lachmi v. Muhammad*, 42 A. 540 : 59 I. C. 908; *Churya v. Baneshwar*, 48 A 334 (overruling *Gujrati v. Sital*, 44 A. 459); *Qaim v. Nura*, 7 L. 78 : 94 I. C. 422 : A. I. R. 1926 Lah. 234.

**Limitation.**—The period of limitation for an application under this rule is 90 days, see Art. 176 of the Limitation Act IX of 1908.

**On an application made in that behalf.**—See notes under that heading under r. 4, *post*. Where the appellant died and his counsel to whom the appellant had given a power-of-attorney applied to implead the legal representatives; *held*, that he could not file the application without first obtaining a fresh power-of-attorney from the legal representative of the deceased—*Parja v. Dumanun*, 133 I. C. 877 : 32 P. L. R. 389. Where there were two appeals from the same decree, one by the plaintiff and the other by the 2nd defendant the substitution of the legal representatives on the death of the plaintiff in his appeal, will not oure for the benefit of the other appeal as well, and the 2nd defendant not having brought them on the record of his appeal, his appeal abated.—*Shankaranaraina v. Laxmi*, 33 L. W. 411 : 130 I. C. 164 : A. I. R. 1931 Mad. 277.

**The suit shall abate "so far as the deceased plaintiff is concerned."**—The words "*so far as the deceased plaintiff is concerned*" mean that the suit shall primarily abate so far as the deceased plaintiff is concerned, but they do not mean that the suit shall in no case abate as a whole. In a suit by the partners of the firm to recover a partnership debt if one of the partners dies pending the suit and his legal representative is not brought on the record, the suit will abate only so far as the deceased partner is concerned; *Sarju v. Ram Sarup*, 19 A. L. J. 266 : 60 I. C. 755. But where the suit cannot proceed in the absence of the deceased plaintiff's legal representative, as when the shares of the parties in the joint property have to be determined, the death of one of such plaintiffs, if no legal representative

of the deceased plaintiff is brought upon record within limitation, will have the effect of causing the suit to abate as a whole; *Huda v. Lala*, 41 P. R. 1915; *Raj Chunder v. Ganga Das*, 31 C. 487 (P. C.): 8 C. W. N. 442: 1 A. L. J. 145: 14 M. L. J. 147: 31 I. A. 71. Abatement arises only under r. 3 or r. 4 when one of two or more plaintiffs or defendants dies and the right to sue does not survive.—*Nankoo v. Bhagelu*, 27 A. L. J. 618: 116 I. C. 746: A. I. R. 1929 All. 347. It is by no means an universal rule that in every case of suit by co-owners against trespassers, that is, in the absence of the legal representatives of one of the co-owners, possibility of two conflicting decrees arises or that the suit or appeal should abate in its entirety. Where each of the plaintiffs has an ascertained share distinct from others, the mere fact that the legal representatives of one of them have not been brought on record is not prejudicial to the prosecution of the appeal (following 10 L. 7).—*Surajmal v. Pyarkhan*, 27 N. L. R. 220: 134 I. C. 679: A. I. R. 1931 Nag. 184.

This rule applies to appeals.—This rule applies to the case of a deceased appellant as it does to the case of a deceased plaintiff (S. 107 and Or. XXII, r. 11). Therefore where one of two or more appellants dies, and the right to appeal does not survive to the surviving appellants alone, the legal representative of the deceased appellant should be brought on the record. If this is not done, the appeal will abate so far as the deceased appellant is concerned. The decision of the question whether the death of one of the appellants causes the appeal of the others to abate, turns upon the question whether the right to appeal survives to the surviving appellants. If it does, the appeal of those appellants does not abate by reason of the death of one of the appellants; *Ram Sewak v. Lambar Pande*, 25 A. 27; *Lachmi v. Amin Chand*, 97 P. R. 1893. Where the decree of the lower Court proceeded on a joint appeal...

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*Bhagwan v. Nanga*,

*Ram Ugrah*, 125.

I. C. 591: A. I. R. 1930 All. 211. Where several plaintiffs or defendants jointly appeal from a decree in a case to which Or. XLII, r. 4 of the Code applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within the period of limitation, can only have the effect of causing the appeal to abate so far only as the deceased appellant is concerned; it cannot have the effect of causing the appeal to abate as a whole; *Chandarsang v. Khimabhai*, 22 B. 718; *Ram Sewak v. Lambar*, 25 A. 27; *Chintaman v. Gangabai*, 27 B. 284; *Somasundaram v. Vaithilinga*, 40 M. 846; *Piyare Lal v. Charamani*, 84 P. R. 1918; *Maung Byaung v. Maung Shwe*, 2 B. 486: 84 I. C. 170: A. I. R. 1924 Rang. 376; *Johaga v. Birchand*, 29 P. L. R. 410: A. I. R. 1923 Lah. 737; *Mahadeo v. Talib Ali*, 50 A. 792: 26 A. L. J. 564: A. I. R. 1923 All. 345: 115 I. C. 785 (F. B.) where one of the plaintiff-appellants in a suit for pre-emption died and his legal representatives were not brought on record (overruling 49 A. 756, 47 A. 100, 45 A. 236). But the appeal will abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant. Where in a suit for correction of entry in the record of rights the only question in appeal was whether the rate of rent should be altered and it

appeared that the effect of allowing the appeal would produce different results on the several parties, the entire appeal abated and it was not competent for the Court to proceed to hear the appeal under Or. XLI, r. 4.—*Naimuddin v. Maniruddin*, 47 C. L. J. 82; 32 C. W. N. 299; 107 I. C. 726; A. I. R. 1928 Cal. 184. Order XLI, r. 4, gives no power to the Court to vary or reverse a decree in favour of a person who is dead whose legal representatives have not been brought on the record and in respect of whom the appeal has abated.—*Ibid.*

The introduction of a plaintiff or a defendant for one stage of suit is an introduction for all stages; impleading of representatives of a deceased in the appellate Court is valid for all stages of the suit (following 45 C. 94 (P.C.)).—*Tota Ram v. Kundan*, A. I. R. 1928 Lah. 784. Where a partner of a creditor firm brought a suit for recovery of a debt due to the firm, impleading the other partner in the suit and pending appeal by the plaintiff the other partner died and no legal representative was brought on the record held, that as the other partner was a necessary party to the suit, the whole appeal abated.—*Chandu Lal v. Khushali Ram*, 124 I. C. 684; A. I. R. 1930 Lah. 174.

See cases noted under rule 11, post.

**Two or more legal representatives.**—The words "legal representative" in Or. XXII, r. 3 must, where there are more than one legal representative, be read in the plural. Hence, where a sole appellant died during the pendency of his appeal, leaving three legal representatives, and only one of them was brought upon the record within the prescribed period of limitation: Held, that the appeal must abate. Either all the representatives should have been brought upon the records as appellants, or if any had refused to be joined as appellants, they should have been brought on record as respondents.—*Ghamandi Lal v. Amir Begam*, 16 A. 211 (followed in *Haidar Husain v. Abdul Ahad*, 30 A. 117; 5 A. L. J. 62). See, however, *Musala Reddi v. Ramayya*, 23 M. 125, where it has been held that when there are more than one legal representative, all of them must, so far as it is possible for this to be done, join in an application under this rule, and the words "legal representative" must in such a case be read in the plural. But where all the representatives cannot be joined as applicants, this rule should not be construed so as to have the effect of rendering the application no application by "the legal representative" within the meaning of this rule (10 B. 220, and 16 A. 211 considered). If one or more of the legal representatives are unknown or are unwilling to join in the application, a *bona fide* application by all the representatives who are willing to join in making the application will be sufficient compliance with r. 3. But where there is no evidence that if the true legal representative had been informed he would not have been willing to join the suit abated and r. 5 would not apply to such a case.—*Fajor Banu v. Rohim Buz*, 32 C. W. N. 1020; 115 I. C. 184; A. I. R. 1929 Cal. 26.

**Legal representative of deceased plaintiff.**—For the definition of the words "legal representative," see S. 2 (11). The words "legal representative," as used in this order, have a very wide significance and are not synonymous with the word "heir"; *Ram Din v. Raj Rani*, 8 N. L. R. 113. On the death of a Hindu widow during the pendency of a suit by her

to recover property belonging to her deceased husband, the reversionary heirs of her husband are her legal representatives within the meaning of this rule; *Premmoyi v. Presnath*, 23 C. 636; *Tribhuvan v. Sri Narain*, 20 A. 341; *Rikhai Rai v. Sheo Pujan*, 33 A. 15. A suit brought by the head of a mutt, on behalf of the mutt, may be continued on his removal by his successor in office, because his successor is a person on whom the trust property devolves within the meaning of Or. XXII, r. 10. *Ratnam v. Nataraja*, 84 I. C. 200: A. I. R. 1924 Mad. 615: 46 M. L. J. 341. The legal representatives of a daughter, who dies after instituting a suit to recover possession of her father's property as his heir, are the next heirs of the father entitled to come in after her, *Ramaswami v. Pedamunayya*, 39 M. 383; *Jadubansi v. Mahpal Singh*, 38 A. 111. On the death of a reversioner, pending a suit for a declaration of

representative  
mal, 38 M. 383: 46 M. L. J. 341. Where a senior *anandravan* of a *tarwad* brings a representative suit under Or. I, r. 8 to dispute on behalf of his *tarwad*, an act prejudicial to the *tarwad's* interests committed by its *karnavan* and obtains a decree but dies during appeal, any of the junior *anandravans* may be joined as his legal representatives and permitted to carry on the proceedings; *Mahomed v. Kunk: Kutti*, (1928) M. W. N. 867. A. I. R. 1929 Mad. 451. Where on a refusal by the registering officer to register the will, two of the legatees bring a suit for registration, the suit must be regarded as in a representative capacity and on the death of any of the plaintiffs the other will be his legal representative, so far as the right to continue the suit is concerned though not so far as the specific rights of the deceased under the will is concerned.—*In re Subramania*, 115 I. C. 851: A. I. R. 1929 Mad. 524.

A person who allows his *benamdar* to sue in his own name and not in a representative character cannot come in on his death as his legal representative.—*Doraiswami v. Ghidambaram*, 31 L. W. 194: (1930) M. W. N. 48: 122 I. C. 176: A. I. R. 1930 Mad. 221: 58 M. L. J. 57.

An executor appointed by the will of a deceased plaintiff or appellant is his legal representative within the meaning of this rule.—*Payyath Nannu Menon v. Thirukipalli Raman*, 20 M. 51.

An administrator appointed under S. 10 of Bombay Regulation, VIII of 1837, does not, by such appointment, become the legal representative of the deceased, or entitled to continue an appeal filed by him.—*Malapa Sidapa v. Devi Nish*, 21 B. 102.

If a question arises as to whether any person is or is not the legal representative of the deceased plaintiff, such question should be determined by the Court under Or. XXII, r. 5.—*Oula v. Beepathee*, 17 M. 209.

The original plaintiff sued for redemption of a mortgage executed by her father. She claimed as the only unmarried daughter of three, arraying as defendants, besides the mortgagee, her surviving married sister and the minor children of a deceased sister. The plaintiff died during the pendency of the suit. Held that the claim being personal to the plaintiff, the suit abated, and the surviving sister could not be permitted to carry on the suit in substitution for the original plaintiff.—*Balak Puri v. Durga*, 30 A. 49.

The right of the mother to a share on partition among the sons, is in lieu of her maintenance, and such share on her death, reverts to the sons. Where the mother brought a suit against the sons for her share of certain G. P. notes, which had been partitioned amongst themselves by them; held that on her death the right to sue did not survive in her executor.—*Tripura Sundari v. Dakshina Mohun*, 11 C. W. N. 698 : 5 C. L. J. 310.

**Death of pauper applicant.**—A right to obtain permission to sue as a pauper is only a personal right : on the death of such applicant his legal representative cannot come and ask to be substituted in his place. There is a marked distinction between a right to sue and a right to make an application for permission to sue as a pauper—*Lalit Mohan v. Satish Chandra*, 33 C. 1163 : 4 C. L. J. 234. See also *Farzand Ali Khan v. Amir Haider*, 26 I. C. 714 ; *Subbiah v. Bala Sundara*, 51 M. 697 : 27 L. W. 445 : A. I. R. 1928 Mad. 278 : 110 I. C. 318.

**Minor applicant.**—A minor is entitled to be made a party as the legal representative of a deceased plaintiff in the same way as an adult, but his application must be through a next friend ; *Rukmani v. Veerasami*, 80 I. C. 942 : 47 M. L. J. 370 : A. I. R. 1924 Mad. 813.

**Death of plaintiff after preliminary and before final decree.**—Where in a suit a plaintiff dies after the passing of the preliminary decree and before the passing of the final decree (as in a mortgage suit), this rule applies, *Lakshmi v. Subbarama*, 39 M. 488 : 29 I. C. 142 ; *Subbarayudu v. Rama Dasu*, 68 I. C. 942 : A. I. R. 1923 Mad. 237 ; *Natesa v. Kannammal*, 46 M. L. J. 181 : 78 I. C. 64 : A. I. R. 1924 Mad. 786 ; *Hemendra v. Fakir*, 50 C. 650 : 74 I. C. 929 : A. I. R. 1923 Cal. 626 ; *Mahabir v. Narain*, 29 A. L. J. 715 : 134 I. C. 236 : A. I. R. 1931 All. 490 : 54 A. 25 (F. B.). But see *contra* : *Perumal v. Perumal*, 51 M. 701 : 28 L. W. 164 : 112 I. C. 116 : (1928) M. W. N. 434 : A. I. R. 1928 Mad. 914 : 55 M. L. J. 253 (F. B.) which has held that the right to sue had come to an end with the passing of the preliminary decree, that r. 3 of Or. XXII, was inapplicable and that the suit did not abate (relying on 4. P. 61 (P. C.)). See *Utanka Lal v. Tarak Nath*, 48 C. L. J. 357, where an opinion has been expressed that it would be very inconvenient if after the preliminary decree all persons who are parties to the suit are required to be alert to see whether any of the decree-holders or judgment-debtors under the preliminary decree dies before the application for final decree. The suit does not abate if the heirs of the deceased mortgagee who died after the passing of the preliminary decree, are not brought on record within the time limited by law.—*Nazir Ahmmad v. Tamizaddi*, A. I. R. 1923 Cal. 430. There can be no question of the surviving of the cause of action in a suit when a judgment has been pronounced in respect of that cause of action. By the effect of the judgment the decree takes the place of the cause of action either by affirming it or rejecting it.—*Kalu Ram v. Gaya Din*, 106 I. C. 332 : 4 O. W. N. 1002 : A. I. R. 1929 Oudh 561.

**Death of sole plaintiff—Abatement of suit.**—The section (*i.e.*, this rule) refers to a death only as occurring before decree.—*Bhugwan Das v. Nilkanta*, 9 C. W. N. 171 ; *Ramanada v. Minatchi*, 3 M. 236.

Upon the death of a solo plaintiff, if no application to revive is made within the prescribed time, the suit abates. But the Court may, under

S. 371, C. P. Code, 1882 (Or. XXII, r. 9) revive the suit, on the application of the legal representative of the plaintiff, within 3 years from the time when the right to apply accrues, if he can show that he was prevented by sufficient cause from continuing the suit.—*Bhojrab Dass v. Doman Thakoor*, 5 C. 139 : 4 C. L. R. 374. See also *Ram Protap v. Lal Chand*, 9 C. W. N. 369 ; and *Fulvahu v. Goculdas*, 9 B. 275.

A sole plaintiff having died after decree, an application was made after the prescribed period of limitation by his legal representative to be substituted on the record in his place. Held that S. 365, C. P. Code, 1882 (Or. XXII, r. 3) does not apply to the case of a sole plaintiff dying after decree, the right to sue being merged in the decree.—*Cally Churn v. Bhuggobutty Churn*, 5 C. L. R. 108. See also *Ramanada v. Minatchi*, 3 M. 236.

On the death of a reversioner pending a suit for a declaration that an alleged adoption is invalid, the next reversioner is the legal representative and is entitled to be brought on the record as such.—*Venkatanarayana v. Subbammal*, 38 M. 406.

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against the deceased plaintiff himself.—*Sham Chand v. Bhayaram*, 22 C. 92 ; *Subbaraya v. Manika*, 19 M. 345. The legal representative is confined to the pleadings and the case of the plaintiff whose representative he is and cannot agitate in that suit his own claim against the other plaintiffs in the case though he may do so in any other proceedings.—*Muhammad Naina v. Ummanakani*, 127 I. C. 127 : A. I. R. 1930 Mad. 593.

On the death of a partner the right to sue in respect of debts due to the firm survives to the surviving partners.—*Balkissen v. Kanhyalal*, 17 C. L. J. 648.

**Abatement where no application by the deceased plaintiff's representative.**—Upon the death of a sole plaintiff, if no application to revive is made within the prescribed period of limitation from the date of the plaintiff's death, the suit abates. But the suit can be revived within three years on the application of the legal representative under S. 371, C. P. Code, 1882 (Or. XXII, r. 9), if it can be shown that he was prevented by sufficient cause from continuing the suit.—*Bhojrab Dass v. Doman Thakoor*, 5 C. 139 : 4 C. L. R. 374 ; *Fulvahu v. Goculdas*, 9 B. 275 ; and *Ram Protap v. Lal Chand*, 9 C. W. N. 369.

Where the appellate Court remanded a suit under Or. XLI, r. 25 and pending the enquiry one of the plaintiffs died but the suit was proceeded with without any action being taken by either side and a decree was passed by the appellate Court on the basis of the finding of the trial Court and an objection on the ground of abatement was raised for the first time in second appeal; held, that the suit should be remanded so as to consider the effect of the abatement and in order to have it set aside if possible. Held also that the plea as to abatement could under these circumstances be raised in second appeal.—*Nathu v. Amrao Singh*, 10 L. L. J. 497 : 30 P. L. R. 13 : 117 I. C. 665 : A. I. R. 1929 Lah. 119.



Death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation results in an abatement of the suit. The abatement is automatic and does not require any formal order by the Court.—*Niaz Ahmad v. Parsottam*, 53 A. 347; 29 A. L. J. 159; 129 I. C. 545; A. I. R. 1931 All. 154.

Award of costs.—Notwithstanding that S. 582, C. P. Code, 1882 (S. 107 and Or. XXII, r. 11) does not expressly direct that the word "plaintiff" in S. 366, C. P. Code, 1882 (Or. XXII, r. 3) shall be held to include an "appellant," yet the power conferred by S. 366 (Or. XXII, r. 3, Cl. 2) in the Court of original jurisdiction to award costs against the estate of a deceased plaintiff, may by analogy, be taken to be conferred on the appellate Court.—*Rajmonee Dabee v. Chunder Kant*, 8 C. 440; 10 C. L. R. 437 (4 B. 654 followed). See also *Dontu Pedda v. Mallan Balayya*, 37 M. L. J. 596.

Limitation.—Under Art. 176, Act IX of 1908 the period of limitation for an application under this rule by the legal representative of a deceased plaintiff, and under S. 582, C. P. Code, 1882 (S. 107; Or. XXII, r. 11) by the legal representative of a deceased appellant, is 90 days from the date of death.

An application for an order to set aside an abatement must be made within 60 days from the date of the abatement, under Art. 171 of the Limitation Act and an application to have the legal representatives of a deceased plaintiff made parties, within 6 months from the death of the deceased party under Art. 176.—*Maman Thin v. Maung Po Win*, 10 Bur. L. T. 27.

The provisions of Act XXVI of 1920 curtailing the period of limitation for bringing on record the legal representative of a deceased appellant to three months from the date of death, apply also to cases where the death has taken place after the commencement of the amending Act; *Nimba v. Janki*, 71 I. L. J. 100; *Jao v. Shivaji Rao*, 26 Bom. L. R. 378.

If a plaintiff dies after decree, his representatives are not bound to apply within the prescribed period of limitation to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have had. Sections 363 and 365, C. P. Code, 1882 (Or. XXII, r. 3) and Art. 171 of the Limitation Act, 1877, do not apply to the case of a plaintiff dying after decree.—*Ramanada v. Minatchi*, 3 M. 236.

The procedure laid down in rr. 3, 4 and 11 of Or. XXII for substitution of the legal representative of an appellant or respondent is not exhaustive. Such application can be made at any time within the period prescribed by Art. 181 of Limitation Act.—*Hakeem Syed Mahomed v. Fateh Bahadur*, A. I. R. 1923 Pat. 565 (F. B.).

Execution-proceedings.—The provisions of this rule do not apply to execution-proceedings by virtue of r. 12 of this order.

Revision.—Under this rule, the Court must enter the name of the legal representative on the record if he applies for the same within the prescribed period. Its not doing so amounts to a failure to exercise jurisdiction vested in it by law under this rule, and the High Court may interfere in revision under S. 151.—*Janardhan v. Ram Chandra*, 26 B. 317.

**Appeal against orders under this rule.**—No appeal lies from an adjudication that a suit or an appeal has abated, because such an adjudication does not amount to a decree; *Hamida Bibi v. Ali Husen*, 17 A. 172; *Walayat v. Ram Lal*, 12 A. L. J. 1118; *Muhammad v. Manohar*, 20 A. L. J. 214; 64 I. C. 838. See also *Mati Lal v. Bishambhar*, 47 A. 741; 88 I. C. 95; A. I. R. 1925 All. 431. An order of the Court declaring that a suit has abated owing to the cause of action not surviving, or that the death of one of several plaintiffs has caused an abatement *in toto*, is a decree, and appealable as such; *Niranjan v. Afzal*, 128 P. R. 1916 (F. B.); *Subramania v. Venkataramier*, 31 I. C. 4. So is an order directing the abatement of a suit in consequence of no legal representative of a deceased plaintiff having applied within the time prescribed by law to be brought upon the record; *Ram Sarup v. Matiram*, 1 L. 493; 57 I. C. 137.

*Held*, that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff, and the invalidity of an application to the Court to bring his legal representative on to the record, was not one of the orders contemplated by S. 366, C. P. Code, 1882 (Or. XXI, r. 3), and no appeal would lie therefrom.—*Bhagwan Das v. Maharaja of Bhartpur*, 17 A. 286.

Where a Court rightly or wrongly comes to the conclusion that certain persons cannot in terms of Or. XXII, r. 3 be substituted in the place of a deceased plaintiff, such an order is not a decree nor is it an order from which an appeal is provided for in the Code.—*Puttoo v. Munshi*, 30 A. L. J. 308. See also *Venkatakrishna v. Krishna*, 49 M. 450; 95 I. C. 489; A. I. R. 1926 Mad. 586 (overruling 43 M. 812). *Contra Rampal Singh v. Abdul Hamid*, 110 I. C. 826; A. I. R. 1928 Oudh 362 (F. B.), which agrees with the decisions of the Lahore High Court.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Procedure in case of death of one of several defendants or of sole defendant

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. [S. 368.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 363, C. P. Code, 1882. The old section has been remodelled and its words have been changed. The present rule has embodied the material provisions of the old section in

a more concise form. Several words and phrases of the old section have been omitted, but no material change seems to have been made in the meaning. Under the old section, an application for substitution was to be made by the plaintiff or by the legal representative of the deceased defendant. But in the present rule the words "*on an application made in that behalf,*" have been added so as to include the application of both; and hence para. 3 and the last para. of the old section have been omitted as unnecessary. The insertion of the above words have also rendered the case in 9 B. 56 obsolete and inoperative. The words "*and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit*" which occurred in para. 5 have been omitted as unnecessary, the omission being supplied by Or. I, r. 10, sub-rule (4).

In sub-rule (1) of this rule the words "*shall cause the legal representative of the deceased defendant to be made a party,*" have been substituted for the words "the Court shall thereupon enter the name of such representative on the record in the place of such defendant" which occurred in para. 4 of the old section. The above amendment clearly shows that under the present rule the legal representative of the deceased defendant is to be made a party. Such addition therefore comes within Or. I, r. 10 (4). See also 8 M. 300, which will explain the object of the amendment.

Rule 4 reproduces with no change in principle S. 368 of the old Code as amended in 1888, except in so far it throws more responsibility on the Court in the matter of bringing the legal representatives on record.—*Chaturbhujadoss v. Rajamanicka*, 54 M. 212; 129 I. C. 469; 32 L. W. 862; (1930) M. W. N. 994; A. I. R. 1930 Mad. 930; 60 M. L. J. 97.

**Suit.**—The word "*suit*" in this rule includes an appeal, and the word "*defendant,*" a respondent; see r. 11.

**Death of defendant and substitution of his legal representative.**—The section applies to the case of a defendant who dies before a decree is passed.—*Sambasiva v. Veera Perumal*, 28 M. 361.

In a suit where a defendant dies, it is not open to the plaintiff to ask the Court to add somebody other than the legal representative of the deceased defendant as a party to the suit, and an application asking for this to be done would not bind the real representative; *Muhammad Junaid v. Aulia Bibi*, 61 I. C. 947; 42 A. 497.

Where only some of the legal representatives of a deceased person were brought on the record and within time, there is no abatement even though the other legal representatives are omitted.—*Abdulla Sahib v. Vageer Beevi*, 117 I. C. 138; A. I. R. 1928 Mad. 1199 (following 26 M. 230 and 4 P. 320); *Muhammad Zafaryab v. Abdul*, 50 A. 857; 111 I. C. 238; A. I. R. 1928 All. 532; *Jehrabi v. Bismillabi*, 26 Bom. L. R. 375; A. I. R. 1924 Bom. 420; 80 I. C. 753; *Shib Dutta v. Sheiko Karim*, 4 P. 320; 89 I. C. 290; A. I. R. 1925 Pat. 551. An objection to the non-joinder of some of the legal representatives of a deceased defendant should be taken at the proper time and by their failure to do so the defendants are estopped from raising it at a subsequent stage of the proceedings.—*Sahij Ram v. Bhambhomal*, 124 I. C. 377; A. I. R. 1930 Sind 147. Where in a suit brought by the creditor against a wrong person as the legal representative of his debtor, a decree passed in

-favour of the plaintiff and the sale held in execution of that decree are binding on the true legal representative, where there has been no fraud or collusion between the parties. The only test of the binding nature of the decree is whether the estate of the deceased person was sufficiently represented by the alleged legal representative who has been actually brought on the record. Where this test is satisfied, the binding nature of the decree is not limited to the assets of the deceased in the hands of the wrong representative but on the whole estate of the deceased. This principle is applicable to all cases where a wrong representative has been brought on the record, whether the suit itself is instituted against the wrong representative at the very commencement, or the wrong representative has been added in the course of the suit or in the course of the execution proceedings.—*Chaturbhujadoss v. Rajamanicka*, 54 M. 212; 32 L. W. 862; (1930) M. W. N. 994; 60 M. L. J. 97; 129 I. C. 469; A. I. R. 1930 Mad. 930; *Pulikkut v. Thappalli*, 103 I. C. 409; A. I. R. 1923 Mad. 243. Rule 4 is sufficiently complied with if all the legal representatives known after diligent inquiry are joined.—*Begum Jan v. Jamat Bibi*, 7 L. 438; 98 I. C. 12; A. I. R. 1927 Lah. 94. Where 2 out of 3 legal representatives were brought on record, it was held that the appeal abated as the whole estate was not represented.—*Muhammad Hassan v. Inayat*, 100 I. C. 418; A. I. R. 1927 Lah. 94. Under the Code it is the duty of the plaintiff to search out the real legal representatives and not merely allege that so and so is the legal representative.—*Kishan v. Yeshwant*, 23 N. L. R. 69.

Where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representatives on the record, held that the suit abated; *Ram Prosad Chimonlal v. Anundji & Co.*, 49 C. 524.

The plaintiffs sued for a declaration of title and confirmation of possession in a  $\frac{2}{3}$  share in certain properties and prayed in the alternative that if the properties were found to be *debutter*, their rights as *shebait* may be declared and possession given to them. The defendant was sued in his personal capacity and also in the capacity of a *shebait*. The dispute was referred to arbitration, and an award and decree followed, which provided that the defendant's son (who was no party to the proceedings) would on no account be appointed *mohunt*. Pending an appeal, the defendant died and his son got himself substituted as his legal representative. Held, that as neither the Deity nor the defendant's son was a party "the defendant's son were not affected by it governed by the Mitakshara law) the son can be substituted as the legal representative of his father.—*Barindra v. Dwijendra*, 86 C. W. N. 1007.

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant. Pending the suit the defendant died, and the suit was continued against his widow. Held that the cause of action did not survive against the widow of the defendant, and that therefore the suit could not proceed—*Sharifa v. Munekhan*, 25 B. 574.

In a suit by a mortgagor against the mortgagee and sub-mortgagee to redeem a mortgage, the mortgagee died pending the suit, and no steps were taken by the plaintiff within the prescribed period to make his representatives

parties. The suit was, however, allowed to be continued against the sub-mortgagee, and a redemption decree was passed in plaintiff's favour. *Held* that the sub-mortgagee, not being the assignee of the mortgagee, on the death of the latter, no cause of action survived to the plaintiff against the sub-mortgagee and the suit abated under this rule.—*Padgaya v. Baji Babaji*, 20 B. 549.

On the death of one of the mortgage defendants whose legal representatives were not brought on record, the suit on the mortgage does not abate as a whole. The mortgagee is entitled to a decree for sale of the remaining mortgaged property, i.e., the mortgaged property excluding the share of the deceased mortgagor and is entitled to sell the remaining portion of the mortgaged property to recover a proportionate amount of the mortgage money.—*Hasbat Shah v. Bahra Jara*, 29 A. L. J. 902: 132 I. C. 31: A. I. R. 1931 All 235.

Where a decree was made declaring that a party was entitled to a share in a certain property and directing the taking of accounts of that property, and the said party applied to have the death of a certain defendant, who had died after the decree, recorded and the names of his heirs substituted before the final decree, *held* that S. 372, C. P. Code, 1882 (Or. XXII, r. 10) applied.—*Surendro Keshup v. Khetter Kristo*, 7 C. W. N. 517: 30 C. 609.

Under this rule, a plaintiff may have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them, but there is no rule which allows the representatives of a sole defendant who has died to be placed on the record at their own request.—*Bayaver v. Hathi Singh*, 9 B. 56.

In the case of joint tort-feasors, the plaintiff is never required to join as defendant every person who is liable for the tort and the liability of others is no defence for those sued as the liability is joint and several. Order XXII, r. 4 does not relate to the case where the whole suit abates by reason of failure to substitute the heirs of a deceased defendant; *Gajo Singh v. Amrit Narain*, 2 P. L. T. 234: 60 I. C. 722.

Where in a suit against a Gurdwara it was contended that the suit had abated by reason of the Managing Committee not having been impleaded, but it was not shown that there was any corporate legal entity in charge of the Gurdwara, nor that the Committee was dissolved more than 90 days before the impleading of the new Committee; *held*, that Or. XXII, r. 4 did not apply to the case and the suit did not abate.—*Sunder Singh v. Gurdwara Choba Sahib*, 11 L. L. J. 78: 30 P. L. R. 231: A. I. R. 1929 Lah. 440.

Where a defendant to a suit for the recovery of a mortgage-debt, who was on the record as a surety personally for the payment of the mortgage money, died, and the plaintiff declined to place on the record such defendant's legal representative, it was held that this only amounted to a waiver of the plaintiff's rights as against the surety and did not preclude him from continuing the suit against the mortgagor. The suit did not abate.—*Mehdi Husain v. Sughra Begam*, 25 A. 206.

A suit against a dead man is a nullity; consequently any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to

proceed against him is a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person; *Rampratab Brij Mohan Das v. Gouri Shankar*, 35 Bom. L. R. 7. See also *Chithambaram v. Narayanswami*, (1928) M. W. N. 240 (following 31 M. 86). Where only one of the defendants happens to be dead at the time of the suit, the Court ought not to dismiss the suit against the other defendants but should strike off the name of the former under Or. I, r. 10 and proceed against the other defendants.—*Roop Chand v. Sardar Khan*, 9 L. 526: 29 P. L. R. 626: 110 I. O. 281: A. I. R. 1928 Lah. 359.

Where the defendant died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and to allow the suit to proceed against them.—*Veerappa Chetty v. Ponnen*, 17 M. L. J. 551: 31 M. 86 (12 W. R. 45 followed; 16 M. 319 distinguished). Order XXII has no application to such a case.—*Roop Chand v. Sardar Khan*, 9 L. 526: 29 P. L. R. 626: 110 I. C. 281: A. I. R. 1928 Lah. 359.

Where no application for substitution is made within time after the death of the sole defendant, the suit abates automatically and no formal order giving effect to an abatement is necessary to be recorded by the Court.—*Kirpa Ram v. Bhagat Chand*, 112 I. C. 5: A. I. R. 1928 Lah. 746.

"Does not survive against the surviving defendant or defendants alone."—Three defendants were sued jointly as representing the estate of their late father and their liability, if any, was joint and indivisible. The lower Court dismissed the suit and the plaintiffs appealed. During the pendency of the appeal one of the defendants respondents died and the application to bring his legal representatives on the record was made nearly two years later. *Held*, that the appeal abated in as much as the right to sue did not survive only against the two defendants on the record; *Gurdas Mal v. Kashi Ram*, 2 L. L. J. 64; *Basist Narayan v. Modnath*, 7 P. 285: 9 P. L. T. 153: 103 I. C. 552: A. I. R. 1928 Pat. 250. See notes under heading "The suit shall abate as against the deceased defendant," below.

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parties. The suit was, however, allowed to be continued against the sub-mortgagee, and a redemption decree was passed in plaintiff's favour. *Held* that the sub-mortgagee, not being the assignee of the mortgagee, on the death of the latter, no cause of action survived to the plaintiff against the sub-mortgagee and the suit abated under this rule.—*Padgaya v. Baji Babaji*, 20 B. 549.

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"On an application made in that behalf."—Under the old Code, an application for substitution was to be made by the plaintiff or by the legal representative of the deceased defendant. But in the present rule, the words "on an application made in that behalf" have been added so as to include the application of both. So when a defendant dies pending a suit, it is open to his legal representative to come on the record on his own application notwithstanding the plaintiff's omission to implead him. In such a case, the Court might award costs to the legal



representative; *Kuppaswami v. Singaravelu*, 45 M. L. J. 233 : A. I. R. 1923 Mad. 679. If the legal representatives of a deceased respondent are already on the record as parties, it is not necessary to make an application for substitution and it is enough to make an entry on the record to that effect. Order XXII, r. 4 is not applicable to the case; *Hafizunnissa v. Jawahir*, 24 O. C. 374 : 66 I. C. 24 (32 A. 551 : 32 A. 563 followed); *Achuthan v. Manavikraman*, 51 M. 347 : 27 L. W. 422 : A. I. R. 1929 Mad. 152 : 109 I. C. 372 : 54 M. L. J. 675 (relying on 2 R. 445 and dissenting from A. I. R. 1925 Bom. 122); *Lalaram v. Tikam Das*, 119 I. C. 537 : A. I. R. 1929 Sind 225 ; *Dawloo Ma v. Ghowdappa*, 126 I. C. 486 : A. I. R. 1930 Mad. 579.

In a case where all the heirs of a deceased respondent are already parties to the appeal, there need be no formal application under Or. XXII, r. 4 to bring on record the legal representatives of the deceased, and the appeal will not abate on that ground. Rules 2 and 4 of Or. XXII contemplate two different sets of circumstances, and the provision in r. 2 is independent of and in no way subject to the provisions of r. 4, and so r. 2 is applicable, and no application need be made under r. 4; *Gopal Das v. Mul Chand*, 7 L. 399 : A. I. R. 1926 Lah. 607. This case has not been followed in *Walayatunnissa v. Chalakhi*, 10 P. 341 : 132 I. C. 100 : 12 P. L. T. 28 : A. I. R. 1931 Pat. 164, noted under r. 2, ante.

Under the Code it is the duty of the plaintiff to search out the real legal representative and not merely allege that so and so is the legal representative.—*Kisan v. Yeshwant*, 28 N. L. R. 69.

Where a respondent's legal representative wishes to bring himself on the record he ought to apply by petition under Or. XXII, r. 4. But he need not apply for setting aside the abatement for it is the appellant's appeal that abates against him.—*Ramakrishna v. Narasimha*, A. I. R. 1932 Med. 527.

Where no application is made within the period of limitation.—Where on a party's death, no application is put in to bring in his legal representatives within the time allowed by law, the suit or appeal abates though the party was ignorant of the death of the deceased; *Mir Nawab v. Hardeo*, 60 P. R. 1911; *Hadu v. Lala*, 41 P. R. 1915; *Jamna v. Sarjit*, 67 P. R. 1919; *Jowala Ram v. Hari Kishen*, 5 L. 70 : 80 I. C. 690 : A. I. R. 1924 Lah. 429; *Hari Saran v. Eradat*, 2 P. L. R. 279. Ignorance of death may, however, be a good ground for setting aside the abatement; *Daya Singh v. Buta Singh*, 118 P. R. 1916. When a decree was passed in appeal in ignorance of the death of the respondent, the appellate Court can decide the question as to the maintainability of an application for substitution having regard to Limitation Act, S. 5.—*Khalil Ahmed v. Khatir Zaman*, 2 Luck. 592.

The suit shall abate as against the deceased defendant.—Ordinarily a suit or appeal does not abate in its entirety on the death of one of several defendants or respondents because of the failure of the plaintiff or appellant to revive it against the representative of the deceased; the abatement only takes place as against the latter; *Kali Dayal v. Nagendra*, 24 C. W. N. 44 : 30 C. L. J. 217 : 54 I. C. 822; *Narain Das v. Sheodin*, 48 A. 251 : A. I. R. 1926 All. 234. A suit or appeal does not abate in its entirety by reason of the failure of a plaintiff or appellant to bring on record the representative of a deceased defendant or respondent within the time prescribed therefor, if the suit or appeal can proceed in.

the absence of such representative in a final and complete adjudication; *Chandrasang v. Khimabai*, 22 B. 718; *Bai Full v. Adesang*, 26 B. 203; *Joy Gobind v. Monmotha*, 33 O. 580; *Upendra v. Sham Lal*, 34 C. 1020; *Medhi Husain v. Sughra*, 25 A. 205; *Renga v. Gnanaprasada*, 30 M. 67; *Abdul Aziz v. Basdeo*, 31 A. 604; *Shankarbhai v. Moti Lal*, 49 B. 118; A. I. R. 1925 Bom. 122; *Rai Kashinath v. Knilas*, 4 P. 53; 89 I. C. 236; A. I. R. 1925 Pat. 480; *Raghubir v. Sohan*, 6 L. 233; A. I. R. 1925 Lah. 381; *Lajjaram v. Sambhu Nath*, 5 L. L. J. 14; A. I. R. 1923 Lah. 252; *Mahant Darshan v. Bikramjit*, 23 A. L. J. 938; 89 I. C. 953; A. I. R. 1926 All. 128; 48 A. 81.

But the suit or appeal will abate as a whole if it is of such a nature that it cannot proceed, in the absence of the legal representative of the deceased, to a final and complete adjudication; *Raj Chunder v. Ganga Das*, 31 I. A. 71; 31 C. 497 (P. C.); 8 C. W. N. 442; 1 A. L. J. 145; 14 M. L. J. 147; *Hem Kunwar v. Amba Prasad*, 22 A. 430; *Imamuddin v. Sadarath*, 32 A. 301; *Nanak Chand v. Ram Chand*, 4 L. L. J. 189; 77 I. C. 175; *Shabhar v. Abbas*, 23 A. L. J. 935; 90 I. C. 324; A. I. R. 1926 All. 152; *Ma Zan v. Maung Kyaw*, 1 R. 189; 74 I. C. 1027; A. I. R. 1923 Rang. 258; *Wajid Ali v. Puran Singh*, 47 A. 100; 85 I. C. 66; A. I. R. 1925 All. 108; *Kafi Dayal v. Nagendra*, 24 C. W. N. 44; 54 I. C. 822; 30 C. L. J. 217; *Sidik Muhammad v. Saran*, 76 I. C. 314. Order XXII, r. 4 does not relate to the case where the whole suit abates by reason of failure to substitute the heirs of a deceased defendant.—*Gajo Singh v. Amrit*, 2 P. L. T. 234; 60 I. C. 722.

If on the death of one of the defendants his legal representatives are not brought on the record, the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate; *Sarat Kamini v. Chaitanya*, 67 I. O. 290; *Ratanlal v. Jaldeo*, 75 I. C. 820.

*Held*, that the legal representatives of one of the deceased mortgagees not having been brought on the record within the period of limitation, the appeal abates as a whole, because the suit being for redemption it cannot proceed without all the mortgagees being before the Court; *Bhagwan Singh v. Jamal*, 3 L. L. J. 252.

In a suit for a declaration that the plaintiff is the owner of a plot and a vacant site, and for issue of a permanent injunction restraining the defendants from preventing the passage of water by removal of *pauri*, it is found that one of the defendants died and his legal representatives were not brought on record, the suit abates *in toto*.—*Miran Bakhsh v. Allah Wasaya*, 118 I. C. 437; A. I. R. 1929 Lah. 256.

Where in a suit for pre-emption, the legal representatives of one of the respondents are not brought on record, the whole suit abates as the decree is indivisible.—*Imamuddin v. Sadarath*, 32 A. 301; *Surajmal v. Pyarkhan*, 27 N. L. R. 220; A. I. R. 1931 Nag. 184; 134 I. C. 679. But see *Mahadeo v. Talib Ali*, 50 A. 792; A. I. R. 1928 All. 345; 115 I. C. 785 (F. B.). Two or more co-sharers may simply sue the stranger purchaser for pre-emption without asking the Court to adjudicate on their rival

claims, and may obtain a decree for possession on depositing the pre-emption money in Court. If the vendee files an appeal from such a decree making all the plaintiffs respondents and one of the respondents dies before the hearing of the appeal and the appeal abates against him and is heard in the absence of the legal representatives of the deceased respondent and the decree of the first Court is reversed and the suit dismissed as against all the plaintiffs, the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to execute the right to pre-empt the whole.—*Mahommad Wajid Ali v. Puran Singh*, 56 I. A. 80: 51 A. 267: 114 I. C. 601: A. I. R. 1939 P. C. 58: 49 C. L. J. 141: 33 C. W. N. 318: 27 A. L. J. 85: 56 M. L. J. 304.

In a suit for possession by an alleged tenant against the proprietors, where one of the proprietors died and his legal representatives were not brought on record, *held* the suit abated *in toto*.—*Akbar v. Hukam Singh*, A. I. R. 1930 Lah. 353.

Where 11 persons out of 237 persons were considered as representatives under Or. I, r. 8, the death of some of these persons other than the representatives will not necessitate the bringing in of their legal representatives on the record and the failure to do so does not abate the appeal.—*Khuda Baksh v. Ahmad*, 120 I. C. 794: A. I. R. 1930 Lah. 18. But the appeal abates if any one of the persons appointed to represent the others dies and his legal representatives are not brought on record.—*Mt. Afzalunnissa v. Fayazuddin*, 132 I. C. 657: A. I. R. 1931 Lah. 610.

In a suit for declaration of title where one of the defendants dies and his legal representatives are not brought on record, the suit abates against the deceased defendant and not against all.—*Raghunath v. Shah Durga*, 129 I. C. 371: A. I. R. 1930 All. 369.

Where a defendant dies, it is for the plaintiff to choose against whom he proposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the representative, he should be added as a party.—*Rameshwar v. Janeshwari*, 18 C. W. N. 129: 19 C. L. J. 19.

If pending an appeal arising out of a suit for damages against several joint wrong-doers, one of the wrong-doers (respondents) dies, his representative must be made a party. It is not open to the plaintiff-appellant to prosecute his appeal only against some of the wrong-doers (respondents) at his choice; *Kali Narayan v. Haran Chandra*, 62 I. C. 714.

Where the plaintiff sued for an injunction alleging that the defendants demolished the fence that he had constructed round his field and on the death of one of the defendants, his legal representatives were not brought on record, *held* that the absence of one defendant from the record was not sufficient to prevent the Court from granting the injunction against the surviving defendant for the cause of action was an infringement of the plaintiff's right tortuously, and the relief was only a preventive relief.—*Bishan Singh v. Indar*, 125 I. C. 620: A. I. R. 1930 Lah. 709. In a suit for an injunction it is the individual act of the several defendants that is complained of and the death of one joint tortfeasor does not cause the suit to abate.—*Ibid.*

Where a party ceased to be a necessary party by the time the award was passed by the arbitrators and a decree on the basis of the award was passed after his death without impleading his legal representatives, *held*, that the proceedings after the award did not abate.—*Deval Ram v. Lachhu*, 127 I. C. 365; 31 P. L. R. 81. A. I. R. 1930 Lah. 477.

Where a person is made party to a suit on a mortgage as being personally liable as a surety for the payment of the debt, and on the death of such person, his legal representative is not brought on the record, the suit abates as against him only, and not as a whole; *Mehdi Husain v. Sughra Begam*, 25 A. 206.

Where upon the death of a defendant the right to sue does not survive the claim abates as a whole. Where a suit has been instituted jointly or is directed against several defendants, cases may occur where the surviving defendants may have distinct rights; in such cases the suit abates only in respect of the deceased party's interest.—*Ram Dei v. Jurawan*, 129 I. C. 8; 25 A. L. J. 857. A. I. R. 1930 All. 762. *Jafal v. Bahawali*, A. I. R. 1927 Lah. 783 (following 6 L. 233 and 39 I. C. 277); *Karam Khan v. Mast Ali Khan*, A. I. R. 1927 Lah. 851.

Where the liability of the defendants is joint and several, and in appeal, on the death of one of the defendants, his legal representatives are not substituted in his place, the appeal abates so far as the deceased defendant is concerned; *Joy Gobind v. Monmotha*, 33 C. 580; *Shankerbhai v. Moti Lal*, 49 B. 118; 26 Bom. L. R. 1217. The liability of fixed rate tenants to pay rent is joint and several. So if one of them dies during the pendency of an appeal in a suit for recovery of rent and his legal representatives are not brought on record, the appeal abates only so far as the deceased tenant is concerned; *Abdul Aziz v. Basdeo*, 34 A. 604; 10 A. L. J. 183; *Kashinath v. Kailash*, 4 P. 53; 89 I. C. 236; A. I. R. 1925 Pat. 480; *Upendra v. Sham Lal*, 34 C. 1030. Where the right of the deceased party is ascertained or ascertainable and is not joint with the surviving parties in the sense they are not entitled to sue or liable to be sued in the absence of the others, then the suit or appeal cannot abate in its entirety on the death of one of the parties. The true test is whether it is necessary for all the plaintiffs to join in the suit to establish the right or whether one of them is entitled to establish the right independently of the others and in the alternative whether it is necessary in a suit against the deceased party to sue the surviving parties jointly with the deceased party as to the entire right.

7 (F.B.)). It is competent for one of several

S. 104-H of the Bengal Tenancy Act, for the purpose of getting a declaration that he was an occupancy raiyat and that the entry in the record of rights on the basis that he was a tenure-holder was wrong. Consequently the failure to implead in time the legal representative of one of the plaintiff-respondents does not have the effect of rendering the entire appeal bad.—*Krishnabandhu v. Brajendra Kumar*, 58 C. 1341; 135 I. C. 797; A. I. R. 1932 Cal. 134. In an appeal against the decree in a suit for redemption of a mortgage, one of the plaintiff-respondents died and no legal representatives were brought on the record: *held* that the appeal did not abate as a whole.—*Narain Das v. Sheo Din*, 48 A. 251; 91 I. C.

859: A. I. R. 1926 All. 234. Whether or not the appeal abates as against the deceased respondent only or as a whole must depend upon the particular circumstances of each case. The test to be applied being whether in the absence of the respondent against whom the appeal has abated, the appeal can proceed; *Midnapore Zamindary Co., Ltd. v. Amulya*, 53 C. 752: 95 I. C. 649. A. I. R. 1926 Cal. 893; *Sant Singh v. Gulab Singh*, 10 L. 7 (F. B.): 114 I. C. 417. 30 P. L. R. 453: 11 L. L. J. 317: A. I. R. 1928 Lah. 572 (F. B.) (overruling 62 P. R. 1913); *Mir Mahabool v. Mir Surajuddin*, A. I. R. 1928 Mad 1148: 115 I. C. 150.

A suit or appeal "abates" against a defendant or respondent if he was alive at the time when the suit or appeal was instituted and has since died. The case of a person who had died before institution of the suit or appeal and who was erroneously impleaded as a party does not fall under Or. XXII.—*Roop Chand v. Sardar Khan*, 9 L. 526: 29 P. L. R. 626: 110 I. C. 231: A. I. R. 1928 Lah. 359. Where an appeal is filed against a dead person no question of abatement arises. The Court may in such a case excuse time and permit the legal representatives to be impleaded.—*Mehar Singh v. Labh Singh*, 33 P. L. R. 116: A. I. R. 1932 Lah. 305.

Where the relief sought against defendants is joint and indivisible, abatement against one is abatement against all; *Chet Ram v. Msst. Naicho*, 92 I. C. 35. 26 P. L. R. 797: 2 L. C. 178; *Sardara v. Allahyar*, A. I. R. 1923 Lah. 132: 73 I. C. 604; *Shah Muhammad v. Karam Ilahi*, A. I. R. 1922 Lah. 131: 65 I. C. 121; *Akbar v. Hukam Singh*, A. I. R. 1930 Lah. 353. In the same way where the interests of the respondents are joint and a decree cannot be reversed without the representative of a deceased respondent being brought on the record, the appeal abates *in toto*; *Bejoy Gopal v. Umesh*, 6 C. W. N. 196; *Hadu v. Lala*, 14 P. R. 1915; *Fatter v. Sikandar*, 2 L. L. J. 442, *Dharanjit v. Chandeshwar*, 11 C. W. N. 504; *Munshi Ramand v. Radha Kishen*, 6 L. L. J. 192: A. I. R. 1924 Lah. 461; *Gurdas Mal v. Rashi Ram*, 2 L. L. J. 64, *Basist Narayan v. Modnath*, 7 P. 285: A. I. R. 1928 Pat. 250, *Umrao Bibi v. Ram Kishen*, 13 L. 70; *Mahomed Hassan v. Haji*, A. I. R. 1927 Lah. 860; *Sita Ram v. Roshen Lal*, A. I. R. 1927 All. 776. The test to determine as to whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole; *Sheo Chand v. Sita Ram*, A. I. R. 1927 All. 331; *Wajid Ali v. Puran Singh*, A. I. R. 1925 All. 103: 47 A. 100; *Darshan Das v. Bikramajit*, 48 A. 81: A. I. R. 1926 All. 128; *Naimuddin v. Maniruddin*, 47 C. L. J. 82: 32 C. W. N. 299: 107 I. C. 726: A. I. R. 1928 Cal. 184; *Laxmanlal v. Narayan*, A. I. R. 1929 Nag. 358; *Surajmal v. Pyarkhan*, 27 N. L. R. 220: 134 I. C. 679: A. I. R. 1931 Nag. 184.

Donees appealed from a decree passed in favour of reversioners, disputing the gift; during the pendency of appeal, a reversioner died and no legal representative was brought on the record; *held*, that the appeal abated against all reversioners.—*Mohammad v. Abdulla*, A. I. R. 1928 Lah. 869:

116 I. C. 216 (*following* 5 L. 429). In appeal in a suit against joint tenants for rent, one of the defendants-respondents died pending the appeal and his legal representatives were not brought on record: *held*, that the entire appeal abated.—*Kuarmony v. Dasharathi*, 109 I. C. 305: A. I. R. 1928 Cal. 570. Where there were two sets of defendants and one of the defendants belonging to one set died during the pendency of a second appeal and his heirs were not brought on record: *held*, that the appeal abated as regards that set.—*Faqira v. Hardewa*, 50 A. 559: 26 A. L. J. 217: A. I. R. 1928 All. 179: 114 I. C. 177 (F. B.). Where the decree provided that the plaintiff and defendants 6 to 31 be put in possession of certain property and the first defendant appealed and wanted to have it declared that the decree-  
 . . . . . : if the appeal  
 . . . . . : *held* that the  
 . . . . . : rel. on.)—  
*Raghunatha v. Swaminathan*, 137 I. C. 319: (1932) M. W. N. 152: 36 L. W. 105. A. I. R. 1932 Mad. 212. An appeal against joint owners or co-mortgagees without any definition of their shares abates on the death of one of them when his legal representative is not impleaded in the appeal.—*Nawab Khan v. Amir Chand*, 33 P. L. R. 38. An appeal against a decree obtained by the individual owners of the firm abates as a whole on the death of one of them when his legal representative is not impleaded in the appeal.—*Shri Chand v. Bansidhar*, 135 I. C. 245: 30 A. L. J. 219.

"May make any defence appropriate to his character."—The legal representative occupies the same character as the deceased and hence must stick to the position taken up by him in the pleadings; *Patinhare v. Sankara Menon*, 73 I. C. 376. But see *Moti Bala v. Satyanand*, 123 I. C. 376: 28 A. L. J. 836: A. I. R. 1930 All. 348, which has held that a legal representative of a deceased defendant against whom an application for a final decree is made is entitled to take any defence which may be appropriate to his character as legal representative; thus where a preliminary decree is passed in a suit on a mortgage executed by the *mohunt* of a Matt. and an application for a final decree is made against the succeeding *mohunt* after the first *mohunt's* death, the succeeding *mohunt* is entitled to oppose further proceedings being taken for the enforcement of the mortgage on the ground that it is invalid.

See notes under S. 50.

Order XLI, r. 20 and abatement.—Order XLI, r. 20 does not override the provisions of Or. XXII of the Code; *Manindra v. Bhagabati*, 30 C. W. N. 45: 90 I. C. 986: A. I. R. 1926 Cal. 335.

Limitation.—Under Art. 177 of Act IX of 1908, an application for substitution of the legal representatives of a deceased defendant or respondent must be made within 90 days, from the date of the death of the defendant or respondent as the case may be. The word "respondent" in Art. 177 of Act IX of 1908 is not confined to a respondent in the first appeal only; *Susya Pillai v. Aiya Kannu*, 29 M. 529; but it includes also a respondent in the second appeal; *Upendra v. Sham Lal*, 34 C. 1020; *Madhuban v. Narain*, 29 A. 535. Where a respondent dies leaving more than one heir and one of the heirs is substituted as heir on the record within time but substitution of the names of the other heirs is made after the time allowed

the appeal will not abate under this rule; *Sadhu Saran v. Nand Kumar*, 94 I. C. 209 : 7 P. L. T. 746 : A. I. R. 1926 Pat. 276.

Where before the making of a final decree in a mortgage suit, the sole judgment-debtor dies and the decree-holder fails to apply within six months of his death to have his heirs substituted and made subject to the preliminary decree, the suit (under Or. XXII, r. 4) will abate; *Bhut Nath v. Tarachand*, 25 C. W. N. 595 : 33 C. L. J. 115.

**Death of pro forma defendant.**—The death of a *pro forma* defendant or respondent during the pendency of a suit or appeal affords no ground for the abatement of a suit or appeal and the passing of a decree without his legal representative being brought on record does not render the decree a nullity; *Ambika Prasad v. Jhinak Singh*, 45 A. 286 : 21 A. L. J. 91; *Abdulla v. Mahammad*, 2 L. L. J. 601; *Ram Labhaya v. Kartar Singh*, 7 L. L. J. 466 : 92 I. C. 261 : A. I. R. 1925 Lah. 651; *Brij Indar v. Kanshi Ram*, 44 I. A. 218 : 104 P. R. 1917 : 45 C. 94; *Raghubar v. Ramchandrar*, A. I. R. 1927 Lah 779.

**Appeal.**—An appeal lies from an order refusing to set aside an order of abatement.—*See Or. XLIII, (1) (k).*

An order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time was a decree and appealable as such though no formal decree dismissing the suit had been drawn up (following 42 M. 52 and 30 M. L. J. 486).—*Barju Biswal v. Kunja Behari*, 10 P. 471 : 12 P. L. J. 909 : A. I. R. 1931 Pat. 353 : 133 I. C. 767.

**Decree for or against a dead person.**—A decree against a defendant who was dead at the institution of the suit is a nullity; *Ram Partab v. Gauri Shankar*, 25 Bom. L. R. 7 : 85 I. C. 464 : A. I. R. 1924 Bom. 109; *Mohun v. Azeem*, 12 W. R. 45; *Veerappa v. Tindal*, 31 M. 86. A decree passed in favour of a number of plaintiffs one of whom is dead at the time, is not necessarily a nullity in its entirety in every case. A decision of this matter will depend on a variety of considerations; *Sikandar Khan v. Baland Khan*, A. I. R. 1927 Lah. 435. Where a decree was passed on appeal against a deceased plaintiff-respondent also who died pending the appeal and there was an execution sale in pursuance of it; *held*, that the decree was to that extent void and that the heir of the deceased plaintiff-respondent could sue under the inherent powers of the Court to set aside the sale.—*See Or. XLIII, (1) (k).* C. 779 : A. I. R. 1930 Pat. 473 : 11 P. L. J. 473. Council against the respondents in ignorance of the fact that one of them died pending the appeal is not a nullity as the decree was an order passed by the Sovereign.—*Deonandan v. Janki Singh*, 5 P. L. J. 314 (319) : 56 I. C. 322.

**Death of defendant after preliminary and before final decree.**—A preliminary decree does not put an end to a suit which remains pending till final decree. Where, therefore, a defendant dies after the passing of a preliminary decree against him and an application to bring his heirs upon the record is not made within the period of limitation the suit abates; *Moti Lal v. Ram Narain*, 39 A. 651 : 40 I. C. 1006; *Jagar Nath v. Ram Karan*, 68 I. C. 251 : 20 A. L. J. 575 : A. I. R. 1922 All. 396; *Bahadur Singh v. Nanak*, 130 I. C. 289 : 28 A. L. J. 999 (following 49 A. 310 and

not following 51 M. 701 (F. B.) and 57 O. 235; *Mahobir v. Narain*, 134 I. C. 236 (F. B.). 29 A. L. J. 715: A. I. R. 1931 All. 490; *Bhutnoth v. Tora Chand*, 25 C. W. N. 695; *Manujendra v. Jnan*, 87 I. C. 818: A. I. R. 1926 Cal. 308; *Jungli Lall v. Laddu Ram*, (1919) P. 105 (F. B.): 4 P. L. J. 240 50 I. C. 529; *Seshamma v. Venkata Rao*, 47 M. L. J. 235: 80 I. C. 397 A. I. R. 1924 Mad. 713. But see *Bapu v. Gulab Chand*, 116 I. C. 657 (F. B.): A. I. R. 1929 Nag. 142, which lays down that Or. XXII, r. 10 applies in a case in which the death of the defendant occurs after the preliminary decree. See notes under r. 10. As the right of action is determined in the preliminary decree, and in the final decree proceedings only the principles laid down and determined in the preliminary decree are worked out in detail, Or. XXII, r. 4 does not apply when the defendant dies after the preliminary decree.—*Debinath v. Bissessar Dos*, A. I. R. 1929 Nag. 206 (following A. I. R. 1923 Mad. 914 (F. B.) noted under r. 3); *Peetha v. Ramchandrayya*, 120 I. C. 77; *Rahim Bakhsh v. Walaiti Ram*, 122 I. C. 227: A. I. R. 1930 Lah. 329. Where after the preliminary decree and pending on application for ascertainment of mesne profits the defendant died, there is no abatement and the proceedings can be continued up to the final decree (following 47 M. L. T. 441 (P. C.) and 51 M. 701 (F. B.))—*Bhotia v. Abdul Shakur*, 11 P. L. J. 796: 129 I. C. 84: A. I. R. 1931 Pat. 57; *Shivashankar v. Kamakhya*, 13 P. L. T. 692. See also *Musst Lakhpoti v. Daulat Singh*, 2 Luck. 464: 101 I. C. 174: A. I. R. 1927 Oudh 156 (relying on 4 P. 61 (P. C.)).

Effect of non-substitution in a mortgage suit where a preliminary decree was passed in favour of the mortgagees and one of judgment-debtors mortgagors and one of the plaintiffs died before the final decree, is that the suit does not abate with respect to the mortgagors on record and the mortgagees are entitled to a decree for a proportionate amount of the mortgage money as against the mortgagors on record (A. I. R. 1925 Cal. 152, A. I. R. 1921 Col. 554 and A. I. R. 1921 Cal. 792 relied on).—*Mohan Sardar v. Hem Chandra*, A. I. R. 1929 Cal. 648. Where the mortgage was one and indivisible and in a suit on the mortgage one of the defendants died after the passing of the preliminary decree and his legal representatives were not brought on the record: held, that the entire suit abated (referring to 50 A. 559).—*Bahadur Singh v. Nonak*, 130 I. C. 289: 28 A. L. J. 999; *Anmol Singh v. Hari Shankar*, 126 I. C. 20: 28 A. L. J. 825: A. I. R. 1930 All. 779.

Indian Succession Act and legal representative.—The legal representatives of a deceased subject to the Indian Succession Act are his executors or administrators and not his heirs; *Barnett Bros v. Mrs. Fowle*, 3 R. 46: 85 I. C. 325: A. I. R. 1925 Rang. 186; *Framji v. Adarji*, 18 B. 337.

Re-hearing of suit or appeal.—A plaintiff whose suit is heard and dismissed is not entitled to a re-hearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal representative of the deceased defendant on the record. The same applied to appeals.—*Vellayam v. Jothi*, 28 M. L. J. 138; *Suryanarayana v. Joga Rao*, 32 L. W. 647: 123 I. C. 607: A. I. R. 1930 Mad. 719.

Execution proceedings.—This rule does not apply to execution proceedings.—See r. 12.



Determination of question as to legal representative.

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. [S. 367.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 367, C. P. Code, 1882, with some alterations and omissions. The word "the Court may either stay the suit until the fact has been determined in another suit" have been omitted; and the effect of the omission is that when rival parties claim to be the legal representatives of a deceased plaintiff or defendant, the Court must determine that question, and it has no longer any option in the matter. The old section is reproduced below for the purpose of comparison. "If any dispute arise as to who is the legal representative of a deceased plaintiff the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit, who shall be admitted to be such legal representative for the purpose of prosecuting the suit."

"Shall be determined by the Court."—The Court in Or. XXII, r. 5, means the Court before whom the question as to who the legal representative is, arises viz, the trial Court if the question arises at the trial stage or the appellate Court if the question arises in appeal.—*Chandmani v. Kartick Singh*, 65 I. C. 131 : 3 P. L. T. 380.

Where a dispute arises in the course of the trial as to who are the representatives of a deceased party, it is the duty of the primary Court to decide the dispute after investigation and if it fails to do so, the appellate Court can decide the question; *Taja v. Devi Ditta*, 4 L. L. J. 314.

**Rival claimants for substitution.**—Court to determine who is the true legal representative.—This rule empowers the Court, in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit; but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit, and particularly (in a suit for partition of family property) such a vital issue as to whether the deceased plaintiff was joint or separate from the rest of the family.—*Porsotam Rao v. Jank Bai*, 28 A. 109 : (1905) A. W. N. 206. This case was not approved and it was held that an order under this rule does operate as *res judicata*.—*Raj Bahadur v. Noratan Prasad* 48 A. 422 : 94 I. C. 157 : A. I. R. 1926 All. 439.

When a question arises as to who are the legal representatives of a deceased plaintiff, it is obligatory on the Court to decide it.—*Subramania Iyer v. Muthu Vaithilinga*, (1918) M. W. N. 198 : 44 I. C. 987. After the Court has decided the question, the decision is final. So where the second wife of a deceased appellant was brought on the record after issue of notice and subsequently the respondent brought to the notice of the Court that there were some other heirs of the deceased: held, that the order as to appointment of legal representatives on the wife's application was final and the same

could not be re-opened.—*Muhammad Zafaryab v. Abdul Razzaq*, 60 A. 857: 26 A. L. J. 820 111 I. C. 238 A. I. R. 1923 All. 532.

When rival parties claim to be the legal representatives of a deceased plaintiff or appellant, the Court should, either before or at the time of hearing of the suit or appeal, ascertain and determine, for the purpose of the prosecution of the suit or appeal, who is the true legal representative of the deceased, and should not admit on the record all the rival claimants as legal representatives of the deceased.—*Muhammad Husain v. Khushale*, 10 A. 223 (F. B.); *Har Narain v. Kharag Singh*, 9 A. 447; *Vithu v. Dhima*, 15 B. 145. See, however, *Sankali v. Murlidhar*, 12 A. 200; and *Dalabai v. Ganesh*, 27 B. 162, in which all the cases on the point have been referred to and discussed. See also *Palchur Mahalakshamma v. Vemi Reddi*, 69 I. C. 529: 44 M. L. J. 60.

Order XXII, r. 3 presupposes that the party claiming to represent a deceased plaintiff is the legal representative; but if the representative character is denied, or when two or more persons claim it, the procedure prescribed in this rule should be followed.—*Oula v. Deepathee*, 17 M. 209 (distinguished in *Meenatchi Achi v. Ananthanarayana*, 26 M. 224).

A dispute within the meaning of this rule need not be between persons claiming to represent the deceased plaintiff.—*Subbayya v. Saminad-ayyar*, 18 M. 496 (followed in *Hanwant Sing v. Ram Gopal*, 30 A. 348: 5 A. L. J. 363; distinguished in *Meenatchi Achi v. Ananthanarayana*, 26 M. 224).

Where an alleged adopted son of a deceased plaintiff applies to be made a legal representative of the deceased and his adoption and representative character is denied by the defendant, the Court is bound to enquire as to his representative character under this rule.—*Vanjinathayar v. Vaithianathayar*, 16 I. C. 798. See also *Vatsalabai v. Sambhaji*, 20 Bom. L. R. 902: 47 I. C. 757.

The Court executing a decree is not competent to entertain the question of the legitimacy of the heir of the deceased judgment-creditor seeking to continue execution proceedings.—*Abidunnissa v. Amirunnissa*, 2 C. 327 (P. C.): 4 I. A. 66 (affirming 20 W. R. 305).

A respondent having died, a conditional order was, on the application of the appellant, made substituting the name of his alleged representative on the record. The order was cancelled upon the application of another person, who satisfied the Court that he and not the person whose name had been conditionally substituted was the real representative, and who asked to have his name put on the record. Held, that the Court had no power to substitute the name of the applicant on the record, and no further application having been made by the appellant to complete the record, the appeal was ordered to abate.—*Sadhu Sarun v. Dwarka Singh*, 12 C. L. R. 45.

Effect of bringing a wrong representative on record.—Where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representatives on

record will be accountable to him; *Zamindar of Bhadrachalam v. Raja Venkatadri Appa Rao*, 43 M. L. J. 486: (1922) M. W. N. 532.

A decree against a wrong legal representative cannot be enforced against the proper legal representatives.—*Manikyanayanim v. Lakshminarasinha*, 139 I. C. 465: 63 M. L. J. 319. Where a brother of a deceased defendant is brought on the record in ignorance of the fact that the deceased had left sons and daughters and a decree is passed against the brother, the decree is not binding on the estate nor on the persons rightly entitled to that estate.—*Pukhraj v. Jamsetji*, 50 B. 802: 100 I. C. 185: A. I. R. 1927 Bom. 63.

**Legal representative, who is?**—For the purposes of Or. XXII, r. 5, it is sufficient if a person has succeeded in forcing recognition of his status from the deceased and has intermeddled with the deceased's estate and is actually in possession of a portion of it, *Goor Bachan Singh v. Gian Singh*, A. I. R. 1922 Lah. 175.

**Appeal.**—No appeal lies from an order under this rule.—*Duni Ohand v. Arja*, 37 A. 272; *Pir Baksh v. Jattu Ram*, 131 I. C. 294: A. I. R. 1931 Lah. 235.

No appeal lies from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff, such an order not being a decree, *Ram Sarup v. Moti Ram*, 1 L. 493: 57 I. C. 137; *Rukmani v. Veerasami*, 80 I. C. 942: 47 M. L. J. 370: A. I. R. 1924 Mad. 813; *Sahdev v. Vidyawati*, 91 I. C. 166: A. I. R. 1926 Lah. 181. The same view was taken by the Madras High Court in the recent Full Bench case of *Venkata Krishna v. Krishna Reddi*, 49 M. 450: 50 M. L. J. 485: 95 I. C. 499: A. I. R. 1926 Mad. 586, where it was held (overruling *Ayya Mudali v. Veerayee*, 43 M. 812) that no appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant even when there is no rival claimant for being brought on the record as his legal representative.

An order under Or. XXII, r. 5 which brings on record two rival claimants as the legal representatives of a party to a suit without adjudicating on the relative claims of both is not appealable.—*Aptab Shaha v. Moyan*, 39 I. C. 371: (1917) M. W. N. 148 (27 B. 162 dissented from). See also *Subramania Iyer v. Muthu Vaithilinga*, (1918) M. W. N. 198: 44 I. C. 987.

**6.** Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place. [New.]

### COMMENTARY.

**Addition.**—This rule is new; it has been framed to give effect to the decisions noted below. See also notes under S. 50.

Where a party to a suit died after argument and before delivery of judgment, the decree passed in the suit or appeal is a valid decree, and can be executed against the heirs of the deceased defendant under S. 231, C. P. Code, 1882 (S. 50) — *Ramacharya v. Anantacharya*, 21 B. 314. See also *Narna v. Anant*, 19 B. 807; *Chetan Charan v. Balbhadra Das*, 21 A. 311; *Raghunatha v. Venkatesa*, 26 M. 101; *Goda v. Soondarammall*, 33 M. 167. See also *Surendro v. Doorga*, 19 I. A. 108; 19 C. 513 (P. C.).

See the Report of the Select Committee.

**Decision on merits after death and before substitution.**—A legal action, on the death of a party to it, passes into a state of suspense which itself passes into a state of abatement if the legal representative is not brought on record in time, and, while the action is in a state of suspense, no valid act which is not purely formal or processual, but which involves a decision on the merits of any part of the action, can be done by the Court. — *Balaramier v. Vasudevan*, 52 M. 933; 120 I. C. 374; (1929) M. W. N. 742; A. I. R. 1929 Mad. 802; 57 M. L. J. 421; *Muhammad Ali v. Allah Ditta*, 122 I. C. 562; A. I. R. 1931 Lah. 73. The Court has no jurisdiction to pass a decree in a case which is heard after the death of the sole plaintiff without bringing his legal representatives on record, and such a decree, if passed, is a nullity. — *Hassanand v. Nandiram*, 123 I. C. 675; A. I. R. 1930 Sind. 259. Where the defendant dies before hearing or completion of arguments, the decree is a nullity. — *Janardhan v. Ramchandra*, 26 B. 317; *American Baptist Mission v. Ammalanadhuni*, 48 I. C. 859; *Visvanath v. Lallu*, 4 I. C. 137; 11 Bom. L. R. 1070; *Narain v. Kaluram*, 2 L. L. J. 144. See in this connection, *Firm Palamal v. Fanya Sing*, 89 I. C. 661; A. I. R. 1926 Lab. 153; *Roopchand v. Sardarkhan*, 9 L. 526; 110 I. C. 281; A. I. R. 1928 Lah. 359; *Maharaja Kesho Prasad v. Shamnandan*, 5 P. 233; 94 I. C. 28; A. I. R. 1926 Pat. 504; *Radha Prasad v. Lal Sahab*, 17 I. A. 150; 13 A. 53 (P. C.); *Junguli Lall v. Laddu Ram*, (1919) P. 105 (F. B.); 4 P. L. J. 240; 50 I. C. 529; *Seshamma v. Venkata*, 47 M. L. J. 235; 80 I. C. 397; A. I. R. 1924 Mad. 713; *Rampratab v. Gavrishankar*, 25 Bom. L. R. 7; 85 I. C. 464; A. I. R. 1924 Bom. 109; *Amanat Khan v. Miyan Khan*, 55 I. C. 498. But see *Goda Cooporamier v. Soondarammall*, 33 M. 167 in which it has been held that a judgment passed after the death of a party is not an absolute nullity and such judgment is not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside it bars a fresh suit.

Where a decree is passed against a person in ignorance of his death the decree on the application of his legal representative may be treated as a nullity, the legal representative may be impleaded as a party and the suit or appeal may be heard *de novo* under the provisions of Or. XXII, r. 9. — See *Khalil v. Khatir*, 2 Luck. 592; 101 I. C. 841; A. I. R. 1927 Oudh 221.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against

Suit not abated  
by marriage of  
female party.

her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

[S. 369.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 369, C. P. Code, 1882, with this difference only that the word "where" in sub-rule (2) has been substituted for the words "if the case is one in which," which occurred in para. 2 of the old section.

**Liability of husband.**—A party having died while a suit was pending against him, his widow was brought upon the record, and judgment was given against her, which was confirmed in appeal. The original decree embraced an award of certain mesne-profits (occurring after the husband's death) for which the widow was personally liable. Between the original decree and final judgment, she married again and accordingly execution was sought against her second husband. *Held*, that he was not liable and that the term "judgment" in this rule did not include the judgment in appeal.—*Bindabun Chunder v. Mackintosh*, 9 W. R. 442.

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's  
insolvency bars  
suit.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Procedure where  
assignee fails to  
continue suit or  
give security.

[S. 370.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 370, C. P. Code, 1882, with some alterations and additions.

The word "*bankruptcy*" which occurred in the old section has been omitted. The first para. of the old section is reproduced below for the purpose of comparison and observing the change introduced in sub-rule (1):—

"*The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under S. 357 might maintain for the benefit of his creditors shall not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.*"

Sub-rule (2) is almost similar to para. 2 of the old section. The changes made are merely of a verbal character.

**Plaintiff's insolvency.**—This rule does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, Or. IX, r. 9 applies—*Anrita Lal v. Rakhali Dassi*, 27 C. 217: 4 C. W. N. 294; *Ramchandra v. Shripati*, 31 Bom. L. R. 357: 118 I. C. 252: A. I. R. 1926 Bom. 202.

This rule lays down the procedure to be followed when a plaintiff becomes insolvent. Order IX, r. 8 would not apply to such a case, for there is known to be no person in the position of the plaintiff who has any right or duty to appear.—*Kissen Gopal v. Suklal*, 53 C. 844: 31 C. W. N. 22: 98 I. C. 781: A. I. R. 1927 Cal. 76.

If pending a suit the plaintiff is adjudged insolvent, the Court ought not to dismiss the suit without notice to the Official Receiver in whom the property of the insolvent vests, to appear and state his willingness or otherwise to continue the suit; *Official Assignee of Rangoon v. Chidambaram*, (1920) M. W. N. 704: 12 L. W. 551.

Section 106 of Act VIII of 1859 (this rule) means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for his costs within 14 days, and should be made a party to the suit within one month, and that in default, the suit should be set down for dismissal within 8 days after the expiration of the time so limited: *Held* that such an order was irregular.—*Ibrahim v. Abdul Rahiman*, 12 B. H. C. R. 257.

If an Assignee who has been substituted for the plaintiff under S. 106 Act VIII of 1859 (this section), declines to furnish security within such reasonable time as the Court may order, the defendant may, within 8 days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.—*Heera Lal v. Carapiet*, 13 W. R. 431.

After the institution of a suit the plaintiff was declared insolvent, and, on the date fixed for hearing, the Official Assignee appearing applied for a postponement. The Court accordingly made the following order:—"It is

ordered that the suit be dismissed unless the Official Assignee elects within two months to continue the suit and give security for the defendant's costs." The time for complying with the order was subsequently extended, and the plaintiff in the meantime obtained an order allowing the insolvency proceedings to be withdrawn. The defendant now applied for dismissal of the suit in pursuance to the terms of the above order, and the plaintiff objected as he was no longer insolvent and now ready to prosecute the suit. *Held* that the order had been made in an improper form, inasmuch as this rule gives the Court no power to order the dismissal of the suit, and that the Court could now rectify it by cancelling that portion of the order.—*Lekhraj Chuni Lal v. Shamlal*, 16 B. 404.

After the institution of a suit the plaintiff was declared an insolvent, and thereupon the defendants obtained an order under this rule directing the Official Assignee to elect within the time fixed by the order, whether he would proceed with the suit, and, if so, to give security for costs. Subsequently a creditor of the insolvent obtained an order from the Insolvency Court for the examination of the defendants with reference to the estate and effects of the said insolvent. *Held*, that the defendants who have filed written statements in the suit, and who have in that suit given inspection of the documents in their possession, ought not to be examined until that case is heard.—*In re Bhagwandas*, 22 B. 447.

If the Official Receiver declines to continue the appeal and to furnish security, the appeal abates, even without the defendant's application for dismissal with costs (12 B. H. C. R. 257 followed and 43 A. 621, 16 B. 404 and 53 C. 844 considered).—*Mulchand Ganga Bishn v. Dcunie & Co.*, 10 L. 208 : 110 I. C. 910 : A. I. R. 1928 Lab. 596.

After the insolvency of a plaintiff in a suit he has no right to continue the suit. It is only the Official Receiver who should continue the suit.—*Buran Sheriff v. Venkatarama*, 109 I. C. 589.

Where one of the two decree-holders appellants became insolvent and the Official Receiver was not prepared to support the appeal; *held*, that the insolvent was not debarred from acting as guardian of the other decree-holder who was a minor and proceeding with the appeal on his behalf.—*Asa Nand v. Bishan Singh*, 125 I. C. 186 : A. I. R. 1930 Lab. 205.

**Insolvency of pauper applicant.**—Where a pauper applies for leave to sue *in forma pauperis*, and after such application is granted, becomes insolvent, the provisions of the present rule can be applied, but not before; *Chidambaram v. Kother*, 48 M. L. J. 491 : 87 I. C. 720 : A. I. R. 1925 Mad. 791.

**"Or to give security."**—Security for costs required to be furnished by the Official Assignee should be at the time when electing to proceed with the suit he brings himself on the record as plaintiff. Where without any such security being demanded, the option is given to the Official Assignee to continue the suit and on that option he has brought himself on the record and he has been prosecuting the suit, no order for security of costs can be made at any subsequent stage; *Venuswami Iyengar v. Varadaraja Iyer*, A. I. R. 1927 Mad. 511 : 100 I. C. 440. The object of Or. XXII, r. 8 is to make the Official Assignee, in case he fails in the suit,

liable for all costs of the suit and not only liable for such costs as were incurred after he appeared on the score. Under this rule, the Official Assignee should give security for the costs of the suit incurred up to the date when the Official Assignee is made a party plaintiff and not all costs that may be incurred till the termination of the suit; *Gulam Hussain v. Piarally*, 29 Bom. L. R. 1074; A. I. R. 1926 Bom. 533; 97 I. C. 797.

**Limitation.**—There is no limitation provided for the Official Assignee to appear and apply for substitution in place of a plaintiff who is adjudged an insolvent or for such plaintiff to appear and apply for the restoration of his name on the record after the adjudication is annulled. Till therefore no order is obtained under Or. XXII, r. 8 of the C. P. Code, the proceedings cannot abate and must be deemed to continue; *Khunni Lal v. Rameshwar*, 43 A. 621; 19 A. L. J. 695.

**Execution proceedings**—*This rule does not apply to execution proceedings. See r. 12.*

**Effect of abatement or dismissal.**      **9. (1)** Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. [S. 371.]

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2). [S. 372-A.]

## COMMENTARY.

**Alterations in the rule.**—Sub-rule (1) corresponds to para. 1 of S. 371, C. P. Code, 1882, with verbal changes only.

Sub-rule (2) corresponds to para. 2 of S. 371, C. P. Code, 1882, with some alterations and additions. The words "*the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff*," have been substituted for the words, "but the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff," which occurred in the beginning of para. 2 of the old section. The other changes in this sub-rule are merely verbal.

Sub-rule (3) corresponds to S. 372-A of the C. P. Code, 1882, with the omission of the words "*applicable to appeals*," which occurred in the old section.



**Limitation.**—An application to set aside an abatement or order of dismissal is to be made within 60 days under Arts. 171 and 172 of the Limitation Act.

**Appeal.**—An appeal lies from an order refusing to set aside the abatement or dismissal of a suit, under Or. XLIII, r. 1 (k).

Where a party to a suit dies, and more than 3 months after, an application is made to bring on record his legal representative, the application is one under Or. XXII, r. 9 (2), and the order thereon is appealable under Or. XLIII, r. 1 (k). An order of abatement must necessarily be followed by a decree and even if no decree be drawn up through the fault of the Court, such order is appealable.—*Lalaram v. Tikamdas*, 119 I. C. 537 : A. I. R. 1929 Sind 225 ; *Hassomal v. Pirbur*, 26 S. L. R. 81.

No appeal lies against an order refusing to set aside an abatement in an appeal—*Akkas Mia v. Abdul Aziz*, 33 C. W. N. 881 : 49 C. L. J. 538 : A. I. R. 1929 Cal. 532

"May apply for an order to set aside the abatement."—The following persons are competent to apply under sub-rule (2), viz., (a) the plaintiff [where a suit has abated under r. 4 (3)] (b) the legal representatives of a deceased plaintiff [where a suit has abated under r. 3 (2)] and (c) the assignee of an insolvent plaintiff [where a suit is dismissed under r. 8 (2)].

Each one of the appellants is entitled to prosecute the appeal and to apply for setting aside an abatement and for substitution ; *Sadhu Saran v. Nand Kumar*, 94 I. C. 209 : 7 P. L. T. 746 : A. I. R. 1926 Pat. 276 : (1926) P. 97.

Though the order of abatement of a suit *in toto* amounts to a decree, it can be set aside on an application under this rule.—*Nand Ram v. Mt. Ralli*, 105 I. C. 556 : A. I. R. 1927 Lah. 865.

Where a suit abates on account of the death of the sole defendant in the suit, the abatement must be set aside under Or. XXII, r. 9, before a substitution of parties could be made ; *Mt. Bibi Khozarma v. The Official Liquidator of the Kayastha Trading and Banking Corporation Ltd.*, 2 P. 168 : A. I. R. 1923 Pat. 417 ; *Mahanth Ramperkash v. Kunj Lall*, 4 P. L. T. 567. See also *Jogunnessa Bibi v. Satish*, 28 C. W. N. 559, where it was held that where substitution had already been made the order for substitution could be treated as being one setting aside the abatement.

If by some oversight the abatement is set aside formally without notice to the surviving respondents, their objections, if any, must be heard when the appeal comes on for hearing.—*Mir Mahboob v. Mir Surayudin*, 115 I. C. 150 : A. I. R. 1928 Mad. 1148.

An application made to bring the legal representative of the deceased defendant on record after the limited time prescribed therefor by law should be treated as an application to set aside the abatement of suit which has taken place, and on proof of sufficient cause for delay the application should be granted.—*Kirpa Ram v. Bhagat*, 112 I. C. 5 : A. I. R. 1928 Lah. 746. Though as a matter of practice the applicant should state in his application that he was prevented by sufficient cause from continuing the suit, it is not legally necessary to do so ; all that is needed is that he should satisfy the Court that there was sufficient cause.—*Ibid.* See also *Dina Nath v. Sayad Habib*, 10 L. 816 : 117 I. C. 884 : A. I. R. 1929 Lah..

129. But where in an application for substitution of heirs the applicant did not state the date of death of the deceased or the fact that the suit had abated and there was no prayer for extension of time, for setting aside the abatement; *held*, that the application for substitution would not be taken as an application for setting aside the abatement and the petition was not a proper application at all.—*Janakinath v. Nirodbaran*, 57 C. 148; 124 I. C. 817; A. I. R. 1930 Cal. 422. It is open to the Court in a proper case to treat the application under Or XX, r. 4 as an application under Or XXII, r. 9.—*Hassomal v. Pirbuz*, 26 S. L. R. 81.

Whether formal order of abatement necessary before abatement can be set aside.—Where no application is made within the prescribed time to bring upon the record the legal representatives of a deceased plaintiff or appellant, the suit or appeal abates automatically. There is no necessity to pass an order that the suit has abated; *Ram Gopal v. Har Kishen*, 7 L. L. J. 517; 88 I. C. 478; A. I. R. 1925 Lah. 598; *Qaim v. Nura*, 7 L. 73; A. I. R. 1926 Lah. 234, *Sarat Chandra v. Maihar Stone and Lime Co. Ltd.*, 49 C. 62; A. I. R. 1923 Cal. 335; 67 I. C. 917; *Lachmi Narain v. Muhammad Yusuf*, 42 A. 540, *Kirpa Ram v. Bhagat Chand*, 113 I. C. 5; A. I. R. 1928 Lah. 746, *Tulsi Ram v. Municipal Board*, 127 I. C. 419; A. I. R. 1930 All. 379. But this automatic abatement does not follow where a party dies after the conclusion of the hearing.—*Ibid.* In *Gujrati v. Sitai*, 44 A. 459; 66 I. C. 554, the Allahabad High Court held that before there can be any abatement, there must be an order, and it is from the date of the order that limitation begins to run. But the same High Court has held in a later case that the abatement is automatic and does not require any formal order by the Court.—*Niaz Ahmad v. Parshotam*, 53 A. 374; 29 A. L. J. 163; 129 I. C. 545; A. I. R. 1931 All. 154.

"No fresh suit"—When it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and the revived suit must be the same, and no fresh cause of action can be imported into the revived suit.—*Sham Chand v. Bhayaram*, 22 C. 92. See also *Umrao Begum v. Irshad Husain*, 21 I. A. 163; 31 C. 997 (P. C.). Rule 9, sub-rule (1) cannot bar the plaintiff's action unless his cause of action for the present suit is identical in whole or in part with the cause of action in the earlier suit. When the former suit is one purely for a declaration and the second suit is for possession, it must be taken that the two causes of action are different; *Ramcharan v. Tulshi Ram*, A. I. R. 1929 All. 306; 119 I. C. 562; 27 A. L. J. 492.

The plaintiff being dead and consequently not appearing on the date of hearing the Court passed an order dismissing the suit for default. Subsequently the successors in title of the deceased plaintiff brought a fresh suit on the same cause of action after 90 days; *held*, that the former suit automatically abated after the expiry of 90 days and so the fresh suit is barred under this rule.—*Shanker v. Motilal*, 109 I. C. 387; A. I. R. 1928 Nag. 220.

Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action; *held*, that the latter suit was not barred.—*Lachman v. Bansri*, 12 L. 275; 131 I. C. 98; 31 P. L. R. 973; A. I. R. 1931 Lab. 79. Order XXII, r. 9 is a disabling rule and should be construed strictly.—*Ibid.*

"Sufficient cause."—Where the plaintiff shows sufficient cause for not making the application for the substitution of the legal representative of the deceased defendant within the prescribed period and when he shows a *bona fide* desire throughout to effect the substitution, his application is not barred.—*Syed Hossain Ally v. Abdur Rahim*, 7 C. W. N. 529.

Mere ignorance of the fact of death is not a sufficient excuse under Or. XXII, r. 9, *Chuni Lal v. Kala Khan*, 4 L. L. J. 171 : 67 I. C. 596 : A. I. R. 1922 Lah. 61 ; *Phulwati v. Maheshwari*, 75 I. C. 909.

Before an abatement is set aside the Court has to be satisfied that there was sufficient cause for not applying in time. Ignorance of death, standing by itself, may be sufficient cause, but if it is accompanied by great delay and dilatoriness it would be otherwise ; *Sarat Chandra v. Maihar Stone and Lime Co Ltd*, 49 C. 62 : 67 I. C. 917 : A. I. R. 1922 Cal. 335 ; *Tirath Ram v. Muhammad Abdul Rahim Shah*, 73 I. C. 616 : A. I. R. 1923 Lah. 546 ; *Jowala Ram v. Hari Kishen*, 5 L. 70 : A. I. R. 1924 Lah. 429 : 80 I. C. 690 ; *Rajani v. Raja Jyoti*, 27 C. W. N. 710 : 75 I. C. 255 : A. I. R. 1924 Cal. 90. Ignorance of the whereabouts of the legal representatives of the deceased may also be a sufficient cause unless the ignorance was due to negligence ; *Munshi Ram v. Radha*, 6 L. L. J. 192 : 80 I. C. 694 : A. I. R. 1924 Lah. 461 ; *Muhammad Mohsin v. Muhammad Abid*, 91 I. C. 560.

Under Or. XXII, r. 9, it must be proved that the appellant was prevented by "sufficient cause" from going on with the suit within the time allowed by law ; otherwise the appeal once abated shall not be revived and the High Court has no discretion in the matter.—*Gopal Lal v. Kerani Gope*, 23 I. C. 803. See also *Daya Singh v. Buta Singh*, 118 P. R. 1916.

If the delay was due to mistake or carelessness, the test to be applied is this : If the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, the application must be granted ; if, on the other hand, the negligence was culpable or there was *malafides* on the .....able  
hurt would result to the other side, the ..... B.  
5 Q. B. D. 368 applied).—*Ramchandra* ..... 54  
M. L. J. 234 103 I. C. 288 : A. I. R. 1923 Mad. 404. The next friend (mother) of the minor plaintiff supported an application for substitution of the legal representative of the deceased defendant by her affidavit stating that though she was aware of the death of the defendant in time, she was ignorant of the fact that, on her death, her legal representatives should be brought on record until the aged father who was conducting the suit on her behalf brought the information to her from her counsel to whom he had gone to give instructions : *held* that sufficient cause within the meaning of Or. XXII, r. 9 and S. 5 of the Limitation Act has been made out under the circumstances of the case, especially as the plaintiff was a minor and it would be open to him to say that he was not bound by the result of this suit on account of the negligence of his next friend and file a fresh suit.—*Ibid*.

Where the appellant was a *pardanashin lady* who had cut off all connections with the place and one of the respondents died in another Province but his legal representatives were not impleaded in time : *held*, that the delay may be condoned.—*Durga Devi v. Shiv Ram*, 32 P. L. R. 822.

r. 9.

The Court has wide powers to set aside an abatement and these powers should be used somewhat liberally unless there is clear proof of laches. Where the plaintiff has had difficulties in keeping in touch with all his adversaries it does not lie in their mouth to object if the Court should condone the delay.—*Hassomal v. Pirbuz*, 26 S. L. R. 81.

Where the petition to set aside abatement sets out good reasons why the appellant did not know of the death of the respondent after the service of notice of the appeal and there was no particular reason why the death of the respondent should have come to his knowledge before the time he alleged; held, that the order of abatement should be set aside.—*Madhab v. Bhubaneswar*, A. I. R. 1927 Pat. 410: 101 I. C. 910.

It is the duty of the person prosecuting an appeal to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate.—*Mohamad Askari v. Lahu*, 45 I. C. 594 21 O. C. 68

The provisions in Or. XXII, r. 9 (3) do not confine the "sufficient cause" mentioned in sub-rule (2) to the circumstances given in S. 15 of the Limitation Act; *Lachma Narain v. Muhammad Yusuf*, 42 A. 540: 18 A. L. J. 688.

Where more than three months after the death of a defendant in a suit the Court brought his legal representatives on record on an application for that purpose, on the ground that the parties were ignorant of the reduction of the time allowed by recent legislation, held, that the delay was properly excused; *Lakshmi Bai v. Yeswant Vithal*, 47 B. 92: 24 Bom. L. R. 909.

Where the appellant had reason to suppose that the enactment of Act XXVI of 1920 would not affect the period of limitation for an application to implead the legal representative of a respondent who had died before the Act came into force, the abatement was set aside; *Niaz Ahmed Khan v. Abdul Latif*, A. I. R. 1923 Lah. 475.

Where one of the defendants died pending the appeal, and the legal representatives of the deceased defendants were under the impression that the co-defendants were prosecuting the appeal and challenging the validity of the entire decree, it was held that it was a sufficient ground for excusing the delay in making the application, to bring him on the record; *Chandra Kumar v. Sandhyamani*, 36 C. 418: 2 I. C. 412.

As to what is "sufficient cause", see also *Shiba Prosad v. Hati Maity*, 53 I. C. 585; *Arur Singh v. Todar Mal*, 22 P. W. R. 1919: 49 I. C. 501; *Syed Akhtar Hussain v. Qudrat Ali*, 9 O. & A. L. R. 267: 73 I. C. 215. See also sub-rule (2) of the rule and S. 5 of the Limitation Act which says: "The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of the section."

Sub-rule (3).—See now the present Limitation Act (Act IX of 1908) Ss. 4 and 5. If no application is made within 60 days to set aside the abatement or dismissal under Arts. 171 and 172 of the Limitation Act, the Court has the power under S. 5 of the Limitation Act to admit the

application after the expiry of the period, if the applicant satisfies the Court that he has sufficient cause for not making the application within 60 days.

Ignorance of the death of one of the respondents, in the absence of any negligence or other act or omission for which the applicant can be held responsible, can be "sufficient cause" within the meaning of S. 5 of the Limitation Act.—*Lakshmi Chand v. Behari Lal*, 54 A. 280 : A. I. R. 1932 All. 459 : 30 A. L. J. 18 : 135 I. C. 159.

A decree was passed against a defendant in ignorance of his death, but on the application of his legal representatives, the decree was treated as a nullity, delay was excused, the representatives impleaded, and the appeal heard *de novo*—*Khalil v. Khatir*, 2 Luck. 592 : 101 I. C. 841 : A. I. R. 1927 Oudh 221.

Substitution without setting aside abatement.—Where a suit abates on the death of a sole defendant, no order for the substitution of his legal representative in place of the deceased can be made until the abatement has been set aside under this rule; *Mt. Bibi Khozaima v. Official Liquidator*, 2 P. 168 : A. I. R. 1923 Pat. 417. According to the Bombay High Court the omission to set aside the abatement is merely a formal defect; *Lakshmi Bai v. Peshvant*, 47 B. 92 : 24 Bom. L. R. 909.

**10.** (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. [S. 372.]

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1). [New.]

### COMMENTARY.

Alterations in the rule.—Sub-rule (1) corresponds to S. 372 of the C. P. Code, 1882, with some additions and alterations. The change introduced in sub-rule (1) will be apparent on a comparison with the provisions of the old section, which is reproduced below: "*In other cases of assignment, creation, or devolution of any interest pending the suit, the suit may, with the leave of the Court given either with the consent of all parties, or after service of notice in writing upon them and hearing their objections (if any), be continued by or against the person to whom such interest has come either in addition to, or in substitution for, the person from whom it has passed, as the case may require.*" On a comparison it would appear that the words "*during the pendency of a suit*" have been substituted for the words "*pending the suit*," and the words "*by leave of the Court*" have been substituted for the words "*with the leave of the Court.*"

The words "*given either with the consent of all parties, or after service of notice in writing upon them and hearing their objections (if any)*" and the words "*either in addition to or in substitution for, the person from whom it has passed, as the case may require,*" which occurred in the old section have been omitted.

On a comparison of sub-rule (1) with the old section, it would appear that under the present rule it is not necessary for the Court to give leave with the consent of the parties or after service of notice upon them. By the above alteration in language, no change seems to have been made in the meaning.

Sub-rule (2) is new. It has been framed to override the case of *Chail Behari v. Rahmal Das*, 20 A. 39, in which it was held that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent under this rule.

"Other cases of assignment, creation or devolution of interest pending suit."—Rules 2, 3 and 4 deal with the case of devolution of interest on the death of a party to a suit. Rule 7 deals with the case of creation of an interest in a husband on marriage of a female party, and rule 8 deals with the case of assignment on the insolvency of a plaintiff. This rule provides for cases of assignment, creation and devolution of interest other than those mentioned above.

The words "other cases" in this rule mean cases other than those specifically mentioned in the previous rules. If therefore the preceding rules, though they have dealt with the event of death, have so dealt with particular cases only, other cases will fall under this rule. A mortgage suit, even after an order absolute for sale, is a pending suit until the sale actually takes place; and an application made before sale by the legal representatives of the decree-holder for substitution would fall under this rule; *Bhugwan Das v. Nilkanta*, 9 O. W. N. 171. *Ali Bahadur v. Rafullah*, 49 A. 310; 100 I. C. 288. A. I. R. 1927 All. 272. See also *Chunni Lal v. Abdul Ali*, 23 A. 331; *Dakshu Subbarayadu v. Musti Ramadasu*, 42 M. L. J. 301: (1922) M. W. N. 375. This rule applies in a case in which the death of the defendant occurs between the passing of the preliminary and the final decree of a suit, and not Or. XXII, r. 4.—*Bapu v. Gulabchand*, A. I. R. 1929 Nag. 142 (F. B.); 116 I. C. 657; *Tularam v. Fukharam*, A. I. R. 1921 Nag. 32: 17 N. L. R. 81; *Peetha Swamigadu v. Chelasami Ramachandrayya*, 120 I. C. 77. An application made by an assignee of the preliminary decree for the preparation of the final decree is not governed by Arts. 171 and 176; the rules governing abatement did not apply to a person who did not claim to come in as legal representative but claimed only as assignee.—*Mithan Lal v. Maya Devi*, 121 I. C. 689: 27 A. L. J. 921: A. I. R. 1929 All. 444. Rule 10 is a residuary rule governing only those cases which are not provided for by the preceding rules; *Sahdev Singh v. Vidyawati*, 91 I. C. 166: A. I. R. 1929 Lah. 181.

Where there was no assignment, creation or devolution of interest in favour of a person who was added as a party on the date of such joinder, held, that he cannot be taken to have been impleaded as party under Or. XXII, r. 10.—*Currimbhoy & Co. Ltd. v. L. A. Creet*, 50 C. L. J. 203.

Where the original plaintiff died after the decision of the suit but before the appeal and his widow got herself substituted as original plaintiff and it appeared that the substitution was ordered on the basis of the evidence in the case and not on any special affidavit filed by the widow: held, that the order was not rendered invalid for want of an affidavit.—*Bhabani Charan v. Suchitra*, 51 C. L. J. 25: 126 I. C. 203: A. I. R. 1930 Cal. 270.

"Interest."—The "interest" contemplated by this rule is an interest which will be vitally affected by the suit; *Harihar v. Gendi Lal*, 43 I. C. 811. The word "interest" in this rule means interest in the property which is the subject-matter of the suit; *Harish v. Chandpore Co. Ltd.*, 30 C. 961. A obtained a decree for money against a certain limited company. The company had sold their properties to a third person who again sold his rights to another limited company. On an application for execution of the decree against the latter company, substituting them on the record as the legal representatives of the former company on their dissolution: *Held*, that the decree could not be enforced against the latter company, this rule not being applicable to the case; *Harish v. Chandpore Co. Ltd.*, 30 C. 961 (followed in *Arbuthnot's Industrials v. Muthu Chelliar*, 31 M. 464: 4 M. L. T. 90). An adoption is not a "devolution" or the "creation" of an interest within the meaning of this rule. It is the creation of a status to which certain incidents are attached by law; *Ganpatrao v. Lazmi Bai*, 15 N. L. R. 24. Where a mortgagee being a party to a suit or proceeding ceases to have any interest the mortgagor in whose favour the property is released may come under r. 10; but where in execution of a decree for rent due to him, the mortgagee purchased the property and an application was made by the judgment-debtor to set aside the sale: *held*, that the mortgagor had no interest either in the decree or in the raiyati interest purchased by the mortgagee and that therefore no interest devolved on him and he was consequently not a necessary or proper person to be impleaded as a party in the litigation.—*Rudra Nath v. Bhujanga*, 8 P. 900.

Assignment, creation or devolution of interest pending suit.—A suit brought on behalf of a *mull* by a trustee not properly appointed can be continued by a properly appointed successor on whom the representation of the institution has devolved. Order XXII, r. 10, and not Or. XXII, r. 5 applies to such a case; *Ratnam v. Nataraja*, 84 I. C. 200: A. I. R. 1924 Mad. 615: 46 M. L. J. 841.

Where a trustee dies or retires or is removed and another is elected in his place, the estate devolves on the new trustee and it is a case of devolution of interest within the meaning of this rule. The new trustee can be added under Or. XXII, r. 10; *Thirumalai v. Arunachella*, 92 I. C. 520: A. I. R. 1926 Mad. 540; *Ajaz Hossain v. Altaf*, 114 I. C. 413: A. I. R. 1928 Cal. 651.

A trustee does not cease to be entitled to maintain and continue the suit merely by reason of his removal from office during the pendency of the suit, in such a case the policy of the law is that the decree that may be obtained by him will enure for the benefit of the trust itself and may be enforced by his successor if there be one (following 20 G. L. J. 107 and relying on A. I. R. 1928 Mad. 246 and A. I. R. 1926 Mad. 540).—*Ittunan Panikkar v. Narayana*, (1923) M. W. N. 746: 109 I. C. 789: A. I. R. 1923 Mad. 607.

Where in a suit for redemption brought by one of four *uralans* of a Malabar Devaswom making the other *uralans* party defendants, one of those *uralans* died, but the parties went to judgment in ignorance of the fact; *held* the death or removal of one of the *uralans* pending the suit or appeal does not *ipso facto* make the further progress and decision of the suit or appeal illegal till his successor is impleaded.—*Sekhara Menon v. Parameswaran*, 53 M. 790: (1930) M. W. N. 705: 32 L. W. 261: 59 M. L. J. 714:

128 I. C. 451 : A. I. R. 1930 Mad. 891. The dismissal or resignation of one trustee and the appointment of another can only be regarded as a devolution of interest under Or. XXII, r. 10 and does not tend to the position of the death of a party.—*Sirakasi v. Koodalinga*, 109 I. C. 401 : A. I. R. 1929 Mad. 216.

Where a suit is alleged to have been compromised and a document embodying the compromise has been filed in Court, the suit does not cease to be pending until the passing of the decree. Consequently it is open to a person alleging himself to be the purchaser of the property before the compromise to apply under Or. XXII, r. 10 to be added as a party to the suit; *Lakshan Chunder v. Nikunjamoni*, 27 C. W. N. 755 (32 C. 483, 13 C. L. J. 487, 43 M. 37, 37 A. 326 *refd. to*).

Where the High Court sends for the records in an appeal filed by the plaintiff against an interlocutory order of the lower Court refusing to appoint a receiver of the property, the suit is still pending on the file of the trial Court and it has jurisdiction to bring on record, the legal representatives of a deceased plaintiff; *Dhagilal v. Darasha Kooveryji*, 25 Bom. L. R. 308.

The words "during the pendency of a suit" in Or. XXII, r. 10, relate to a suit in which no final order has been made—*Gocool Chunder v. The Administrator-General of Bengal*, 5 C. 726 : 5 C. L. R. 569.

An application by a person who has purchased a portion of a revenue-paying estate for being joined as a party to a suit for partition of that estate before the final decree is passed in that suit falls within the purview of Or. XXII, r. 10.—*Shankar v. Kutubuddin*, 123 I. C. 473 : A. I. R. 1930 Nag. 212.

There is no power to make a substitution under this rule after a final decree has been made and before any question of execution proceedings has arisen; *Quare*, whether substitution can be made even in execution proceedings.—*Cunningham v. Fred Stephens*, 57 C. 1143 : 130 I. C. 907 : A. I. R. 1931 Cal. 51. See also *Srinivasa v. Pratapa*, 49 M. L. J. 704 : 91 I. C. 820 : A. I. R. 1926 Mad. 244.

A party seeking to bind the Official Assignee by the result of a suit, pending which the interest in its subject-matter has devolved upon him by operation of law, should apply under this rule to have him joined as a party to the suit. . . . in assignment of an interest . . . . . dency of the suit.—*Punit* . . . . . The "devolution" referred to in Or. XXII, r. 10 is not of the same character as is referred to in the definition of "legal representative" in S 2 (11) and only means the devolution of the interest of the person who instituted the suit; *Lakshmi v. Subbarama*, 28 M. L. J. 491 : 29 I. C. 142

The "cases of assignment, creation, or devolution" of any interest pending a suit contemplated by this rule are those in which "the person to whom such interest has come" is arrayed on the same side in the suit as "the person to whom it has passed." *Held*, therefore, that a compromise in a suit for land between the plaintiffs and of the defendants, whereby the latter consented to a decree being given to the former for half of the land,



was not a "case of assignment" of interest in such land within the meaning of this rule.—*Radha Prasad v. Rajendra Kishore*, 5 A 209.

Order XXII, r. 10 applies to an application made by a person who has not obtained any assignment directly from a party to the suit but has obtained an assignment derivatively from a party to the suit.—*Prasanno Kumar v. Ashutesh*, 18 C. W. N. 450: 20 I. C. 685.

Where a public trust is represented at different stages of a suit by different representatives, one not claiming under the other, the rule applicable to the case is Or. XXII, r. 10, and not Or. XXII, r. 3 of the C. P. Code: *Sundaresan Chettiar v. Viswanada*, 45 M. 703: 43 M. L. J. 147: (1922) M. W. N. 444

This rule is applicable to a case where a suit is brought by a deity through the *Mohunt* and *Shebait* and on his death an application is made for the substitution of another as the next *Shebait* and legal representative (46 M. L. J. 341 referred to).—*Sri Sri Keshab Rai Jieu Thakur v. Raja Jyoti Prosad*, 36 C. W. N. 816.

A person who had advanced monies to the plaintiff to carry on the suit and had obtained an assignment of half of her interest, which assignment was disputed by the plaintiff, was made a party defendant on his own application only upon the statement of the plaintiff that the assignment was executed but without deciding her objection that the assignment was not good and valid.—*Rajaranee Dassee v. Debendra Nath*, 3 C. W. N. 754.

A mortgagee of the defendant's property before suit, who has also made further advances to the defendant on the same security after the suit, is entitled to be made a party to the suit under this rule on the defendant's declaring his intention of abandoning his defence.—*Ahmedbhoj Hubibbhoj v. Vulleebhoj*, 8 B. 323.

The language of Or. XXII, r. 10 is sufficiently wide to cover the cases of leases such as those which are alleged to have been granted by the defendants during the pendency of the litigation.—*Ramkumar Lal v. Raja Mukund*, 1 P. L. J. 596 (39 C 220 distd.). See also *Maharaja Sir Manindra Chandra v. Ram Kumar Lal Bhagat*, 27 C. W. N. 29 (P. C.): 36 C. L. J. 542: 49 I. A. 220: 68 I. C. 973.

When certain persons applied to be made co-plaintiffs and failed, they could not apply to have the application treated as one under Or. XXII, r. 10 for substitution of new plaintiffs on the ground that there had been a transfer or devolution of interest from the plaintiff, *pendente lite*.—*Bibijan v. Abdul*, 36 I. C. 919.

Where one of the plaintiffs died during the pendency of a suit and after the expiry of the period during which the heirs should be impleaded but before the Court had made a formal order of dismissal, certain assignees from the deceased applied to be substituted as party-plaintiffs; held, that an order of substitution could be made.—*Kader Bux v. Salimuddi*, 50 C. L. J. 543: 126 I. C. 401: A. I. R. 1930 Cal. 267.

The words "devolution of interest" in this rule do not mean only devolution by death, but are applicable to a case in which, pending a suit instituted by the manager of the Chota Nagpore encumbered estate, the estate

r. 10.

is released from the management and restored to the owners. It is open in such a case to persons alleging themselves to be owners of the estate to apply to be made plaintiffs in the place of the manager, under this rule.—*Sourindra Mohan Tagore v. Sirmou Debi*, 29 C. 171 : 5 C. W. N. 307. The assignee of a mortgage deed has a right to come in under this rule. When a receiver has filed a suit and has been discharged during its pendency the person beneficially entitled to the property, may be allowed to continue the suit as plaintiff.—*Macleod v. Kissan*, 30 B. 250 : 6 Bom. L. R. 996.

The insolvency of defendants in a mere money suit does not affect the devolution of any interest upon the Official Assignee within the meaning of this rule which is substantially the same in its terms as S 372 of the old Code.—*Jethalal Kalianji v. Gangaram*, 29 I. C. 30 : 8 S. L. R. 325.

On the death of the plaintiff, his sons, who were mere heirs of a joint Mitakshara family, of which their father, the deceased plaintiff, was a managing member, applied for the revival of the suit. *Held*, that it was not necessary that either letters of administration or a certificate under Act VII of 1889 should be obtained in order to entitle the applicants to ask that they may be permitted to proceed with the suit.—*Beejraj v. Bhyro Persaud*, 23 C. 912.

An adoption is not the creation of an interest within Or. XXII, r. 10, but is the creation of a status. It does not operate as a devolution of interest or as an alienation.—*Ganpat Rao v. Lazma Bai*, 43 I. O. 64.

If a person applies to be substituted or added under Or. XXII, r. 10, on the ground of an assignment *pendente lite* and it is disputed, the Court has power to decide that dispute. This rule is not confined to cases of admitted assignment, creation or devolution of interest.—*Enday Ali v. Binodini*, 29 C. L. J. 362 : 51 I. C. 233, *Surendra Narain v. Nityendra Narain*, 90 I. C. 267 : A. I. R. 1926 Cal. 173, *Allah Jawaya v. Lajpat Rai*, 94 I. C. 926 : A. I. R. 1925 Lah. 574.

Assignment or devolution of interest pending appeal.—This rule does not apply to a case where the devolution of interest occurs between the time of the passing of a decree and the time of filing an appeal from the decree.—*Collector of Muzaffarnagar v. Husani Begam*, 18 A. 86 (distinguished in *In re Durga Prasad*, 22 A. 231). See also *Narain Singh v. Dy. Commr., Partabgarh*, 38 I. C. 511 : 20 O. C. 31.

*Held*, that the rule applies as well as to the case of a devolution of interest pending an appeal as to the case of a devolution of interest pending a suit.—*Held*, also, that a person may, under this rule be added or substituted as a party either on his own application, or on the application of one of the parties already on the record.—*Gokul Chand v. Sarat Chandra*, 18 A. 285 (followed in *In re Durga Prasad*, 22 A. 231; *Rajani Kanta v. Raja Jyoti Prasad*, 27 C. W. N. 710).

Death of respondent pending appeal.—Right of assignee of his interest to be substituted in his place. *Held*, that where there has not only been the death of the respondent, but an alleged prior conveyance to him of the property awarded by the decree appealed against, there is a fact in addition to the fact contemplated by S. 368, C. P. Code, 1882 (Or. XXII, r. 4) and

this rule being alone sufficiently inclusive, must apply.—*Rajaram Bhagwat v. Jibai*, 9 B. 151 (approved in *Jamnadas v. Sorabji*, 16 B. 27).

*A* obtained a decree against *B*, declaring his right to a house. The decree was reversed on appeal, and *A*'s claim was dismissed. The High Court reversed the decree of the District Court and remanded the appeal. On remand the District Court made a decree in favour of *A* confirming the original decree of the first Court. Subsequent to the decree of the District Court on remand, *B* sold the house to *C*. *B* then preferred a special appeal to the High Court, but died before it was heard. Held, that *C* could not carry on the special appeal after *B*'s death.—*Moreshwar Bapuji v. Kushaba*, 2 B. 248.

Assignment of decree pending appeal—Assignee of decree made respondent to appeal—Decree reversed in appeal—Liability of assignee for costs of hearing in lower Court. Held, that the assignee of a decree, who is made respondent in an appeal from it and takes no steps actively to support it, ought not to be ordered to pay costs.—*Ramji Morarji v. J. E. Ellis*, 20 B. 167.

A receiver who filed the appeal was discharged and a new receiver was appointed in his place. Held, that the litigation commenced by him did not abate, but it cannot proceed without his successor being impleaded.—*Akula Paradesi v. Dhelli Jagannadha*, 28 M. 157.

By leave of the Court.—Rule 10 makes it discretionary with the Court to allow an application for substitution in the circumstances of a particular case. Such discretion cannot be interfered with in revision. Unless the law casts a duty on the plaintiff to bring the Receiver or trustee on the record it cannot be said that the insolvent must be represented in the suit. He has no right to remain on the record as a defendant and he cannot insist that he must remain on the record through his trustee.—*Prince Victor v. Kumar Bhairabendra*, 34 C. W. N. 53; 125 I. C. 851; A. I. R. 1930 Cal. 388.

No new suit.—The suit, carried on with the leave of the Court by the person who has acquired an interest by devolution, is not a new suit. It is the old suit carried on at his instance, and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings; *Rai Caran v. Biswa Nath*, 20 C. L. J. 107. The essence of this rule, whether applied to proceedings in the Court of the first instance or proceedings in appeal, is that the suit is one from the beginning, and that the addition of the transferee does not initiate, as regards him, a new proceeding; *Chunni Lal v. Abdul Ali*, 23 A. 331, 335.

Limitation.—The right of the assignee to apply for substitution is a pending suit is a right which accrues from day to day and is not therefore barred by limitation.—*Kedarnath v. Hara Chand*, 8 C. 420; *Surendra Keshub v. Khettler Krishito*, 30 C. 609; *Prasunno Kumar v. Ashutosh*, 18 C. W. N. 450.

In a partition suit a preliminary decree was made in July 1887. Since then no steps had been taken to carry out the decree. The plaintiff, the father of the petitioners, died in December, 1891, leaving the petitioners, who now applied to have the suit revived in their name. Held, that the

application was made in a pending suit, and though falling within this rule was not time-barred, the right to apply being one which accrues from day to day.—*Ram Nath v. Uma Charan*, 3 C. W. N. 756 (8 C. 420 followed).

After the preliminary decree and before the final decree where the judgment-debtor dies and more than six months after his death an application is made to bring his legal representatives on the record, such application falls under Or. XXII, r. 10, and not under Or. XXII, r. 4 and is not barred by time: *Tularam v. Tukaram*, 64 I. C. 307; *Bapu v. Gulabchand*, 116 I. C. 657 (F. B.): A. I. R. 1929 Nag. 142.

**Appeal against orders under this rule.**—Under Or. XLIII, r. 1, Cl. (i), an appeal lies from an order under this rule giving or refusing to give leave.—*Midnapore Zemindary Co., Ltd. v. Naresh*, 54 C. 716: 104 I. C. 842: A. I. R. 1927 Cal. 844.

On an application for substitution made under this rule, it was objected that the application could not be granted, but the Court overruled the objection and ordered the substitution applied for. *Held*, that the order for substitution was practically the same as an order disallowing objections, and that there was nothing in the terms of S. 589 (21), C. P. Code, 1882 [Or. XLIII, r. 1, Cls. (k) and (i)], to prevent an appeal from that order.—*Sourindra Mohun Tagore v. Siromoni Debi*, 29 C. 171: 5 C. W. N. 307.

An order dismissing on its merits an application by the assignee of a plaintiff in a suit to be brought upon the record either in addition to or in substitution for the plaintiff, is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom.—*Commercial Bank of India v. Sabju Saheb*, 24 M. 252.

No appeal lies from an order dismissing an application by an assignee who obtained the assignment prior to the institution of the suit, as the order did not come under this rule, the assignment not being made pending the suit.—*Equitable Trust Co. v. Hafiz Mohammad Halim & Co.*, 25 A. L. J. 985: 108 I. C. 699: A. I. R. 1928 All. 120.

An application by a mortgagee to be added as a party to a partition suit is an application under Or. XXII, r. 10 and an order granting or refusing it is appealable in accordance with the provisions of Or. XLIII, r. 1 (i), (49 I. A. 220 explained).—*Jadu Nath v. Murari*, 35 C. W. N. 296: 134 I. C. 307: A. I. R. 1931 Cal. 594.

**Execution proceedings.**—It is doubtful whether Or. XXII, r. 10 applies to execution proceedings.—*Harish Chandra v. Chandpore Company Limited*, 30 C. 961. This rule seems to have been made applicable to execution proceedings by Or. XXII, r. 12 by the principle of exclusion.—*Midnapur Zemindary Co., Ltd. v. Kumar Naresh Narain Roy*, 16 C. W. N. 109 (30 C. 961 referred to). See the *Quere* in *Cunningham v. Fred. Stephens*, 57 C. 1143: 130 I. C. 907: A. I. R. 1931 Cal. 51 and notes under r. 12, *post*.

**11.** In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal. [S. 582.]

### COMMENTARY.

**Alterations.**—This rule corresponds to the latter part of S. 582, with some alterations. The first portion of the section has been incorporated in S. 107.

This rule gives effect to *Soshi Bhusan v. Grish Chunder*, 11 C. 694; *Chajmal Das v. Jagdamba Prasad*, 10 A. 260 (F. B.); *Debi Din v. Chunna Lal*, 10 A. 264 (F. B.); *Rajmones Dabes v. Chunder Kant*, 8 C. 440; 10 C.L.R. 437; *Chajmal Das v. Jagdamba Prasad*, 11 A. 403 and *Hem Kunwar v. Amba Prasad*, 22 A. 430. In these cases it has been held that the word "plaintiff" or "defendant" must be held to include "appellant" or "respondent" respectively. The cases in which a contrary view was taken have been overridden by this rule.

This rule does not apply to an application under S. 21-A, Punjab Alienation of Land Act, for revision of an order of the District Judge.—*Secretary of State v. Amar Singh*, 11 L. 706; 32 P. L. R. 190; A. I. R. 1930 Lah. 775; 126 I. C. 441.

**Death of appellant or respondent—Abatement of appeal.**—Where the right to sue is a personal right, it ceases with the death of the appellant and the appeal abates, as in the case of a reversioner.—*Sakyahani v. Bhavani*, 27 M. 588.

The test to determine whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole; *Sheo Chand v. Sita Ram*, A. I. R. 1927 All. 331; 100 I. C. 482.

Where pending an appeal by the plaintiff in a suit for malicious prosecution on the ground that the damages awarded were insufficient, the appellant (plaintiff) died: *Held*, that the appeal abated; *Murugappa Chettiar v. Ponnusami*, 44 M. 828; 41 M. L. J. 304; (1921) M. W. N. 438.

At the date of the hearing of the appeal the appellant was dead, but neither the pleader nor the Court was aware of the fact. The Court heard and decided the appeal. Subsequently the deceased appellant's son applied for re-hearing of the appeal. *Held*, that the decree of the lower appellate Court was a nullity. The Court was bound under S. 365, C. P. Code, 1882 (Or. XXII, r. 3) to enter his name on the record and to rehear the appeal.—*Janardhan v. Ram Chandra*, 26 B. 317.

Where there were two appeals from the same decree, one by the plaintiff and the other by the 2nd defendant, the substitution of the legal representatives on the death of the plaintiff in his appeal will not oust the benefit of the other appeal as well, and the 2nd defendant not having brought on the record of his appeal, his appeal abated—*Shankaranarayana v. Larmi*, 130 I. C. 764: 33 L. W. 411: A. I. R. 1931 Mad. 277: 60 M. L. J. 267.

Death of joint appellant pending appeal—Legal representative of the deceased appellant not brought on the record.—Appeal proceeded with by surviving appellant. *Held*, that the appellate Court had power to hear the appeal and reverse the whole decree under S. 514, C. P. Code, 1882 (Or. XLI, r. 4).—*Chintaman v. Gangabai*, 27 B. 234: 5 Bom. L. R. 90.

Pending the hearing of a special appeal the appellant died, and after the prescribed period of limitation, his son and sole heir applied to be substituted as appellant in place of the deceased for the purpose of prosecuting the appeal. *Held*, that the application was not made under S. 365, (Or. XXII, r. 3) but under S. 537, C. P. Code, 1877 (S. 103) and was, therefore, not barred by Arts 171 and 172 of the Limitation Act—*In the matter of Ram Sunker*, 3 C. L. R. 440.

Leave to revive the widow's appeal which abated on her death before the hearing, was obtained by the younger daughter of the deceased *talukdar*, one of the defendants: she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed. *Held*, that the appellant by reviving must be restricted to the suit for the *taluk*, and her own which she might have had belonged to the deceased other than the *talukdari* estate.—*Umrao Bejam v. Irshad Husain*, 21 O. 997 (P. C.): 21 I. A. 163.

Procedure analogous to that laid down in S. 369, C. P. Code, 1882 (Or. XXII, r. 4), in respect of the death of a defendant must be applied in the case of the death of a respondent. Where, therefore, a respondent dies pending an appeal, the appellant is at liberty to select one or more persons to defend the appeal; and no person, other than the person so selected, has a right to force himself into the proceedings and to claim to have his name entered as representative of the deceased respondent against the appellant's consent.—*Lakshmibai v. Balkrishna*, 4 B. 654. See also *Rajmonee Dabee v. Chunder Kant*, 8 C. 440: 10 O. L. R. 437.

Where the manager of the family died after the disposal of the appeal but before the second appeal was filed and the succeeding manager and the other adult co-parcener were impleaded as party respondents: *held*, that the omission to implead the legal representatives of the deceased manager was not fatal to the second appeal.—*Subbaraghava v. Adinarayana*, (1932), M. W. N. 491.

Although a Court is bound by S. 368, C. P. Code, 1882 (Or. XXII, r. 4) to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *prima facie* grounds to be the representative of the deceased respondent, and the interest of the person entitled to the estate of

the deceased may be prejudiced, the Court should under S. 32, C. P. Code, 1882 (Or. I, rr. 8, 10, 11), proceed to make such claimant also a party to the appeal.—*Athiappa v. Ayanna*, 8 M. 300.

On the death of a respondent pending an appeal, the assignee of his interest has a right to be substituted in his place.—*Rajaram Bhagwat v. Jibai*, 9 B. 151.

Where several plaintiffs or defendants jointly appeal against a decree to which S. 544, C. P. Code, 1882 (Or. XII, r. 4) applies, the death of one of such appellants, if no legal representative of the deceased is brought upon the record within limitation, can only have the effect of causing the appeal to abate only as against the deceased appellant; it cannot have the effect of causing the appeal as a whole to abate.—*Ram Sewak v. Lambar Pande*, 25 A. 27 (22 A. 222 overruled; 16 A. 211 distinguished). See also *Alla Bakhsh v. Madho Ram*, 23 A. 22; and *Chandarsang v. Khimabhai*, 22 B. 718 (followed in *Bai Full v. Adesang*, 26 B. 203 and in *Upendra Kumar v. Sham Lal*, 34 C. 1020; 11 C. W. N. 1100; 6 C. L. J. 715; referred to in *Chintaman v. Gangabai*, 27 B. 284). But where the relief sought against two defendants is joint and indivisible, abatement against one is abatement against all; *Sardara v. Allayar*, 73 I. C. 604; A. I. R. 1923 Lah. 132.

A Mahomedan lady transferred a share of her immoveable property to certain persons whose shares in the subject-matter of the transfer were separately specified. *M* brought a suit for pre-emption against the transferees, which was dismissed and *M* appealed. During the pendency of the appeal one of the transferees died and nothing was done to bring his legal representatives on record. Held, that the appeal abated as against the deceased only.—*Madho v. Mt. Mehro*, 124 I. C. 338; A. I. R. 1930 Lah. 33.

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial Court and pending an appeal therefrom by the defendant, one of the plaintiffs respondents dies and his legal representatives are not brought on record within time, the whole appeal abates: *Arjan Mircha v. Kali Kumar*, 68 I. C. 194. *Sheikh Dendoo v. Shaikh Sachoo*, 72 I. C. 2. Pending an appeal by the plaintiffs in a suit for ejectment, one of them died but his legal representatives were not impleaded: held that the appeal abated as a whole. It was held, however, that the surviving plaintiffs, could, after obtaining leave to amend the plaint, set aside the decree for joint possession with condition of payment of costs to

33 C.W.N. 359; 119 I.C. 814; A. I. R. 1929 Cal. 519. See, however, *Surajmal v. Pyarkhan*, 27 N. L. R. 220; 134 I. C. 679; A. I. R. 1931 Nag. 184, noted under r. 3, ante. Pending an appeal by the defendants against a decree for joint possession, one of the plaintiffs-respondents died and his legal representative was not brought on record; held that the appeal could not proceed in the absence of the heirs of the dead plaintiff.—*Laxmanlal v. Narayan*, A. I. R. 1929 Nag. 858; 121 I. C. 664. When a declaration is sought to the effect that certain lands appertain to the plaintiff's village and not to another village, the suit will not be properly constituted unless all the proprietors of the other village are impleaded, as the claim is indivisible. So where on the death of some of the defendants during the trial and after the filing of the appeal, the plaintiff

- did not bring their representatives on record, the suit must abate *in toto*—not merely *qua* the deceased defendants alone.—*Kesho Prasad v. Muhammad Wahid*, 9 P. 693 : 129 I. C. 119 : A. I. R. 1931 Pat. 17. Where 14 persons sued for a declaration of their right to take water from a tank and the defendant appealed against the decree of the trial Court but during its pendency one of the plaintiffs died and his heirs were not brought on record : *held* that the entire appeal did not abate since the plaintiffs could separately have brought a suit for such declaration. In such a case the decree cannot be said to be a joint decree merely because there is one piece of paper on which the names of all the plaintiffs are entered. The Court may however refuse to continue the appeal if the decree that may be passed would be ineffectual.—*Umrao Singh v. Kapuria*, 31 P. L. R. 269 : 12 L. L. J. 82 : 128 I. C. 53 : A. I. R. 1930 Lah. 651. If the nature of a suit is such as to require the presence of all the parties interested in the subject-matter of the litigation and if the absence of any such party prevents the adjudication of the claims of the parties on record, the suit or appeal cannot proceed at all. Consequently it will abate in its entirety ; such for example are suits for pre-emption and suits for dissolution of partnership. In this view it follows that it lies on the party in default to satisfy the Court that the nature of the suit is such as to permit of its progress notwithstanding the defect in the array of the parties.—*Surajmal v. Pyarkhan*, 37 N. L. R. 220 : 134 I. C. 679 : A. I. R. 1931 Nag. 184.

Where for failure to bring on record the representatives of one of the respondents who is a necessary party, the appeal abates, it also abates as against all respondents ; *Ma Zan Nyen v. Maung Kyaw Zan*, 1 R. 189 : 74 I. C. 1027 : A. I. R. 1923 Rang. 258.

Where a respondent dies during the pendency of an appeal and his legal representatives are not brought on record within time, the appeal automatically abates as against him, even where the appellant is not aware of his death ; *Sheo Chand v. Sita Ram*, 100 I. C. 482 : A. I. R. 1927 All. 331 (A. I. R. 1926 All. 317, *folld.*).

Where one of four respondents in the lower appellate Court died, and no application was made within the period of limitation to put the legal representative on the record, and, in the application that was eventually made, a wrong person was named as legal representative : *Held*, that the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the deceased respondent. Under the circumstances S. 368, O. P. Code, 1882 (Or. XXII, r. 4), read with this rule, applied, and the proper order was to have directed the suit to abate.—*Hem Kunwar v. Amba Prasad*, 22 A. 430 (*distinguished* in *Joy Gobind v. Monmotho Nath*, 33 C. 580). See in this connection *Dharanjit v. Chandeshwar*, 11 C. W. N. 504 : 5 C. L. J. 393.

! In a suit for accounts of partnership business, all the partners are necessary parties, and the suit cannot go on in the absence of any one of them. A respondent, to whom a sum of money was due under the decree of the first Court died, pending an appeal to the High Court. An application for substitution of his representative was made more than 6 months after his death, and no sufficient cause was shown for the delay. *Held*, that the nature of the suit being such that the right to sue did not survive



against the other defendants (respondents) alone, the appeal abated.—*Ray Chunder v. Gangadas*, 31 I. A. 71: 31 C. 487 (P. C.): 8 C. W. N. 442: 1 A. L. J. 145: 14 M. L. J. 147.

Where in an appeal the interests of the several respondents cannot be discriminated, an order of abatement in respect of one of the respondents results in the abatement of the appeal against all; *Srimati Gol Asmater Khatun v. Nawab Khajeh Habibulla*, 64 I. C. 49.

An appeal does not abate by reason of the failure of an appellant to bring on record, the representative of a deceased respondent within the prescribed period, if the appeal can proceed, in the absence of such representative, to a final and complete adjudication.—*Renga Srinivasa v. Gnanaprakasa Mudaliar*, 30 M. 67 (31 C. 487: 8 C. W. N. 442: 31 I. A. 71 distinguished).

Where on the death of a respondent it appears that his heirs are already parties to the appeal, it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased; *Kartar Singh v. Lal Singh*, 59 I. C. 238.

When during the pendency of an appeal against a decree for rent one of the plaintiffs (respondents) died and his heirs were not brought on the record; held, that the appeal ought to be dismissed.—*Tarip Dafadar v. Khotejannessa*, 10 C. W. N. 981 (6 C. W. N. 196 followed).

Where the special appellant died during the pendency of the appeal; held, that the appeal must abate and that the respondent could not require that it should proceed, in order that he might have an opportunity of taking objections to the decree of the lower Court. If the respondent desired to secure the right of asking for a decision on his objection, he must file a separate appeal.—*Jaita v. Balu*, 3 B. H. C. R. 81. Though the legal representative of the deceased party to an appeal has the right, if he so chooses to apply, to have the decree vacated and the case freshly decided after hearing him, it is not open to the party who was (alive and) really heard and against whom a decree was passed on the merits, to take advantage of the death of the opponent and claim a re-hearing on the merits (following 39 M. 386).—*Surya Narayana v. Joga Rao*, 32 L. W. 647: 123 I. C. 607: A. I. R. 1930 Mad. 719.

See notes under rr. 3 and 4, ante.

**Limitation for application for substitution.**—Articles 176 and 177 of the Limitation Act IX of 1908 are now applicable to applications to have the legal representatives of the deceased appellant or respondent made a party, and the period is 6 months from the date of the death. These articles have overridden the cases (12 C. 590: 10 A. 264: 7 A. 693 and 10 B. 663) in which it was held that Art. 178 of the Limitation Act, 1877. (Art. 181 of Act IX of 1909), was applicable to such cases.

When a respondent in a second appeal dies during the pendency of the appeal, an application by the appellants to substitute his heirs on the record is governed by Art. 177 of the Limitation Act.—*Upendra Kumar v. Sham Lal*, 34 C. 1020: 11 C. W. N. 1100: 6 C. L. J. 715 (29 M. 529 dissented from). See also *Madhuban Das v. Narain Das*, 29 A. 535: 4 A. L. J. 397.

(29 M. 529 *not followed*); and *Vakkalogadda Norasimham v. Vohizulla Sahib*, 28 M. 498: 15 M. L. J. 404.

On failure of defendants (appellants) to apply for substitution of the legal representatives of a deceased plaintiff (respondent) within the time allowed by Art. 177 of the Limitation Act 1908, the appeal must abate, unless sufficiently explained.—*Chajmal Das v. Jagdamba Prasad*, 11 A. 409. See also *Jamnadas v. Sorabji*, 16 B. 27.

An enquiry into a claim to sue *in forma pauperis* is not subject to any limitation and there is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of the deceased opponent's heir in place of such opponent.—*Janardan Vithal v. Anant Mohadev*, 7 B. 373.

The procedure laid down for substitution of the legal representatives of the deceased appellant or the deceased respondent in rr. 3 and 4 read with r. 11 is not exhaustive; such application can be made at any time within the period of limitation provided by the residuary Art. 181 of the Limitation Act, namely three years from the time when the right to apply accrues.—*per Knlwant Sahay, J.*—*Hakeem Syed Mohommed v. Foteh Bohadur*, A. I. R. 1929 Pat. 565 (F. B.): 10 P. L. T. 763.

Application of Order to proceed-logs. **12.** Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. [New.]

## COMMENTARY.

**Scope and object of the rule.**—This rule is new. It has been framed to set at rest the several conflicting rulings under the old Code. Under the Code of 1882, it was held in several cases that Chapter XXI of that Code, which has been replaced by this Order, did not apply to proceedings in execution of a decree. But this rule provides that with the exception of rr. 3, 4 and 8 of this Order all other rules shall apply to execution proceedings. Rule 3 deals with the procedure in case of death of one of several plaintiffs or of a sole plaintiff; r. 4 deals with the procedure in case of death of one of several defendants or of a sole defendant; and r. 8 deals with the procedure in case of plaintiff's insolvency.

**Application of Or. XXII to execution proceedings.**—On the death of a judgment-debtor or execution-creditor, the execution proceedings do not abate, and the legal representatives may apply to proceed with the execution.—*Manmota v. Rakhal*, 14 C. W. N. 752: 10 C. L. J. 396.

The provisions of Or. XXII relating to the abatement of suits and appeals do not apply to execution proceedings or to appeals from orders made in such proceedings; *Mr Khan v. Sharfu*, 5 L. L. J. 163: 74 I. C. 577: A. I. R. 1923 Lah. 560.

Order XXII, r. 12 provides that r. 3, which refers to substitution of legal representatives of a deceased plaintiff, does not apply to proceedings in execution of a decree. On the death of the applicant for execution, it is open to his legal representatives to apply immediately for carrying on the proceedings in execution of the decree, or to apply for fresh execution under

Or. XXI, r. 16. It is not necessary for them nor is it competent, to make an application for substitution, and therefore an order for substitution, if made, cannot have the effect of continuing the application made by the predecessor; *Akhoy Kumar v. Surendra*, 30 C. W. N. 735: 96 I. C. 378: A. I. R. 1926 Cal. 957.

Where an appellant decree-holder dies during the course of appeal in execution proceedings, his legal representative can be brought on record. In such a case the ordinary procedure relating to appeals, when an appellant dies, applies (50 M. 1: A. I. R. 1927 Mad 184 *not applied*).—*Sundayee Ammal v. Krishnan Chetti*, 51 M. 858: (1928) M. W. N. 385: 110 I. C. 662: 28 L. W. 351: A. I. R. 1928 Mad. 772: 55 M. L. J. 497. The rules of abatement laid down in Or. XXII apply to appeals against orders on the execution side.—*Rajah of Kalahasti v. Jagannadha*, (1932) M. W. N. 597: A. I. R. 1932 Mad. 574: 55 M. 1006: 139 I. C. 409. But see *Hakeem Syed Mahommed v. Fateh Bahadur*, A. I. R. 1929 Pat. 565 (F. B.): 10 P. L. T. 763 which has held that r. 12 is applicable to appeals in proceedings relating to execution of a decree as they are a mere continuation of the execution proceedings. An appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of the respondent if the appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law.—*Ibid.* *Quare*—whether after the death of a decree-holder, pending an application in execution, his representative in title by succession can apply for substitution of names under Or. XXII, r. 10.—*Niader v. Khazan*, 128 I. C. 398: 28 A. L. J. 1279: A. I. R. 1930 All. 604. See also *Cunningham v. Fred. Stephens*, 57 C. 1143: A. I. R. 1931 Cal. 51: 130 I. C. 907. Order XXII, r. 12 read with r. 4 does not require a fresh execution petition to be presented in case the judgment-debtor dies while execution proceedings are pending and the legal representative of the judgment-debtor can be brought on record in the execution proceedings already initiated.—*Venkatalakshamma v. Sheshagiri*, (1931) M. W. N. 48: 60 M. L. J. 628: 131 I. C. 610: 33 L. W. 359: A. I. R. 1931 Mad. 303.

The judgment-debtor appealed against an order in execution instituted by one of two decree-holders. The other decree-holder was dead before the appeal was filed and no application was made by the judgment-debtor for substitution of his legal representatives in his place within time, it was made after the expiry of the prescribed period; *held*, that as one of the decree-holders applied for execution, the other decree-holder was either not a party to the execution proceedings at all or was represented for all purposes, including the appeal by the decree-holder who had applied for execution and that consequently the contention of the legal representatives that the appeal was barred as against them could not be sustained.—*Punjab National Bank Ltd. v. Sundar Singh*, 118 I. C. 901: A. I. R. 1929 Lah. 673.

The only effect of Or. XXII, r. 12 is that the penalty of abatement of suits under r. 3 will not apply to execution proceedings and the question whether the legal representative can be substituted in the pending execution application and be allowed to proceed with the application or whether he should be compelled to file a fresh application remains to be considered in the light of the other provisions of the Code apart from Or. XXII, r. 12. The procedure in such cases is indicated by S. 146 and Or. XXI, r. 16. The legal

of his name in a pending  
 action under Or. XXI, r. 16  
 be continued after substi-

the decree-holder dies, it is open to his heir and legal representative to continue the execution proceedings, provided he applies to the Court and obtains an order under Or. XXI, r. 16. He need not be compelled to resort to a separate proceeding (*following* 50 M. 1).—*Kacharabhai v. Kacharabhai*, 33 Bom. L. R. 818 : 134 I. C. 720 : A. I. R. 1931 Bom. 423.

A pending execution proceeding does not abate by reason of the death of any of the joint decree-holders.—*Bimbadhar v. Abdul Zail*, 117 I. C. 165 : A. I. R. 1929 Pat. 200 (relying on A. I. R. 1931 Pat. 180), or by reason of his insolvency. It may be that by virtue of S. 23 of the Provincial Insolvency Act, the insolvency Court or even the executing Court is competent to impose conditions as to the disposal of the decretal amount if and when realized; but so far as the judgment-debtor was concerned, it does not lie in his mouth to claim that the execution proceedings should be dropped merely because the decree-holder has been adjudicated insolvent and the Official Receiver does not care to continue them.—*Asa Nand v. Bishan Singh*, 125 I. C. 186 : A. I. R. 1930 Lah. 205.

## ORDER XXIII.

### WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit or abandonment of part of claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others. [S. 373.]

### COMMENTARY.

**Alteration in the rule.**—Sub-rule (1) is new, except the words "at any time after the institution of a suit" in the first line. The most important change introduced in this sub-rule is the substitution of the words "withdraw his suit" for the words "withdraw from the suit" which occurred in the old section. The distinction between the above two expressions has been clearly pointed out in 32 B. 345, noted below.

Sub-rule (2) corresponds to first para. of S. 373, O. P. Code, 1882, with some additions, alterations and omissions. The words "on the application of the plaintiff," which stood after the words "the Court is satisfied," have been omitted from the present rule. The words "allowing the plaintiff to institute" have been substituted for the words "permitting him to bring" in Cl. (b). The words "as to costs or otherwise" which

stood after the words "*terms*" in the old section, have been omitted. The other alterations made in sub-rule (2) are merely verbal.

Sub-rule (3) corresponds to para. 2 of S. 373, C. P. Code, 1882, with change of some words and phrases, without any change in the meaning. The words "*in respect of such subject-matter or such part of the claim,*" have been substituted for the words "*for the same matter or in respect of the same part*" which occurred in the old section.

Sub-rule (4) is almost similar to para. 3 of the old section.

**Object of the rule.**—The object of Or. XXIII, r. 1 is not to enable a plaintiff after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and thus prejudice the opposite party.—*Nathuni Ram v. Musammat Sheo Koar*, 3 P. L. J. 460: 5 P. L. W. 104: (1918) P. 220: 46 I. C. 179.

The main object of Or. XXIII, r. 1 (2) is to prevent a defeat of justice on technical grounds. Where no formal defect necessitating the failure of the suit is shown to exist there must still be a defect which has the effect of shutting out a fair trial on the merits and which arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.—*Doma v. Dayaram*, 48 I. C. 1005.

**At any time.**—A Court cannot refuse to allow the plaintiff to abandon a portion of his claim on the ground that the petition was filed too late, for this rule gives a right to the plaintiff to do so at any time during the pendency of the suit.—*Muthu Chettiar v. Govindaswami*, 116 I. O. 823.

**Distinction between the expressions "withdrawal from suit" and "withdrawal of suit."**—Sub-rule (1) contemplates a withdrawal of the suit and sub-rule (2) a withdrawal from the suit. If a party desires to withdraw from the suit with liberty to bring a fresh suit, he must apply to the Court under sub-rule (2) for permission so to withdraw. If he does not desire to withdraw from the suit with liberty to bring a fresh suit then he can under sub-rule (1) withdraw the suit of his own motion for which the Court's order is not necessary.—*Muhant Biharidasji v. Parshotamdas*, 32 B. 345: 10 Bom. L. R. 293. A party cannot withdraw a suit reserving to himself a right to bring a fresh suit.—*U. E. Maung v. P. A. R. P. Chettyar Firm*, 6 R. 494: A. I. R. 1928 Rang. 273.

**Power of Court to allow withdrawal of suit.**—There is no general jurisdiction given by the C. P. Code for allowing a party to withdraw except under Or. XXIII, r. 1. If there is no formal defect in the case, the plaintiff cannot be allowed to withdraw the suit with liberty to bring a fresh one. If the plaintiff is allowed in such a case, the High Court will set aside the order.—*Ram Chandra v. Hachunia Fakir*, 35 I. C. 843 (16 C. W. N. 1027 approved); *Harshamukhi v. Sarat Chandra*, 32 C. W. N. 1244: 117 I. C. 864. A Court has no jurisdiction to permit withdrawal unless there is something to show that the suit must fail by reason of some formal defect; where the Munsif did not refer to any such defect but allowed the withdrawal with liberty; held that the order was bad as being made without jurisdiction.—*Ibid.*

Order XXIII, r. 1 does not apply except to cases where the suit is properly pending in a Court in which the leave is granted. Therefore a Court which has no jurisdiction cannot permit withdrawal of a suit.—*Ramdeo v. Gonesh*, 35 C. 924: 12 C. W. N. 921.

Where a plaintiff does not desire to withdraw unless with liberty to bring a fresh suit and the Court considers that such liberty ought not to be granted no sufficient ground having been made out, the proper course is to dismiss the application.—*Suradhani v. Chandra Nath*, 20 C. W. N. 1011 (32 B. 345 followed). An order permitting the withdrawal of a suit without liberty to bring a fresh suit is not warranted by law. The proper order to be passed is to dismiss the application and proceed with the suit.—*Jolirmoy v. Guru Gobinda*, 107 I. C. 469: A. I. R. 1928 Cal. 273.

A Court has no jurisdiction to allow withdrawal of a suit after an award is made by an arbitrator against the plaintiff.—*Debi Churn v. Bipra Prasad*, 7 C. W. N. 186.

An application for withdrawal cannot be conditional to the effect, "that if the Court considers the suit to be badly framed, then the plaintiff may be permitted to withdraw." Such conditional application is not contemplated by the rule.—*Bajinath v. Ravaneswar Prasad*, 6 C. L. J. 163 (166).

The Court should allow an application for withdrawal to be heard in the presence of all the parties concerned and should not grant the permission in their absence (following 44 C. 454).—*Chaganlal v. Mt. Dhanu*, 123 I. C. 697: A. I. R. 1930 Nag. 151.

Courts in India have no power to dismiss a suit with liberty to bring a fresh suit.—*Hira Lal v. Uday*, 16 C. W. N. 1027: 16 C. L. J. 103.

Permission under S. 97, Act VII of 1859 (this rule), to bring a fresh suit, could not be given after final judgment has been pronounced.—*Sheoraj Nundun v. Rajcoomar*, 24 W. R. 23.

An appellate Court has no power to interfere with the discretion of the first Court in allowing a plaintiff, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit in the same matter.—*Ram Kanye v. Haroo Chunder*, 17 W. R. 229.

**Withdrawal of application to withdraw suit.**—An application to withdraw a suit can itself be withdrawn for proper reason, and the suit could be proceeded with thereafter; *Lakshmana v. Appalwar*, 44 M. L. J. 77: 71 I. C. 288: A. I. R. 1929 Mad. 246.

**Finality of order allowing withdrawal.**—Where a suit has been allowed to be withdrawn with liberty to sue afresh, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order; *Samaddi Sheikh v. Fulbash Bawa*, 65 I. C. 704: A. I. R. 1923 Cal. 269; *Hriday Nath v. Ram Chandra*, 48 C. 138 (F. B.); 31 C. L. J. 482: 24 C. W. N. 723: 59 I. C. 806; *Rajkumar v. Ram Khelawan* 1 P. 90 (F. B.); 64 I. C. 337: A. I. R. 1922 Pat. 44; *Jhunku v. Bisheshar*, 40 A. 612: 46 I. C. 71; *Sheikh Hassan v. Mahomed Ali*, 45 B. 206: 59 I. C. 210: A. I. R. 1921 Bom. 278.

Power of appellate Court to allow withdrawal of suit.—Where a plaintiff's suit is dismissed, and he appeals from the decree, the appellate Court has power, under this rule read with S. 532, O. P. Code, 1882 [S. 107 (2)], to allow a plaintiff to withdraw from the suit with liberty to bring a fresh suit.—*Afzal Begam v. Albari*, 37 A. 326 : 13 A. L. J. 444; *Ganga Ram v. Data Ram*, 8 A. 82; *Kamayya v. Papayya*, 40 M. 259 (F. B.) : 37 I. C. 414; *Chhanubhai v. Dahyabhai*, 44 B. 598; *Shekh Hassan v. Mahmood Ali*, 45 B. 206 : 59 I. C. 210 : 22 Bom. L. R. 1183; *Uday Chand v. Molla Syed Rezasat Hossain*, A. I. R. 1923 Cal. 58; *Gajraj v. Sri Thakurji Maharaj*, 74 I. C. 894; *Krishnan v. Raman*, 114 I. C. 557 : A. I. R. 1929 Mad. 36. But see *Kali Prasanna v. Panchanan*, 44 C. 367 : 33 I. C. 670 : 23 C. L. J. 489; where a contrary view was taken. The appellate Court has no power to grant leave to withdraw the suit before the appeal is admitted.—*Eknath v. Ranoji*, 35 B. 261 : 10 I. C. 813 : 13 Bom. L. R. 237.

A Court ought to be very cautious before allowing an application for withdrawal when the case has reached the stage of appeal, even though it orders the entire costs of the defendant to be paid by the plaintiff; *Kamta Prasad v. Ram Ratan*, 24 A. L. J. 721 : A. I. R. 1926 All. 548 : 96 I. C. 480.

Where the case was likely to raise questions of importance affecting the rights of the plaintiffs and other persons and the case required consideration best exercised a fresh suit.—

The question whether leave should be granted in second appeal to a plaintiff to withdraw his suit depends upon whether the Court is satisfied that the decree against the plaintiff should be set aside. Where the decree is based on a concurrent finding of fact, it is not open to the Court to grant leave to withdraw; *Ram Kumar v. Safiunnessa*, 63 I. O. 169.

When the suit has reached the stage of a Letters Patent appeal it would not be right to allow the plaintiff to withdraw the suit in order to bring a fresh one, especially when the defendants do not consent to that course.—*Rajrakh v. Shani Shanker*, 129 I. C. 543 : A. I. R. 1930 Pat. 410.

An appellate Court ought not to grant permission to a plaintiff who had been unsuccessful in the trial Court to withdraw his suit with liberty to bring a fresh suit, more especially where the parties quite understood what were the matters in dispute between them and exactly what it was that the plaintiff claimed and the defects were more apparent than real; *Singhai Rajjilal v. Kanhai*, 61 I. C. 584. Permission should only be given when the Court is satisfied that the defect is not for any default of the plaintiff but for discovery of certain facts which render the suit in its present shape so defective. The duty of looking at the case from this standpoint becomes more necessary if an application for withdrawal is presented in the lower appellate Court, and unless the Court is absolutely satisfied that the failure of the plaintiff was due to certain defects which were not known to him at the time of the institution or trial of the suit, it should give the permission.—*Moti Lal v. Kali Das*, 130 I. C. 142 : 34 C. W. N. 912 : A. I. R. 1931. Cal. 107.

See S. 107, sub-rule (2).



**Allowing withdrawal alone without liberty to bring fresh suit, whether proper.**—Where plaintiff prayed for leave to withdraw his suit with liberty to bring a fresh suit but the Court simply allowed him to withdraw his suit and refused him permission to bring a fresh suit; held, that the Court acted without jurisdiction in dividing the plaintiff's petition into two parts and attempting to treat the application as one under the first part of Or. XXIII, r. 1, Cl. (1); *Shamandan v. Mulchandram*, 1 P. L. T. 292. See *Jotirmoy v. Guru Gobinda*, 107 I. C. 469 : A. I. R. 1928 Cal. 273.

**"Formal defect."**—Where the Court is satisfied that a suit must fail by reason of "some formal defect," or that there are "other sufficient grounds" for allowing the plaintiff to institute a fresh suit for the subject-matter of the suit, the Court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit, with liberty to institute a fresh suit in respect of the subject-matter of such suit. A Court ought not to grant leave to withdraw a suit with liberty to bring a fresh suit on a mere allegation that there is some formal defect, without satisfying itself that it does exist as a matter of fact; *Kiranmoyi v. Rama Nath*, 64 I. C. 556; *Radha Rawan v. Tularam*, 10 A. L. J. 393. A mere general statement that there are formal defects is not sufficient—the plaintiff must specifically state the formal defect.—*Pundalik v. Chandrabhan*, 43 I. C. 345. Misjoinder of parties and causes of action is a formal defect; *Watson v. Collector of Rajshahye*, 13 M. I. A. 160 (170) : 3 B. L. R. 48 (P. C.); *Ganeshi v. Khairati*, 16 A. 279; *Afzal v. Lachmi Narain*, 40 A. 7 : 42 I. C. 856. Improper valuation of the subject-matter of a suit and consequent insufficiency of Court-fee is also a formal defect; *Watson v. Collector of Rajshahye*, 13 M. I. A. 160 : 3 B. L. R. 48 (P. C.); *Kannuswami v. Jagathambal*, 41 M. 701. Want of proper stamp or non-registration of a material document is a formal defect; *Watson v. Collector of Rajshahye*, 13 M. I. A. 160 : 3 B. L. R. 48 (P. C.); *Misser Debes v. Baldeo*, 5 N. W. P. 116. If the defect is curable by amendment of the pleadings, no leave to withdraw should be granted; *Rameshwar v. Rasul Beg*, 21 O. C. 66 : 45 I. C. 603. The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the plaint, and is not a sufficient ground to allow withdrawal of the suit with liberty to bring a fresh one; *Manbhar v. Sumerchand*, 12 A. L. J. 441. If a plaint is defective, the only sort of defect which attracts this rule is a formal defect; *Pali Kanj v. Krishna Aiyar*, 23 L. W. 525 : 94 I. C. 983 : A. I. R. 1925 Mad 863. The words "formal defect" refer to cases of misjoinder either of parties or matters in contest in the suit, or to cases in which a material document has been rejected because it has not borne a proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. Where the plaintiff finds after evidence has been recorded that his claim is not based on the particular note of hand but on another note altogether he cannot be permitted to withdraw from the suit with liberty to bring a fresh suit.—*Ramji v. Anjaniprasad*, 115 I. C. 172 : A. I. R. 1929 Nag. 72. Clause (a) does not say that the formal defect must be in the pleading.—*Syed Sadaq Beza v. Nawab Bahadur of Murshidabad*, 34 C. W. N. 578 : 127 I. C. 549.

**"Other sufficient grounds."**—The power to dismiss a suit, with liberty to bring a fresh one for the same matter, is limited to cases where the

suit fails by reason of some point of form. Such liberty should not be given where, after issue joined, the plaintiff has failed to make out his case.—*Watson v. Collector of Rajshahye*, 3 B. L. R. 48 (P. C.) : 13 M. I. A. 160. See also *Mona Bibee v. Omed Ali*, 16 W. R. 276; and *Muddun Ram v. Israil Ali*, 21 W. R. 291. See, however, *Omesh Chunder v. Thakoor Doss*, 23 W. R. 345.

The circumstances contemplated by Or. XXIII, r. 1 of the Code are confined to those cases mentioned in Cls. (a) and (b) of r. 1, sub-rule (2) of the Order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in Cls. (a) or (b) exist. If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the Court is so satisfied. If this condition is not fulfilled, it is clear that the jurisdiction does not arise; *Raj Kumar v. Ram Khelawan*, 1 P. 90 (F. B.) : A. I. R. 1922 Pat. 44 : 3 P. L. T. 80; 64 I. C. 337.

The words "other sufficient ground" in Or. XXIII, r. 1, Cl. (2) mean that the ground must be one *eiusdem generis* with the formal defect referred to in sub-clause (a). Mere inability of a party to prove his case is not sufficient ground for permitting him to withdraw it with liberty to bring a fresh suit.—*Burathagunta v. Thurlapatti*, 8 I. C. 868 : 9 M. L. T. 204 : (1911) M. W. N. 105; *Lala Punjshet v. Motiram*, 50 B. 192; 94 I. C. 777 : A. I. R. 1926 Bom. 315; *Mahendra v. Sing Lal*, 3 P. L. J. 651; 48 I. C. 197; *Ishardas v. Lal Singh*, 7 L. L. J. 290 : 90 I. C. 632 : A. I. R. 1925 Lah. 497; *Tikai v. Firm Sheo Dayal*, 3 Luck. 403 : 107 I. C. 887 : 5 O. W. N. 61 : A. I. R. 1928 Oudh 482; *Nagamma v. Lakshminarasu*, 112 I. C. 312 : A. I. R. 1928 Mad. 1085; *Jagmohan v. Ramkhelawan*, 27 A. L. J. 961 : 119 I. C. 859 : A. I. R. 1929 All. 693; *Buta Singh v. Hardit Singh*, 124 I. C. 696 : A. I. R. 1930 Lah. 175. But see *Syed Sadeq Reza v. Nawab Bahadur of Murshidabad*, 34 C. W. N. 578 : 127 I. C. 549, where it has been held that "other sufficient grounds" mean some ground other than and different from a formal defect.

Absence or incompleteness of evidence is no sufficient ground for permitting a plaintiff to withdraw with liberty to bring a fresh suit.—*Khub Chand v. Ajodhya*, 11 A. L. J. 733. There is a marked distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract evidence given by the defendant, i. e., where the plaintiff wants time to prepare merely what would be more or less a new case, and a case where a plaintiff wishes to give formal proof of a document which was essential to its success. In the latter case permission should be granted to withdraw the suit with liberty to bring a fresh suit; *Chandrika Lal v. Sam Nath*, 50 A. 835 : 26 A. L. J. 774 : A. I. R. 1929 All. 133 : 115 I. C. 124 (40 All. 612 folld.; A. I. R. 1927 All. 523 dist.). Where the plaintiff endeavoured to produce documentary evidence at a period when it could not be admitted and having decided not to go on with the evidence applied for withdrawal and the Court sanctioned the same; held that there was no formal defect and that the order allowing withdrawal was passed with material irregularity in the exercise of jurisdiction and therefore should be set aside in revision.—*Tikai v. Firm*

*Sheo Dayal*, 3 Luck. 403 : 107 I. C. 887 : 5 O. W. N. 61 : A. I. R. 1928 Oudh 482. It is a wrong principle to hold that if a plaintiff finds at the trial that his evidence is scanty he should be given another chance of bringing another suit to supplement his scanty evidence.—*Bhikaji v. Anant*, 31 Bom. L. R. 613 : 119 I. C. 773 : A. I. R. 1929 Bom. 320.

In a suit for enhancement of rent, the plaintiff also claimed additional rent on account of excess area under S. 52 of the Bengal Tenancy Act, but gave no evidence as was necessary under that section, *held*, that, under the circumstances of the case, the plaintiff could be allowed to withdraw the claim with regard to additional rent with respect to the additional area with liberty to bring a fresh suit in respect of the same subject-matter; *Indu Bhusan v. Jatu Mallik*, 62 I. C. 699.

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing the plaintiff to withdraw the suit with liberty to file a fresh suit; *Lakshmi Bai v. Yeshwant Vithal*, 24 Bom. L. R. 909.

Change in substantive law during progress of a suit—Application for withdrawal in order to get benefit of the alteration in the substantive law. *Held*, that permission should not be given by the appellate Court.—*Prabhakar v. Khanderao*, 10 Bom. L. R. 635.

The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the plaint and is not a sufficient ground to allow withdrawal of the suit with liberty to bring a fresh one.—*Manbhari v. Sumer Chand*, 12 A. L. J. 441.

Where according to one of the plaintiffs, a pedigree filed is incorrect in several particulars, there is no formal defect to allow the suit to be withdrawn with liberty to bring a fresh suit.—*Gulab Dei v. Patan Din*, 30 I. C. 351.

Where a plaintiff brought a joint suit against three sets of defendants to set aside separate alienations made by a Hindu widow during her lifetime and the suit was had for misjoinder of parties and causes of action, the plaintiff was allowed to withdraw his suit against two sets of defendants with liberty to bring a fresh suit.—*Ganeshi Lal v. Khairati Singh*, 16 A. 279.

Where it would be difficult to execute the decree against the defendant on account of his absence, the plaintiff might be allowed to withdraw the suit with liberty to bring a fresh suit on the same cause of action.—*Syed Ali v. Adib*, 15 B. 160.

An order for withdrawal under Or. XXIII, r. 1, cannot properly be made on the ground that the plaintiff had failed to produce evidence in support of his claim. Clause (b) of sub-rule (2) should be read in conjunction with Cl. (a). Hence the grounds included in Cl. (b) must be of the same nature as the ground specified in Cl. (a).—*Hriday Nath v. Akshay Lal*, 25 O. L. J. 451 : 39 I. C. 963 (11 O. L. J. 45 : 11 O. L. J. 512 : 23 O. L. J. 489 referred to); *Munna Lal v. Chhabil Das*, 46 I. C. 181; *Mahendra Ram v. Singi Lal*, 3 P. L. J. 651 : 48 I. C. 197.

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Plaintiff's inability to produce important evidence is not sufficient ground within Or. XXIII, r. 1 (2) (b), C. P. Code, for permitting him to withdraw the suit with permission to bring a fresh suit in respect of the same subject matter; *Uchant v. Basawan*, 6 P. L. J. 112: 2 P. L. T. 634: 61 I. C. 639: A. I. R. 1921 Pat. 42.

Permission to withdraw a suit with liberty should not, as a matter of discretion, be allowed on the grounds (1) that there are some other persons who are necessary parties to the suit and (2) that the success of the suit depended upon proof of a fact which could only be proved by production of a cash book, whereas the applicant had only produced a ledger.—*Kamla Singh v. Bhagwan Das*, 50 A. 199: 106 I. C. 431: A. I. R. 1923 All. 98.

Where the award given by the arbitrator appointed in a suit was wider than the submission and the Court therefore refused to pass a decree in terms of that award but granted permission to the plaintiff to withdraw and bring a fresh suit on the basis of the award; held that the Court's order was not proper, because it could not be said that the plaintiff could not continue the suit by reason of the award.—*Nagamma v. Lakshminarasu*, 112 I. C. 312: A. I. R. 1923 Mad 1035

Where a suit is brought for the interest due on a mortgage, it is not a sufficient cause for granting leave to withdraw the suit with liberty to sue afresh that a subsequent suit for the principal would be barred by Or. II, r. 2, C. P. Code; *Parduman Chand v. Ganga Ram*, 66 I. C. 235.

In order to succeed in an application for withdrawal, the plaintiff must specifically state the formal defect. A mere general statement that there are formal defects is not sufficient.—*Pundalik v. Chandrabhan*, 43 I. C. 346

A special Judge appointed under S. 54 of the Dekkan Agriculturist Relief Act (XVII of 1879) is not competent in the exercise of his revisional powers to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit.—*Muktajibhagoji v. Manaji*, 12 B. 634.

In a suit against a Ruling Chief, if the consent of the Governor-General in Council under S. 433, C. P. Code, 1892 (S. 86), has not been obtained before the commencement of the suit, the Court should allow the plaintiff to withdraw it with liberty to bring a fresh suit under this section (i.e., this rule).—*Chandulal v. Awad*, 21 B 351.

Effect of erroneous grant of leave to withdraw.—An order for withdrawal of a suit with leave to institute a fresh suit made under Or. XXIII, r. 1 but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void. A fresh suit instituted upon leave so granted is not incompetent. The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted permission to the plaintiff to withdraw the first suit had properly made each order.—*Hriday Nath v. Ram Chandra*, 48 C. 138 (F. B.): 24 C. W. N. 723: 58 I. C. 806: 31 C. L. J. 482 (23 C. L. J. 489: 20 C. W. N. 1000, overruled); *Sammaddi Sheikh v. Fulbash*, 65 I. C. 704: A. I. R. 1923 Cal. 269.

Assuming that a Court ought not, under Or. XXIII, r. 1 of the C. P. Code, to grant permission to a plaintiff to consolidate the claim in the suit

which is withdrawn with that in another suit pending at the time, the order granting the permission is not a nullity and the plaintiff cannot, without complying with the terms of the order, maintain a fresh suit in regard to the same subject-matter; *Lakshmanan v. Muthaya Chetty*, 40 M. L. J. 126 : 29 M. L. T. 189.

Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred; *Mt. Ram Dei v. Mt. Bahu Rani*, 1 P. 228; A. I. R. 1922 Pat. 489.

**Power to allow withdrawal of appeal.**—An appellate Court has authority to permit an appeal to be withdrawn.—*Ram Pershad v. Bhurosa Koonwar*, 9 W. R. 323. When an appeal is allowed to be withdrawn, the decree of the lower Court is left intact and it cannot be said that it has confirmed the decision appealed from; it merely recognises authoritatively that the appellant does not wish to go on with the appeal.—*Deoki v. Jwala Prasad*, 50 A. 608 : 26 A. L. J. 407 : 108 I. C. 564; A. I. R. 1928 All. 679; *Kamini v. Rajendra*, 42 C. L. J. 219 : 90 I. C. 432; A. I. R. 1926 Cal. 233.

The High Court allowed the appellant to withdraw his second appeal after it had been argued, though not decided, in order that he might apply to the lower Court for a review of its judgment on the ground of discovery of new evidence.—*Pandu v. Devji*, 7 B. 287.

One of the appellants can withdraw from the appeal so far as his own interest in the appeal is concerned.—*Gopala v. Hira Singh*, 119 P. W. R. 1908.

Where no cross-objections have been filed by the appellant has an absolute right to withdraw his appeal before judgment, his only liability being to pay costs.—*Kanhaya Lal v. Partab Chand*, 132 I. C. 194 : 29 A. L. J. 404.

**When permission ought not to be granted**—Where all the evidence in the case has been adduced and the case almost finished, the Court ought not to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the same cause of action, more especially when it is not shown what defects there were in the plaint which necessitated such withdrawal.—*Rajendra Nath v. Baikuntha Nath*, 34 I. C. 934; *Abdul Sobhan v. Samasuddin*, 35 C. W. N. 112 : 131 I. C. 863; A. I. R. 1931 Cal. 336.

On an application by the plaintiff to withdraw a part of his claim with liberty to bring a fresh suit on the same cause of action, the Court found but still granted the leave.—*Held that the plaintiff ought to be allowed to withdraw a part of the claim*; *Gopal Chandra v. Benode Behary*, 64 I. C. 82.

Except where such a power is conferred by law, as for example under Or. XXIII, r. 1, C. P. Code, a Court is not competent to give a party leave to file a separate suit in respect of any relief which it does not itself grant (following 11 A. 187 and 52 I. A. 100 : 47 A. 159).—*Lakshmi v. Lakshminipathi*, (1931) M. W. N. 1009; A. I. R. 1931 Mad. 830 : 135 I. C. 718.

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Permission need not be express.—The permission mentioned in Or. XXIII, r. 1, O. P. Code, need not be express and it is sufficient if the grant of permission can be implied from the order read with the application on which the order was passed; *Banwari Lal v. Kishen Devi*, 2 L. L. J. 242: 67 I. C. 1002.

Where the Court gave permission to withdraw the suit, but did not in terms give the plaintiff liberty to bring a fresh suit, it was held that the order ought to be read along with the petition and construed as granting permission to file a fresh suit; *Khudi Rai v. Lalo Rai*, 5 P. 23: 93 I. C. 1001; A. I. R. 1926 Pat. 259.

After a suit has been referred to arbitration and a valid award has been made, it would be improper to allow withdrawal having regard to the provisions of para. 3 (2), Sec. II, C. P. Code.—*Abdul Karim v. Muhammad Husain*, 32 I. C. 347.

Form of order granting permission to withdraw.—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order must not be one dismissing the suit with liberty to bring a fresh suit, but one granting permission to withdraw with liberty to bring a fresh suit.—*Doucett v. Wise*, 1 W. R. 322. *Banwari v. Muhammad*, 9 A. 690; *Fateh Singh v. Jagannath*, 52 I. A. 100 (105): 47 A. 153 (162) (P. C.): 91 I. C. 290: A. I. R. 1925 P. C. 55: 29 C. W. N. 749. Where permission to withdraw with liberty to bring a fresh suit is refused, the Court should simply dismiss the application; *Mahant Bihardassi v. Parshotamdas*, 32 B. 345. See also *Marudachala v. Chinna*, (1931) M. W. N. 1148. In such a case the suit remains on the file of the Court and the plaintiff has the right to proceed with the suit.—*Dodraj v. Gayan Prakash*, 29 A. L. J. 966.

The order of the lower Court allowing the suit to be withdrawn with leave to file a fresh suit should be in such terms as to make it possible for the High Court to be satisfied that there was *prima facie*, at any rate, proper ground for the Court's order.—*Bansidhar v. Mt. Bitola*, A. I. R. 1931 All. 19: 132 I. C. 36.

Dismissal of suit coupled with liberty to bring a fresh suit, whether permissible.—The Courts in India do not possess the power to dismiss a suit with liberty to the plaintiff to bring a fresh suit for the same matter, *Banwari v. Muhammad*, 9 A. 690; *Sukh Lal v. Bhikhi*, 11 A. 187 (F. B.), *Fateh Singh v. Jagannath*, 52 I. A. 100: 47 A. 153 (P. C.): A. I. R. 1925 P. C. 55: 91 I. C. 290. 29 C. W. N. 749; *Watson v. Collector of Rajshahye*, 13 M. I. A. 160: 3 B. L. R. 48 (P. C.).

Right of appellant to withdraw his appeal where cross-objections have been filed.—See notes under Or. XLI, r. 22, *post*.

Order under this rule, if subject to appeal or revision.—An order under this rule permitting the withdrawal of a suit with liberty to bring fresh suit is not a decree within the meaning of S. 2, and is therefore not appealable.—*Jogindro Nath v. Sarut Sundari*, 18 C. 323; *Kalian Singh v. Lekhraj*, 6 A. 211; *Dick v. Dick*, 15 A. 163; *Jagdish Chaudhri v. Tulshi*, 16 A. 19; *Genda Mal v. Pirbhu Lal*, 17 A. 97; *Abdul Hossein v. Kasi Sahu*, 27 C. 362: 4 C. W. N. 41. But see *Ganga Ram v. Data Ram*, 8 A. 82; *Sant Ram v. Mt. Sahib Kuar*, A. I. R. 1922 Lah. 267: 65 I. C. 719. But

such an order is open to revision if it falls within S. 115 of the Code. An order under this rule is open to revision if the Court acted illegally or with material illegality in making the order; *Hiralal v. Uday*, 16 C. W. N. 1027; *Hriday v. Akshay*, 25 C. L. J. 454; *Uchant v. Basawan*, 6 P. L. J. 112: 61 I. C. 639; A. I. R. 1921 Pat. 42; *Bai Kashi Bai v. Shidapa*, 37 B. 682; *Isher Das v. Lal Singh*, 7 L. L. J. 290: 90 I. C. 632; A. I. R. 1925 Lah. 497; *Aiya v. Gopanna*, 27 M. L. J. 480: 26 I. C. 57; *Tirupati v. Mutlu*, 11 M. 322; *Dick v. Dick*, 15 A. 169. The High Court can also interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions of this rule; *Ganga v. Msst. Kishni*, 47 A. 319: 87 I. C. 175; A. I. R. 1925 All. 466; *Moti Lal v. Kali Das*, 34 C. W. N. 912: 130 I. C. 142; A. I. R. 1931 Cal. 107.

Where the trial Court gives a considered decision that there is a formal defect in the plaint and that if the plaintiff is not permitted to withdraw the suit with liberty to bring a new suit he will be denied justice, that decision cannot be challenged on revision.—*Ishar Das v. Aya Ram*, 136 I. C. 1: 33 P. L. R. 275: 13 L. 537; A. I. R. 1932 Lah. 360. Where leave was granted without assigning any reasons, the High Court will interfere in revision.—*Bainath v. Babban*, 49 A. 459: 103 I. C. 232; A. I. R. 1927 All. 522; *Kamta Singh v. Bhagwan Das*, 50 A. 199: 106 I. C. 431; A. I. R. 1928 All. 98.

No appeal lies against an order for costs passed under this rule.—*Yeshwant v. Gangadhar*, 105 I. C. 733; A. I. R. 1927 Nag. 399.

Effect of reversal of order granting leave to withdraw.—The effect of such reversal on a fresh suit filed before such reversal is to declare the fresh suit null and void and to direct the lower Court to proceed with the original suit from the stage which it had reached when the order granting leave was made by that Court.—*Nathuni Ram v. Sheo Koer*, 3 P. L. J. 460: 46 I. C. 179: (1918) P. 220.

Applicability of this rule to suits in Revenue Courts.—This rule does not apply to suits before the revenue authorities under Act X of 1859, that Act being a complete Code in itself.—*Radha Madhub v. Lukhi Narain*, 21 C. 428; *Mokunda Bullav v. Bhogaban Chunder*, 21 C. 514. See also *Doyal Chunder v. Dwarkanauth*, Marsh. Rep. 148: W. R. Sp. No. 47: 1 Hay. 347: 1 Ind. Jnr. C. S. 41; *Modhoo Soodun v. Panch Cowree*, 7 W. R. 302; *Beer Chunder v. Tarine Churn*, 11 W. R. 46; *Ramanath v. Joy Kishen*, 11 W. R. 3; *Golam Mahomed v. Shibendra*, 35 C. 990: 12 C. W. N. 893 (29 C. 532 distinguished); *Sasi Kanta v. Salim Sheikh*, 50 C. 626: 27 C. W. N. 987.

Held, that the procedure provided by Ss. 43 and 373, C. P. Code, 1882 (Or. II, r. 2 and this rule), is applicable to suits under the North-Western Provinces Rent Act, 1891.—*Madho Prakash v. Murli Manohar*, 5 A. 406 (F. B.) (9 C. 295 followed).

Applicability of this rule to execution proceedings.—This rule does not apply to applications for execution of decrees.—*Thakur Prasad v. Fakirullah*, 17 A. 106 (P. C.): 22 I. A. 44 (18 C. 635 approved; 10 A. 71 overruled; and 12 A. 179 reversed). See also *Wajihan alias Alijan v. Bishwanath*, 18 C. 462 (10 B. 62 followed; 12 A. 393 dissented from); *Radha Kishen v. Radha Pershad*, 18 C. 615 (18 C. 462 followed; 12 A.

-392 dissented from); *Lakshmi Narasimha v. Atchanna*, 15 M. 240 (12 A. 392 dissented from; 18 C. 462 and 11 B. 467 approved). From the above rulings it would appear that there was a difference of opinion between the Allahabad and the other three High Courts on this point—the former holding that S. 647, C. P. Code, 1882 (S. 141), makes this rule applicable to proceedings in execution of decrees, and the latter holding that S. 141 does not operate to extend the rule laid down in respect of a suit in this rule to an application for execution of a decree. But the matter has been set at rest by the Privy Council case *Thakur Prasad v. Fakirullah*, reported in 17 A. 106, overruling 10 A. 71, reversing 12 A. 179, and approving 18 C. 635. The Privy Council case has impliedly overruled; *Sher Singh v. Daya Ram*, 13 A. 564 and *Kishan Shahai v. Aladad Khan*, 14 A. 64.

An application to withdraw a pending proceeding for execution, with leave to institute another at some future time, is not a step in aid of execution within the meaning of Art. 182 (5) of the Limitation Act.—*Tarak Chunder v. Gyanada Sundari*, 23 C. 817; *contra* in *Ram Narain v. Bakhtu Kuar*, 16 A. 75.

This rule, read with S. 647, C. P. Code, 1882 (S. 141), applies to insolvency proceedings under the Civil Procedure Code.—*Haidar Shah v. Jamna Das*, 17 A. 156, p. 161.

**Applicability of this rule to probate proceedings**—This rule does not apply to probate proceedings, the provision in S. 55 of the Probate and Administration Act being qualified by the words "so far as the circumstances of the case will admit."—*Banwari Lal v. Kishen Devi*, 67 I. C. 1002: 2 L. L. J. 242 (40 I. C. 345; 20 C. W. N. 986 and 21 B. 335, *relied on*; 38 B. 309 *distd.*). See also *Saroda v. Gobindo*, 12 C. L. J. 91; *Gauri Mal v. Veroo Mal*, 182 I. C. 224.

"On such terms as the Court thinks fit."—A plaintiff who is permitted to withdraw from his suit must pay the defendant's costs.—*Doucett v. Wise*, 1 W. R. 322; *Khimchand v. Bhogilal*, 47 B. 559; 72 I. C. 324: A. I. R. 1923 Bom. 206. Ordinarily the order giving an indulgence to the plaintiff to withdraw from the suit should *prima facie* and in the absence of special circumstances make it a condition that the plaintiff should pay the defendant's costs.—*Somasundaram v. Muthumanicka*, 139 I. C. 167: A. I. R. 1932 Mad. 714. The order should declare that the case has been and stands withdrawn and, as the Court sees fit, that permission is given to the plaintiff to file a fresh suit, either unconditionally or on such terms as the Court sees fit and if the terms are imposed for payment of costs a date should be fixed for such payment, and it is desirable in the interest of the defendants already once harassed, though not necessary, that an early date for the payment should be fixed (*not following* 31 C. 965; 14 C. L. J. 105; 19 C. L. J. 529).—*Rachhpal v. Sheo Ratan*, 118 I. C. 584: A. I. R. 1929 All 692.

It has been held by the High Court of Madras that where leave to bring a fresh suit is granted to the plaintiff on payment of the defendant's costs on or before a specified date, but no payment is made on or before that date, the plaintiff is precluded from bringing a fresh suit and if such suit is brought, it should stand dismissed.—*Fisher v. Nagappa*, 33 M. 258. The same High Court in another case has held that where leave to bring a fresh suit is given on payment of the defendant's costs but no time is specified within which the payment is to be made, the plaintiff is similarly precluded.



from bringing a second suit unless the costs are paid before the institution of the second suit.—*Seshayya v. Subbaya*, 47 M. L. J. 646: 82 I. C. 499: A. I. R. 1924 Mad. 877. This case has been followed by the Bombay High Court in *Shidramappa v. Mallappa*, 55 B. 206: 33 Bom. L. R. 278: 133 I. C. 256: A. I. R. 1931 Bom. 257 (dissenting from 31 C. 965, 19 C. L. J. 529, 5 P. 306 and relying on A. I. R. 1929 All. 692). The Calcutta High Court in *Abdul Aziz v. Ebrahim* 31 C. 965, held that though payment of defendant's costs was a condition precedent to the institution of a second suit, non-payment of such costs before the institution of the second suit, did not render the suit *ab initio* void. The same High Court in *Shital Prosad v. Gaya Prosad*, 19 C. L. J. 529: 23 I. C. 210, took the same view and held that where leave to withdraw a suit with liberty to bring a fresh suit, was given on payment of the defendant's costs within a fixed time, the non-payment of the costs within that time, did not operate as a dismissal of the suit or as a bar to the institution of a fresh suit, unless the order granting leave had itself provided that, on such non-payment, the suit should stand dismissed. It was also held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and it must therefore be deemed to be a pending suit which would become disposed of as soon as payment was made. The same view has been taken in *Deb Kumar v. Debnath*, 64 I. C. 738. The Patna High Court in *Syed Quazi v. Lachman Singh*, 5 P. 306: 96 I. C. 942: A. I. R. 1926 Pat. 409, in *Kuldip v. Kuldip*, 3 P. L. J. 63: 44 I. C. 79, and in *Din Dayal v. Indra Dan*, 95 I. C. 875: A. I. R. 1926 Pat. 472, has followed the Calcutta High Court decisions. When the plaintiff obtains permission to withdraw from the suit with liberty to bring a fresh suit on condition of paying the costs before instituting fresh suit, the suit does not remain pending until the costs are paid, nor can a fresh suit be dismissed under Or. XXIII, r. 1. Failure to pay costs before instituting a fresh suit is only an irregularity and the fresh suit should not be dismissed if the payment is made after its institution (following 31 C. 965 and dissenting from A. I. R. 1926 Pat. 409 and A. I. R. 1924 Mad. 877).—*Narsingh v. Nathuji*, 25 N. L. R. 171: 118 I. C. 54: A. I. R. 1929 Nag. 135.

The first suit of the plaintiff was allowed to be withdrawn on condition of paying the defendant's costs. He then brought a second suit without paying the costs and again a similar order made permitting him to withdraw on condition of paying the costs. Sometime later the plaintiff paid the costs of the first suit and brought a third suit on the same cause of action: *Held*, (1) the payment of the costs before the institution of the third suit and after the withdrawal of the second suit did not fulfil the condition imposed by the order in the first suit; (2) the second suit was therefore incompetent; (3) the permission granted in the original suit would only extend to the filing of one fresh suit and not the filing of any number of fresh suits which might be dismissed in turn for failure to pay costs; (4) the present suit was not therefore maintainable (relying on 27 Bom. L. R. 243).—*Shidramappa v. Mallappa*, 55 B. 206: 33 Bom. L. R. 278: 133 I. C. 256: A. I. R. 1931 Bom. 257.

The only case in which a Court may, under this rule, impose any condition upon a plaintiff who seeks to withdraw, is where that plaintiff asks the Court for permission, not only to withdraw, but also for liberty to

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bring a fresh suit for the same subject-matter. But where he asks leave to withdraw without permission to bring a fresh suit, the Court cannot make the payment of costs a condition precedent to the granting of such permission.—*Haidar Shah v. Jamna Das*, 17 A. 156 (161). See *Syed Ali v. Adil*, 15 B. 160.

The High Court has no power under the Civil Procedure Code to award costs to the defendant where the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter.—*Brass v. Tiruvengada*, 1 M. H. C. R. 247 (dissented from in 1 B. L. R. O. C. 45).

Effect of withdrawal or abandonment of claim with or without permission to bring fresh suit.—Permission to bring a fresh suit under Or. XXIII, r. 1, must be given in express terms and cannot be implied.—*Jitu Singh v. Hari Singh*, 97 P. R. 1916 (21 C. 265; 4 C. W. N. 110 distinguished). But see *Banwari Lal v. Kishen Devi*, 67 I. C. 1002; 2 L. L. J. 242. In the absence of permission to bring a fresh suit, Or. XXIII, r. (1), sub-rule (3), precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn.—*Aswini Kumar v. Saroda Charan*, 24 C. L. J. 79; *Maung Mu v. Maung Kan*, 1 B. 618; A. I. R. 1924 Rang. 127. The rule enacted in Or. XXIII, r. 1 is a statutory recognition of a legal principle barring the fresh institution of a claim unless certain conditions were fulfilled, and the rule is imperative.—*Rangacharya v. Revti Raman*, A. I. R. 1928 All. 689; 27 A. L. J. 229; 114 I. C. 734. The rule does not bar a suit already instituted before the other suit has been abandoned or dismissed.—*Mang Lal v. Radha Mohan*, 129 I. C. 215; A. I. R. 1930 Lah. 599.

It is necessary to establish the identity of the parties and the identity of the causes of action before a suit can be a bar under this rule.—*Rangacharya v. Revti Raman*, A. I. R. 1928 All. 689; 27 A. L. J. 229; 114 I. C. 734. The real test for determining whether a suit is barred, is whether the cause of action or transaction on which the two suits are based is the same and not whether the transaction is sought to be established in different modes or by different means. Where the cause of action for recovery of immovable property against the defendant was that he was a trustee in the first suit and the cause of action for recovery of the same property was that defendant was a trespasser in the second suit, the subject-matter and claim in the two suits are different and withdrawal of the former will not bar the latter suit.—*Narayanaswami v. Mannar*, 30 L. W. 562; A. I. R. 1929 Mad. 798. Where the suit was premature, as a suit under S. 77 of the Registration Act before a final order was passed by the Registrar, a fresh suit filed after the refusal of the Registrar was not barred by this rule even though permission to withdraw had not been obtained.—*Karam Singh v. Sardar Singh*, 134 I. C. 482; A. I. R. 1932 Lah. 139.

Where a plaintiff brought a suit for partition of joint property from which he withdrew with . . . . .  
being dispossessed from . . . . .  
of joint-possession of the . . . . .  
by this rule. The mere fact of two suits being in respect of the same property would not be sufficient to make the latter suit one for the same matter as the former, when the state of facts leading to the two suits and the

reliefs claimed under them are different.—*Gopal Chandra v. Purna Chandra*, 4 O. W. N. 110 (*Juggobundo v. Watson & Co.*, Bourke Rep Part VII A. O. C. 162, *doubted*). Section 97 of Act VIII of 1859 (this rule) only applied to cases where the plaintiff withdraws from the suit without the consent of the defendant.—*Juggobundo v. Watson & Co.*, Bourke, 162. See also *Kamini v. Ram Nath*, 21 C. 265.

In a suit for ejectment on the ground that the defendant was a trespasser and had no right whatever to the land, the defendant raised the defence that he had a tenancy right in the land and could not be ejected. The suit was withdrawn without liberty to bring a fresh suit in respect of the same subject-matter. *Held*, that Or. XXIII, r. 1 did not operate as a bar to a subsequent suit for possession in which tenancy of the defendant had been determined by service of notice to quit, *Abdulla v. Akhil Chandra*, 59 I. C. 84.

A suit for ejectment was withdrawn without obtaining leave to file a fresh suit, for want of notice to quit. A fresh suit was filed after giving notice to quit. *Held* that the suit was not barred under this rule. The series of acts or transactions which formed the basis of the former suit was incomplete because there was no notice to quit. The second series of acts or transactions is complete, because notice to quit was given and therefore the subject-matter of the two suits was not the same—*Chenchuram v. Mahomed Bahavuddin*, 63 M. L. J. 446 : (1932) M. W. N. 955.

The plaintiffs sued the defendant upon a balance order dated 24th February 1882 to recover a certain sum of money. They had previously sued the defendant to recover the said sum of money, but that suit was based upon a call order dated 11th November 1880, and they were permitted to withdraw it with liberty to bring a fresh suit on the same cause of action. *Held*, that the plaintiffs were not precluded from bringing the second suit upon the balance order.—*London, Bombay and Mediterranean Bank v. Burjorji Sorabji*, 9 B. 346.

An unsuccessful claimant brought a regular suit against a decree-holder, who then released the property from attachment and the plaintiff withdrew his suit. The same property was afterwards attached and sold in execution of the same decree. *Held*, that the subsequent suit for possession of the property against the auction-purchaser was not barred by this rule.—*Mukhoda Soondury v. Ram Churan*, 8 C. 871 (11 M. L. A. 7 cited).

A sued B and C claiming certain property as his private property. Pending this suit he sued B for an injunction directing B to close certain doors in the property claimed in the first suit—the first suit was withdrawn. It was contended that the second suit was barred: *Held*, that the suit did not come within the provisions of this rule.—*Rama Mal v. Upendra*, 110 I. C. 818 : A. I. R. 1923 Lah. 710.

A Court after reference to arbitration cannot, pending the reference, grant permission to withdraw the suit with liberty to bring a fresh suit for the same matter. Permission thus given to a plaintiff to withdraw, with liberty to bring fresh suit, is *ultra vires*, and does not save the fresh suit from being barred by this rule.—*Sheoambar v. Doodat*, 9 A. 168.

The dismissal of the former suit "in the form it was brought" does not amount to permission to sue again as contemplated by this rule and such dismissal must be regarded as a "decision" thereof in the sense of

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S. 13, Explanation iii, C. P. Code, 1882 (S. 11), and therefore as a bar to the fresh suit.—*Ganesh v. Kalka Prasad*, 5 A. 595; *Muhammad Salim v. Nabian Bibi*, 8 A. 292; *Kudrat v. Dinu*, 9 A. 155; *Banucari Das v. Muhammad Mashiat*, 9 A. 690 (3 B. L. R. 48 (P. C.) : 13 M. I. A. 160 referred to).

After a suit has been tried and dismissed on the merits the plaintiff cannot be permitted to start the proceedings all over again against the successful defendants merely because there was also a formal defect in the frame of the suit, and the Court cannot pass an order under Or. XXIII, r. 1.—*Ram Soran v. Radha Raman*, 55 C. 1067 : 113 I. C. 847 : A. I. R. 1929 Cal. 88.

A suit for possession was wholly dismissed on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of it, the decree containing a clause that a fresh suit might be brought for a one-third share. Subsequently the plaintiff brought another suit for possession of the one-third share. *Held*, that the Court in the former suit had no power to include in its decree any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect.—*Sukh Lal v. Bhikht*, 11 A. 187 (F. B.) (5 A. 595, 8 A. 292, and 9 A. 155 explained).

In a suit for partition both the parties having arrived at a compromise, filed a joint petition praying that the suit might be struck off, the terms of the compromise were however not inserted in the decree and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property. *Held*, that the suit was barred by this rule.—*Gulkandi Lal v. Manni Lal*, 23 A. 219.

Where the former suit was withdrawn with permission to bring a fresh suit, the subsequent suit is not barred.—*Kunhan v. Sankara*, 14 M. 78, p. 80.

A redemption suit was dismissed for want of necessary parties. In the appellate Court, the plaintiff put in a petition saying that he did not wish to prosecute his "appeal or claim," the other side having given up his costs. The plaintiff then brought a second suit to redeem. *Held*, that the suit was barred by the last para. of this rule, the consideration for withdrawal being that the respondents gave up their costs.—*Ram Prasad v. Dungan Singh*, 4 A. L. J. 201 : (1907) A. W. N. 91.

Where in a suit for partition, a defendant has, by concession of the plaintiff, acquired rights, which otherwise, could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect, by withdrawing the suit in the appellate Court. Sections 373 (Or. XXIII, r. 1) and 582 (Or. XXII, r. 11), C. P. Code, 1882, do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by the plaintiff's withdrawal of the entire suit of his own free will and without the permission of the Court.—*Satyabhamabai v. Ganesh Balkrishna*, 29 B. 13 : 6 Bom. L. R. 533.

A *shebait* sued the other manager of a Hindu religious endowment as representing the idol. Part of the claim was withdrawn. There was no fraud in the withdrawal. Subsequently another *shebait* sued a third one in respect of the same claim as representative of the idol. *Held*, that the suit was barred.—*Rangacharya v. Retti Raman*, A. I. R. 1928 All. 689 : 27 A. L. J. 229 : 114 I. O. 734.

Where the earlier suit was withdrawn without permission to bring a fresh suit, it is not open to the plaintiff to evade the provisions of r. 1 by instituting a fresh suit after joining his brother as co-plaintiff.—*Farhat v. Kamaruddin*, 15 R. D. 598.

"In respect of such subject-matter."—The expression used in the corresponding S. 373 of the old Code, was "matter." Section 373 of the Code of 1882 was interpreted in two different phases by the Courts. In the cases of *Kaminu Kanta v. Ram Nath*, 21 C. 265 and *Gopal Chandra v. Purna Chandra*, 4 C. W. N. 110, the Calcutta High Court expressed the view that the word "matter" used in S. 373 did not mean the property concerned in the suit that it had reference to the right in that property which the plaintiff was seeking to enforce in that suit. A very different view was taken by the Madras High Court in the case of *Achuta Menon v. Achutan Nayar*, 21 M. 35. In that case, the learned Judges referring to Anderson's Dictionary of Law held that the term "matter" in a context like that in S. 373 means, "the subject of legal action, consideration, complaint or defence or the fact or facts constituting the whole or a part of a ground of action or defence." The logical result of accepting this definition was that even though the plaintiff's suit had been dismissed by reason of the fact that he had failed to comply with the condition under which liberty was reserved to him for the institution of a fresh suit when he was allowed to withdraw the same even though the plaintiff instituted a fresh suit upon a different cause of action or upon a different title—subsequently acquired the fresh suit would have to be held to be not maintainable. Indeed, in that case, what happened was that the plaintiff had tried to eject the defendant in the earlier suit upon a title derived in the year 1880 and subsequent to the dismissal of that suit under the aforesaid circumstances he derived a fresh title in 1892 and it was held that the fresh suit which was being litigated upon the title subsequently acquired was barred by reason of the dismissal of the previous suit. This view of the Madras High Court was adhered to in several decisions of that Court amongst which reference may be made to the cases of *Machana Ujjhala Dikshatulu v. Gorugantulu*, (1910) M.W.N. 782 and *Sennava v. Venkatachala*, (1915) M.L.W. 177. Subsequently, however, there was a reference to a Full Bench in the year 1916 and the Full Bench in the case of *Singa Reddi v. Subba Reddi*, 39 M. 987: 35 I. C. 185, overruled the decision in the case of *Achuta Menon v. Achutan Nayar*, 21 M. 35, and the other cases which had followed it and agreeing with the view taken by the Calcutta High Court in the case of *Gopal Chandra v. Purna Chandra*, 4 C. W. N. 110 held that "without attempting an exhaustive definition of all that may be included in the term "subject-matter", it should be held that "where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit within the meaning of Or. XXIII, r. 1, sub-rule (3) of the Code of Civil Procedure." There are two other decisions, one of the Madras High Court and other of the Bombay High Court to which reference is also necessary. In the Madras High Court in the case of *Chenchuram Naidu v. Baharuddin Sahib*, 56 M. 163, the facts were that the plaintiff as landlord had instituted a suit in ejectment against a tenant but the suit was allowed to be withdrawn on the ground that there was absence of the

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requisite notice to quit but no liberty was reserved to the plaintiff to institute a fresh suit and thereafter the plaintiff instituted another suit after having given the necessary notice. It was held in that case that the second suit was not a suit in respect of the same subject-matter, because the words "subject-matter" in Or. XXIII, r. 1 mean "the series of acts or transactions alleged to exist giving rise to the relief claimed." The learned Judges purported to follow the decision of the Bombay High Court in the case of *Rakhmabai v. Mahadeo Narayan*, 42 B. 155. In the case last mentioned, Scott, C. J., has explained the meaning of the words "subject-matter" in these words: "The question is whether the previous suit was a suit for the same subject-matter within the meaning of Or. XXIII, r. 1. We are of opinion that "subject-matter" means, to use the words of Or. I, r. 1, the series of acts or transactions-alleged to exist giving rise to the relief claimed". Obviously, the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same "subject-matter". It may be pointed out that the case of *Rakhmabai v. Mahadeo Narayan*, 42 B. 155 also was a case in which the first suit was withdrawn upon the ground that the notice which had been served was defective and, therefore, the cause of action was incomplete. See also *Narayanaswami v. Mannar*, 30 L. W. 562; A. I. R. 1929 Mad. 798. A contrary view was taken by the Punjab Chief Court in *Jita Singh v. Hari Singh*, 97 P. R. 1916; 37 I. C. 128.

The word "subject-matter" used in this rule is not to be identified with the "property" in the suit. It means the cause of action for a claim. A suit on a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court; *Putto Khan v. Ahmad Zaman Khan*, 74 I. C. 56. The subject-matter of a suit for ejectment of a year-to-year tenant with effect from a certain year is not the same as his ejectment with effect from a subsequent year. Or. XXIII, r. 1 (3) can bar only a second suit for ejectment instituted after the withdrawal of the first if the object of both suits is to eject the tenant with effect from the same year.—*Bhullan v. Dasrath*, 113 I. C. 748; A. I. R. 1929 All. 67. "Subject-matter" is equivalent to the phrase "cause of action."—*Shadi Ram v. Amir Chand*, 12 L. L. J. 203; 130 I. C. 513; A. I. R. 1930 Lah. 937.

Where, in a prior suit, the plaintiffs sued for a declaration of title to a war-bond without any consequential relief, which suit was withdrawn without leave to bring a new suit, held, that Or. XXIII, r. 1 (3), barred a new suit brought for the consequential relief of recovery of the war-bond or its value.—*Maung Mu v. Maung Kan*, 1 R. 618; A. I. R. 1924 Rang. 127.

Sub-rule (3)—Its applicability to an application.—This sub-rule is intended to apply to a case where a suit or part of a suit or claim is withdrawn, but it does not in terms apply to an application for final decree. What is thereby barred is a fresh suit, not a fresh application (*following* A. I. R. 1924 Mad. 473). So where an application for ascertaining mesne profits after passing of the preliminary decree is withdrawn without leave of the Court, a fresh application is not barred.—*Latchayya v. Suryaprakasa*, A. I. R. 1928 Mad. 1165; 115 I. C. 825. Where a Receiver applied to be

made a party defendant in a suit against the person whom he represented but withdrew the application on coming to know that the suit had been decreed *ex parte*, and subsequently filed a fresh application praying that the case might be re-opened and he might be made a defendant, and his application was rejected; held, that Or. XXIII, r. 1 did not apply and that under the peculiar circumstances of the case S. 151 applied and the application should be allowed.—*U. E. Maung v. P. A. R. P. Chettyar*, 6 R. 494: A. I. R. 1928 Rang. 273 · 113 I. C. 811.

Under sub-rule (3) the plaintiff is bound to pay the costs fixed by the Court. The rule that costs ordinarily follow the event has no application to such a case.—*Yeshwant v. Gangadhar*, 105 I. C. 733: A. I. R. 1927 Nag. 399.

**Sub-rule (4)—Withdrawal by no-plaintiffs.**—Sub-rule (4) provides that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

One of several plaintiffs cannot withdraw from the suit without the consent of the others. Where the Court in contravention of this sub-rule allows two out of four plaintiffs to withdraw from a suit without the consent of the other two, it acts without jurisdiction, and a second suit in respect of the same subject-matter is barred.—*Musst. Ram Dei v. Musst. Bahu Ram*, 1 P. 228: A. I. R. 1922 Pat 469.

Where there are two plaintiffs of whom the second plaintiff is a minor represented by the first plaintiff as guardian, the first plaintiff cannot withdraw the suit.—*Upputuri v. Lingayya*, 107 I. O. 431: A. I. R. 1923 Mad. 496.

**Notice.**—An order under this rule without notice to the opposite party is bad.—*Rajendra v. Atal*, 25 C. L. J. 456: 44 C. 454.

**Withdrawal of suit by next friend of minor.**—When a suit is fraudulently withdrawn by the next friend of a minor plaintiff, without leave to bring a fresh suit, it is open to the minor to relieve himself from the consequences of fraud in one of the three ways, viz. (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.—*Eshan Chandra v. Nundamoni*, 10 C. 357. In *Ram Sarup v. Shah Latafat Hossein*, 29 C. 735, the withdrawal of a suit by the next friend was treated as gross negligence. A withdrawal of a suit by the next friend of a minor in pursuance of an agreement or compromise entered into with the defendant without the leave of the Court, is voidable at the instance of the minor, under Or. XXXII, r. 7.—*Doraswami v. Thungasami*, 27 M. 377: 14 M. L. J. 159.

**Power of Court of Small Causes to allow withdrawal.**—The Court of Small Causes at Calcutta has jurisdiction to pass an order under this rule after granting a new trial.—*Jadu Mani v. Ram Kumar*, 29 C. 239; but the Judge of a Small Cause Court cannot allow withdrawal without recording reasons.—*Luchi v. Raghubir*, 2 P. L. J. 682. But in *Fule & Co. v. Mahomed Hossain*, 24 C. 129, it has been held that the Small Cause Court Judge after receiving the judgment of the High Court on a reference, had no jurisdiction to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit, but was bound to enter judgment according to the decision of the High Court.

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. [S. 374.]

Limitation law not affected by first suit.

# COMMENTARY.

**Alterations.**—This rule corresponds to S. 374, C. P. Code, 1882, with this modification that the word "*instituted*" has been substituted for the word "*brought*" which occurred in the old section.

**Limitation.**—When a suit is withdrawn under Or. XXIII, r. 1 with permission to bring a fresh suit, the effect of this rule is, that limitation is to apply to the second suit, as if it was the first. *Held* also, that section 14 of the Limitation Act does not apply to such a case—*Varajlal v. Shomeshwar*, 29 B. 219; 7 Bom. L. R. 90 (12 B. 625, *followed*). Where leave to withdraw was granted erroneously by a Court which had no jurisdiction to entertain the suit, the case will be governed not by the provisions of this rule but by those of S. 14 of the Limitation Act, and the term during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit; *Ramdeo v. Gonesh*, 35 C 924; 12 C. W. N. 921.

The effect of withdrawal of a suit with permission to bring a fresh suit, is to leave the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained permission under S. 373, C. P. Code, 1882 (Or. XXIII, r. 1), will not be debarred by S. 43, C. P. Code, 1882 (Or. II, r. 2), from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw.—*Behari Lal v. Baran Mai Dasi*, 17 A. 53. See also *Venkata Shetti v. Ranga Nayak*, 10 M. 160 (*followed* in *Syed Hassen Ali v. Hari Nath*, 1 C. L. J. 29-n; *Ilahi Baksh v. Imam Baksh*, 1 A. 324; *Mulchand v. Bhikari*, 7 A. 624; and *Sabhapathi v. Lakshmu*, 24 M. 293).

**Execution proceedings.**—The rule laid down in this rule does not apply to applications for executions.—*Tara Chand Meg Raj v. Kashinath*, 10 B. 62; *Thakur Prasad v. Fakirullah*, 17 A. 106 (P. C.); 22 I. A. 44 (10 A. 71 *overruled*; 12 A. 179 *reversed*; and 18 C. 635 *approved*); see *Eshan Chunder v. Prannath*, 22 W. R. 512. But see *Pirjade v. Pirjade*, 6 B. 681. See also notes under Or. XXIII, r. 1.

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The effect of withdrawal of an appeal under a compromise estops the parties with regard to the points raised in the lower Court's decision.—*Vythilinga v. Vijayathammal*, 6 M. 43.



**3.** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. [S 375.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 375, C. P. Code, 1882, with some alterations and omissions.

The words "*where it is proved to the satisfaction of the Court that a suit has been adjusted*" have been substituted for the words "if a suit be adjusted," which occurred in the old section. The words "the Court shall order" have been added and the words "*and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction*" which occurred in the concluding part of the old section, have been omitted, having regard to Cl. (3) of S. 96, which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. But on account of the omission of the words "*such decree shall be final*," a review of a consent decree may be granted. Under the old law, review was prohibited (see *Purmessuree v. Romeezooddeen*, 5 W. R. 226).

"The committee have considered it expedient to alter the language of S. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise."—*See the Report of the Special Committee.*

"Has been adjusted wholly or in part."—An adjustment which is not *bona fide* and on the basis of which the Court was not asked to record satisfaction and pass a decree in accordance therewith does not comply with the provisions of Or. XXIII, r. 3; *Seth Kevaldas v. Saker Lal Bulakhidas*, 28 C. W. N. 930 (P. C.); 79 I. C. 452 · 45 M. L. J. 763; 33 M. L. T. 424. Any part of the suit may be adjusted.—*Mahomed Shah v. Ghulam*, 123 I. C. 693; A. I. R. 1930 Sind 217.

"By any lawful agreement or compromise."—The language of this rule is wide and general and does not preclude parties from settling their disputes on such lawful terms as they might agree to, without being restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money, where the plaint prays for a simple money decree, an agreement by which the parties agreed that the decretal amount should be a charge on certain properties, is lawful and "relates to the suit," so as to be embodied in the decree—*Joti Kuruvetappa v. Izari Sirusappa*, 30 M. 478. In a suit for money based on simple money bonds, a compromise was arrived at between the parties that in lieu of the amount of the claim and plaintiff's costs and interests, the defendant should execute a sale deed in plaintiff's favour in respect of certain fields free from all incumbrances on a certain date and deliver possession of the same on a certain date. The plaintiff applied for the execution of the compromise decree. *Held*, that the compromise decree was not *ultra vires* or void or merely

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declaratory in nature, that it was executable and that it was not necessary for the plaintiff (decree-holder) to institute a separate suit for the relief granted by the said decree.—*Ramkrishna v. Laxminarayan*, 25 N. L. R. 110 : 116 I. C. 651 : A. I. R. 1929 Nag. 164 Where in a money-suit the plaintiff prayed for relief against the joint family assets in the hands of the sons of the executants but by the terms of a compromise embodied in the decree the plaintiff got personal relief against the sons held, that the validity of such a compromise cannot be questioned on the execution side.—*Gorinda v. Murugesu*, 138 I. C. 786 : (1932) M. W. N. 623 : A. I. R. 1932 Mad. 557.

The word "lawful" does not merely mean binding or enforceable. The word refers to agreements which in their very terms or nature are not unlawful and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about by coercion, undue influence or fraud.—*Qadri Jahan Begam v. Fazal Ahmad*, 50 A. 748 : 110 I. C. 573 : 26 A. L. J. 691 : A. I. R. 1928 All. 494. See also *Lalaiti v. Shyam Sundar*, 30 A. L. J. 509 : A. I. R. 1932 All. 478 : 141 I. C. 653. Where the agreement of compromise was duly verified by an officer of the Court, but before the compromise decree was passed, the appellant died and his heirs were brought on record : held, that the Court was bound to pass a decree under Or. XXIII, r 3 in the absence of any evidence that the compromise was unlawful. Held also that the relinquishment by the appellant was not rendered unlawful by the doctrine of Mahomedan law that it was done during *marz-ul-maut*.—*Ibid.* Where no injustice of any kind is established and it is established that a suit has been adjusted either wholly or in part by a lawful compromise, it is the duty of the Court to record the agreement and pass a decree in accordance therewith. *Quere*, whether notwithstanding the words of Or. XXIII, r 3, the Courts retain an inherent power not to allow the proceedings to be used to work a substantial injustice.—*Sourendra v. Tarubala*, 57 I. A. 133 : 57 C. 1311 : 34 O. W. N. 453 : 51 C. L. J. 309 : 32 Bom. L. R. 645 : 31 L. W. 803 : 58 M. L. J. 551 : 11 P. L. T. 461 : 28 A. L. J. 489 : 31 P. L. R. 884 : 123 I. C. 545 : A. I. R. 1930 P. C. 158. Where a preliminary decree in a mortgage-suit directs payment of money into Court, a payment out of Court to the decree-holder cannot be recognised either by virtue of Or. XXI, r. 2 or Or. XXIII, r. 3. The Court is bound to pass a final decree for sale.—*Durga Devi v. Nand Lal*, 136 I. C. 732 : 33 P. L. R. 138 : A. I. R. 1932 Lab. 231.

In a suit for a mere declaration the Court can pass a decree in terms of the compromise entered into by the parties by which one of them is to pay a certain sum of money to the other.—*Narain Das v. Kalyanji*, 24 N. L. R. 55 : 107 I. C. 525 : A. I. R. 1928 Nag. 173.

A Hindu father has full authority to act on behalf of his adopted son and to enter into a compromise in a suit on mortgage of joint-family property so as to bind the son to the compromise in respect of the son's interest in the property; *Saiyid Mehdi v. Chaudhri Ghansham*, A. I. R. 1927 P. C. 204 : 104 I. C. 375 : 27 L. W. 540 : 46 C. L. J. 209 : 32 C. W. N. 93.

A compromise signed by a pleader who was not specially authorized for the purpose is bad and a decree in accordance with it should be set aside.—*Basan Gowda v. Churchigirigowda*, 34 B. 408.

Where the parties to a suit themselves effect a compromise and the fact of the compromise is conveyed to the Court by means of a petition presented by the pleaders appearing on both sides, it is not open to the parties to question the compromise on the ground that the pleaders had no authority to compromise.—*Pambayam Chetty v. Kandaswami*, 12 L. W. 562: 60 I. C. 22.

It is incumbent on a Court to pass a decree in terms of a compromise, only if the same is lawful, i.e. enforceable in law. One test to apply is, were the parties competent to enter into the agreement in order to achieve the purpose they had in view. When after a mortgage-decree to which the puisne mortgagee was a party, the mortgagee and the prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be "lawful".—*Malchand Boid v. Osman Ali*, 38 C. L. J. 272.

The Court has no jurisdiction, under this rule, to pass a decree on a compromise, unless it is a lawful compromise. Any terms of a contract which are opposed to public policy, are invalid and will, therefore, not be enforced by the Courts and so far as a decree embodies unlawful terms of a compromise, it is inoperative and will not be enforced.—*Lakshmanaswami v. Rangamma*, 26 M 31 (24 M. 265 referred to). No option is left to a Court to examine the terms of a compromise beyond seeing whether the agreement is lawful or not. An agreement which carries a penal clause such as may be covered by S 74 of the Contract Act, is not in any sense of the term "unlawful" and hence it must be recorded and a decree passed in terms thereof; *Kishen Prasad v. Kunj Behari*, 24 A. L. J. 210: 91 I. C. 790: A. I. R. 1926 All. 278.

The legality of a provision for ejectment is to be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not in such circumstances, assist the decree-holder to achieve his illegal purposes in defiance of express statutory prohibition. The circumstance, that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether on equitable grounds, relief could have been granted against forfeiture if it had been called to enforce the agreement itself.—*Gopal Krishna v. Hari Nath*, 34 C. L. J. 157.

Although under Or. XXIII, r. 3 it is obligatory on the Court to pass a decree in terms of the compromise after it has been recorded, it is not essential that the passing of the decree should be simultaneous with the recording of the compromise and there is nothing in the rule to prevent a Court from postponing the passing of a decree in a proper case.—*Abhaynand v. Rameshwar*, 9 P. 314: 125 I. C. 521: A. I. R. 1930 Pat. 395: 12 P. L. T. 46.

A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule.—*Sakli v. Ram Kishun*, 55 I. C. 504. The presumption is that the Court followed the procedure in recording a compromise.—*Mahbub v. Munshi*, 32 P. L. R. 761.

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent.—*Asan Pandey v. Rajmon Misser*, 52 I. C. 105.

On an application to record an agreement, under Or. XXIII, r. 3, C. P. Code, the Court has power to go behind the transaction and to enquire whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor.—*Goturam Radhakison v. Barku*, 24 Bom. L. R. 89; 46 B. 560. The Court has jurisdiction to consider whether the award is legal and enforceable (45 B. 245, 51 B. 908 followed). Thus if the arbitrators entered upon a consideration of the matters when they had no jurisdiction to do so (*e. g.*, contracts not in the form sanctioned by the Bombay Cotton Contracts Act) it cannot be said that the suit has been adjusted by a lawful compromise and the award cannot be recorded under this rule.—*Babubhai v. Madhavji*, 65 B. 503; 134 I. C. 705; 33 Bom. L. R. 759; A. I. R. 1931 Bom 343. The Court has power to, and should, enquire whether the agreement of compromise which is not signed by all the parties, is binding on all the parties when certain communications are relied upon to show that all the parties in fact intended to abide by it; such an enquiry is not barred by S. 23 of the Evidence Act.—*Joint Hindu family of Sadhu Ram v. Botha Ram*, 11 L. L. J. 446.

The plaintiff undertook to abide by the statement of a particular person and closed his case. The person was examined on solemn affirmation but denied any knowledge of the case, and the plaintiff's suit was dismissed. *Held*, the proceedings were tantamount to a compromise of the suit; *Chet Ram v. Bhup Singh*, A. I. R. 1927 Lah 99; 98 I. C. 864.

Statement that the parties would accept terms stated by a particular third person does not come within the purview of rule 3, it being not to the effect that the parties had come to certain terms regarding the subject-matter of the suit but being . . . . . by one third person.—

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608; A. I. R. 1927 All. 614. There is a striking difference between the phraseology of Or. XXIII, r. 3 and para. 1 of Sch. II. The former clearly and very strikingly deals with an agreement which has been arrived at, while the main agreement to be arrived at . . . . . ment which is to be arrived at in . . . . . by the decision of the pleaders a

Court gave a decree accordingly: *held* that the agreement did not amount to an adjustment of the suit but was a mere reference to arbitration, the statement of the pleaders was an award and the Court was bound to give 10 days time to file objections under Cl. (1) of para. 16 of Sch. II.—*Ibid*. An agreement between the parties that they should be bound by the statement of a third party might be valid under S. 23 of the Contract Act, but it was open to a party to resile from the agreement before the referee has made his statement.—*Bishambhar v. Radha*, 29 A. L. J. 393; 133 I. C. 29; A. I. R. 1931 All. 557; *Basdeo v. Ram Raj*, 137 I. C. 263; 30 A. L. J. 71; A. I. R. 1932 All. 166.

An agreement between the parties to a suit that it should abide and follow the result of another suit between the same parties is a valid and binding agreement. As soon as a decision is given in the second suit, there

is a lawful adjustment of the first suit within the meaning of Or. XXIII, r. 3.—*Sreenivasa Chariar v. Kumara Thattha Chariar*, (1918) M. W. N. 746 (37 M. 408 *distd.*). The pleader of both the parties applied for adjournment of the case stating that the parties had agreed to abide by the decision of the High Court in another suit and the adjournment was granted; *Held*, that the application by the pleaders was only one for adjournment stating certain reasons and so the order of adjournment would not amount to an order recording a compromise.—*Venkatarayudu v. Venkata Kumara*, 120 I. C. 742: A. I. R. 1929 Mad. 416. A joint petition by both the parties to a suit requesting the Court to adjourn the case for enabling the parties to arrive at the terms of a contemplated settlement is not by itself a compromise when nothing further was done by the parties in furtherance of their original intention. A decree based on the original petition itself as if it were a compromise is without jurisdiction.—*Haridas v. Ramdas*, 34 C. W. N. 1068: A. I. R. 1931 Cal 205 131 I. C. 257.

Where the claim is beyond the jurisdiction of the trial Court, it is not competent to the Court to pass a compromise decree; *Gorindaswami v. Kalia-perumal*, (1922) M. W. N. 83 66 I. C. 837.

The plaintiff (respondent) after obtaining a decree in the first Court compromised the suit in the appellate Court and asked that a decree should be made in favour of the defendants (appellants). *Held*, that the High Court on an application to make a decree in accordance with the compromise, had acted properly in adding as plaintiffs, members of the temple community who opposed the application, and in refusing the application on the ground that the compromise was a breach of trust on the part of the respondent and therefore unlawful under Or. XXIII, r. 3.—*Sankaralinga v. Rajeswara Dorai*, 35 I. A. 176. 31 M. 236 (P. C.): 8 C. L. J. 230: 12 C. W. N. 946: 10 Bom. L. R. 781. An agreement by which a Mahant agrees to transfer the property of the mutt for no necessary purpose is not a lawful agreement which can be enforced under this rule.—*Anandilal v. Jagannath*, 106 I. C. 645: 9 P. L. T. 214. A compromise in a suit relating to a public trust cannot be said to be "lawful" if it sacrifices the interests of the trust.—*Narayanaswami v. President of the Board of Commissioners, etc.*, 53 M. 398: 31 L. W. 442: 58 M. L. J. 410: 124 I. C. 602: (1930) M. W. N. 243: A. I. R. 1930 Mad. 629.

Agreement that a suit may be decided in a manner different from that prescribed by law is void.—*Raja of Venkatagiri v. Chinta Reddy*, 37 M. 403.

Unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of this rule.—*Monmohini v. Banga Chandra*, 31 C. 357: 8 C. W. N. 197 (9 B. 241 and 21 B. 335 *followed*).

The terms of this rule are imperative and a Court cannot refuse to record a lawful agreement or compromise and to pass a decree in accordance therewith, merely because in its view it is too favourable to one of the parties.—*Motiram v. Yesu*, 22 B. 238. But the Court must see that the compromise is a lawful agreement before it is recorded and a decree is passed in accordance with the terms thereof and should look into the merits when necessary to determine its *bona fides*.

Where a compromise embodied terms the substantial portion of which was legal and enforceable and the rest illegal, the compromise should be accepted to the extent it is legal. An agreement that the money should be paid in equal instalments of crops each year and that in default of any instalment the whole debt would become due and be enforceable by the sale of the holdings of the defendant which were situated in the Sonthal Pergannas; held, that though the latter portion was illegal under S. 37 of the Sonthal Pergannas Settlement Regulation, the compromise should be accepted as to the former portion.—*Baiju Lal v. Narayan*, 109 I. C. 261 A. I. R. 1929 Pat. 495.

Where after the hearing of an appeal and when it is pending for delivery of judgment, a petition for compromise is presented, the Court has to receive the petition and pass the necessary orders thereon; *Najiah v. Seshamma*, 41 M. L. J. 395; 14 L. W. 514.

Where a compromise set up by one party is denied by the other.—When the parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court can by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it, notwithstanding that one of the parties to such agreement objects to the compromise being accepted.—*Brojodurlabh v. Ramanath*, 24 C. 909 (F. B.): 1 C. W. N. 597. See also *Karuppan v. Ramasami*, 8 M. 482; *Buttensay Lalji v. Pooribai*, 7 B. 304; *Appasami v. Manikam*, 9 M. 103; *Goculdas Bulabdas v. Scott*, 16 B. 202, *Raghubir Singh v. Chanan Singh*, 69 I. C. 395. See also *Qadri Jahan Begam v. Fazal Ahmad*, 50 A. 748; 110 I. C. 573: A. I. R. 1928 All. 494; 26 A. L. J. 691.

There can be no doubt that when one party alleges and the other denies that a suit has been settled by a lawful agreement out of Court, the Court has power to decide whether there has been such a settlement and if this question is decided in the affirmative, to grant a decree in accordance with the agreement. The Full Bench decision in 24 C. 909; 1 C. W. N. 597 (noted above) has been now given effect to by the alterations made in Or. XXIII, r. 3 from the language of S. 375 of the old Code.—*Anadi Krishna v. Priya Shankar*, 21 C. W. N. 366; 36 I. C. 375; *Sital v. Lal Bahadur*, 38 A. 75, 80-81; *Ramjas v. Baruni*, 116 I. C. 524; A. I. R. 1929 Pat. 102.

Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge and consent, before an order is passed accepting the compromise as the final determination of the suit.—*Monmohini v. Banga Chandra*, 31 C. 357; 8 C. W. N. 197 (24 C. 909 (F. B.): 1 C. W. N. 597 referred to).

Where a party to a suit impugns an alleged agreement or compromise by which he would be bound, the Court must satisfy itself by evidence that the agreement or compromise is a lawful one, and that its terms have been consented to by the parties to the suit before it can proceed under this section (this rule), to record it and pass a decree in accordance therewith.—*Sridharan v. Puramathan*, 23 M. 101.

Where the first defendant transferred his interest in the subject-matter of the suit to the 2nd defendant and the plaintiff compromised the suit with him, the fact that the 1st defendant remained on the record did not give



him sufficient interest to entitle him to raise any objection to the compromise or to appeal from the decree.—*Shanker Bharati v. Narsinha*, 54 I. A. 111: 51 B. 442 (P. C.): 101 I. C. 20: A. I. R. 1927 P. C. 57: 31 C. W. N. 649.

The rule was intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.—*Appasami v. Varadachari*, 19 M. 419.

It was held, that under this rule, the Court had jurisdiction to determine whether, as a fact, the alleged agreement adjusting the suit had been made, and if it was satisfied that it has been made, to record it. Whether that fact should be tried on affidavit or by oral evidence, is entirely in the discretion of the Court.—*Samibai v. Premji Pragji*, 20 B. 304.

Compromise as between some of the parties—Effect on others.—The agreement between the plaintiff and one set of defendants cannot affect the position of the other defendants. They can neither be prejudiced by, nor can they take any advantage of, that agreement; *Musst. Bhagwati v. Jagdam Sahas*, 2 P. L. T. 471.

Submission and award equivalent to "Adjustment of the suit by an agreement" within the meaning of this rule.—It was held by the Bombay High Court, in two earlier cases decided under the old Code, that where the matters in difference in a pending suit are referred to arbitration without the intervention of the Court and an award is made, the submission and the award may be treated as an "adjustment of the suit by agreement" within the meaning of S. 373 of that Code, and it may be recorded as an adjustment under that section; *Pragdas v. Girdhardas*, 26 B. 76; *Samibai v. Premji*, 20 B. 304. The same High Court, in a case decided under this Code, took the same view and held that where in a pending suit the matters in difference are referred by the parties to arbitration without the intervention of the Court and an award is made, the provisions of para. 20 of Sch. II do not apply to the award, but that the submission and award may be recorded as an adjustment under this rule; *Harakhbai v. Jamnabai*, 37 B. 639: 19 I. C. 786. A contrary view was, however, taken by Sir Norman Macleod, J., in *Shavakshaw v. Tyab Haji*, 40 B. 386: 37 I. C. 140, where it was held that, in view of the words "any other law for the time being in force" in S. 89 of the Code and having regard to the provisions of that section, a submission and an award made without the intervention of the Court could not be recorded as an adjustment under this rule, and that the proper procedure was under paras. 20 and 21 of Sch. II, and that accordingly the matter should be treated as an application under those paragraphs and treated accordingly. But in *Manilal Motilal v. Gokal Das*, 45 B. 245: A. I. R. 1921 Bom. 310, Sir Norman Macleod and Mr. Justice Fawcett reconsidered the matter and held 'that the submission and award could properly be recorded under Or. XXIII, r. 3, and that the previous judgment of Mr. Justice Macleod, in *Shavakshaw v. Tyab Haji*, 40 B. 386: 37 I. C. 140, was incorrect. It has recently been held by a Full Bench of the Bombay High Court in *Chandrabasappa v. Basalingayya*, 51 B. 908 (F. B.): 105 I. C. 516: 29 Bom. L. R. 1254: A. I. R. 1927 Bom. 565 (following *Manilal Motilal v. Gokal Das*, 45 B. 245) that where in a suit, parties have referred their differences to

arbitration without an order of the Court and on award is made, a decree in terms of the award can be passed by the Court under Or. XXIII, r. 3, but not otherwise. See also *Raoji v. Ratansi*, 54 B. 696: 32 Bom. L. R. 339: 126 I. C. 305: A. I. R. 1930 Bom. 431. If a party does not object to the submission and award being made, he is estopped from objecting that the award is voidable. — *Kondi v. Ohunilal*, 53

The Allahabad High Court in *Gajendra v. Durga Kunwar*, 47 A. 637 (F. B.): A. I. R. 1925 All. 503: 83 I. C. 763, and the Madras High Court, in *Chinnakatasami v. Venkatasami*, 42 M. 625, have taken the same view as the Bombay High Court in *Manilal's case*. See also *Subbaraju v. Venkatramaraju*, 51 M. 800 (F. B.): A. I. R. 1923 Mad. 1025: 55 M. L. J. 429: 113 I. C. 632; *Narayandas v. Kalyanji*, 24 N. L. R. 55: 107 I. C. 525: A. I. R. 1923 Nag. 173; *Basao v. Jagannath*, 14 O. L. J. 184: 131 I. C. 443: 8 O. W. N. 71: A. I. R. 1930 Oudh 127; *Laljee v. Chander Bhan*, 9 R. 39: A. I. R. 1931 Rang. 53: 131 I. C. 57; *Ramadhar v. Subedar*, 11 P. 237: A. I. R. 1932 Pat. 205. The Calcutta High Court in *Amar Chand v. Banwari*, 49 C. 608. 69 I. C. 803. A. I. R. 1922 Cal. 404 has dissented from the decision in *Manilal's case* and held that the award cannot be enforced under Or. XXIII, r. 3, or under paras. 20 and 21 of Sch. II. The Lahore High Court in *Hari Prasad v. Sooni*, 3 L. L. J. 162 has followed the Calcutta High Court decision in *Amar Chand v. Banwari*. See also *Kishore Chand v. Hans Raj*, 104 I. C. 561: A. I. R. 1923 Lah. 39; *Girimoni v. Tarini*, 55 C. 538: 47 C. L. J. 59: 33 C. W. N. 390. In *Nihal Singh v. Ashtabakar*, A. I. R. 1929 Lah. 806, it has been held that where a literate person, having an award explained to him, signs it, he should be taken to agree to it and the award becomes a compromise; but an award as such is not an adjustment and therefore cannot be recorded.

Reference to arbitration does not preclude parties from compromising. — Even after a reference to arbitration is made in a pending suit, the parties are not precluded from settling the dispute amicably by mutual agreement, and it is not therefore necessary to cancel the reference before accepting the compromise; *Aishan v. Abdulla*, 99 I. C. 1002: A. I. R. 1927 Lah. 156.

Power of Court to pass decree on partial award. — It was held that it was open to the Court to record the decision of the arbitrator and pass a decree thereon even though the award was partial. There is no rule of law that a partial award is invalid and the question has to be decided on the intention of the parties, the matter being a subject of contract between them; *Alagu Pillai v. Veluchami*, 74 I. C. 609: A. I. R. 1923 Mad. 576: 45 M. L. J. 76: 32 M. L. T. (H. C.) 369.

Compromise extending beyond scope of suit. — A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions; if these other conditions are the considerations for the compromise of the subject-matter of the suit, they must be incorporated in the decree. — *Gobinda Chandra v. Dwarka Nath*, 7 C. L. J. 492. See also *Charu Chandra v. Sambhu Nath*, 3 P. L. J. 255 (F. B.); *Hari Chand v. Maghi Mal*, 95 P. W. R. 1917: 78 P. R. 1917: 12 P. L. R. 1917; *Purna Chandra v. Nil Madhub*, 5 C. W. N. 485; *The Manager of Sri Meenakshi Devasthanam v.*

*Abdul Kasim*, 30 M. 421: 17 M. L. J. 255 and *Joti Kuruvetappa v. Izari Sirusappa*, 30 M. 478, where it has been held that a compromise decree containing reliefs not covered by suit is valid.

When the compromise has been effected between the parties, the proper course to follow is not to recite the compromise in the decree in its entirety but to pass a decree in accordance therewith only in so far as it relates to the suit; *Jiban Krishna v. Ramesh Chandra*, 38 C. L. J. 72: 65 I. C. 47. It cannot be maintained that unless the whole of the compromise is recited *verbatim* in the decree or produced *verbatim* in a schedule to the decree the compromise must be held to be not incorporated in the decree. Where the decree made a general reference to the terms of the compromise it had the same effect as that of mentioning the conditions in the schedule and all the terms of compromise should be deemed to have been incorporated in the decree. *Held* also that the compromise was not compulsorily registrable.—*Malik Chand v. Juwan Mal*, 11 L. L. J. 127: 118 I. C. 395: A. I. R. 1929 Lah. 527. *See also U Pon Nyun v. Ma Pan Me*, 5 R. 662: 107 I. C. 163: A. I. R. 1928 Rang. 43.

The words "so far as it relates to the suit" in Or. XXIII, r. 3 show that the terms which form the consideration for the adjustment of the matter in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree.—*Karu Mian v. Tejo Mian*, 3 P. L. J. 43: 43 I. C. 282 (30 M. 478: 20 A. 171 referred to); *Shambhusing v. Mani Lal*, 33 Bom. L. R. 1457. The question whether the terms of a compromise decree go beyond the subject-matter of the suit is one which has to be determined on the facts of each particular case with reference to what the claim in the suit was and what was the nature of the compromise.—*Ibid.* A suit for injunction and damages against the defendant on the ground that he had been wrongly officiating as inamdar and made certain remissions without authority ended in a decree in terms of a compromise which contained a provision that the parties should officiate by turns. *Held*, that this clause was the main consideration for the compromise and intimately connected with it and so the Court had jurisdiction to incorporate it in the decree and that the clause was as much executable as the rest of the decree.—*Bajirao v. Sakharam*, 33 Bom. L. R. 463: A. I. R. 1931 Bom 295: 132 I. C. 434. *See also Vishnu v. Ram Chandra*, 34 Bom. L. R. 849: A. I. R. 1932 Bom. 466: 139 I. C. 830.

Where the parties present a petition of compromise extending beyond the scope of the suit, the decree should be passed embodying the whole of its terms, but the decree should be passed in terms of such of the provisions agreed upon as relate to relief which the Court can give in the suit.—*Venkatappa v. Thimma Nayanam*, 18 M. 410.

The only compromise which a Court can in any case be bound to enforce under this rule is one which adjusts, wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced. A Court, refusing to grant a decree on a compromise going beyond the suit, cannot however, grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised.—*Fajaleh Ali Miah v. Kamaruddin*, 13 C. 170. *See also Venkatappa v. Thimma Nayanam*, 18 M. 410; *Purna Chandra v. Panchkari*, 5 C. L. J. 15; and *Muthu Vijaya Raghunatha v. Thandavaraya*, 22 M. 214.

By consent of parties and the leave of the Court, a suit may be amended to recover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging, by consent or compromise, the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for.—*Mohibullah v. Imami*, 9 A. 229.

The terms of a *solehnama* decree in so far as they cover matters not involved in the suit, cannot be enforced in execution of the decree but the decree is evidence of the agreement entered into as regards those matters; *Jagabandhu v. Hari Mohan*, 62 I. C. 653.

Where there has been a lawful compromise, comprising matters in suit and matters extraneous to the suit, the compromise would be recorded, but the decree would be made in accordance with the compromise, in so far as it affects the suit. The parties came to terms and the suit for ejectment was dismissed in terms of a compromise under which it was agreed that the defendants should have the status and position of an occupancy tenant, but they should pay an enhanced rent. In a subsequent suit for arrears of rent on the basis of the above compromise; *held*, that the only portion of the compromise relevant to the suit was that which gave the defendants the status of an occupancy tenant, but the decree could not and did not declare anything as to what should be the future rent, the question of rent being extraneous to the suit, nor could the compromise be put in evidence to prove the agreement as to enhanced rent, it being unregistered.—*Har Sarup v. Tohfa Singh*, 111 I. C. 156: A. I. R. 1928 All. 534. A perfectly proper and effectual method of carrying out the terms of r. 3 of Or. XXIII would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or to introduce the agreement in a schedule to the decree, but the operative part of the decree should be confined to the subject-matter of the suit. The operative part can be enforced as between the parties to the suit under S. 47; any agreement as to matters extraneous to the suit can be enforced in a separate suit.—*Vishnu v. Ramchandra*, 34 Bom. L. R. 849: A. I. R. 1933 Bom. 466: 139 I. C. 830. See also *Hemanta Kumar v. Midnapore Zamindary Co.*, 46 I. A. 240 (246): 47 C. 485 (495) (P. C.): 53 I. C. 534: 37 M. L. J. 525: 17 A. L. J. 1117.

**Compromise of doubtful claims.**—An agreement entered upon a supposition of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding and the right shall not prevail against the agreement of the parties: for the right must always be on one side or the other and therefore the compromise of a doubtful right, is a sufficient foundation of an agreement.—*Stapilton v. Stapilton*, 2 White and Tudor's Leading Cases, 836 and 920, reported in 1 Atk. 2 (1739). See *Moidin Kutti v. Beets Kutti*, 18 M. 38, in which compromise of doubtful claims by adult members was held binding on minor members. See also *Helan Dasi v. Durga Das*, 4 C. L. J. 323; *Rameshwar v. Lachmi Prasad*, 31 C. 111: 7 C. W. N. 689; *Awadh Sarju Prasad v. Sita Ram*, 29 A. 37; *Pulliah Chetti v. Varadarajulu*, 31 M. 474; *Ram Nirunjun v. Prayag Singh*, 8 C. 138 (141-142): 10 C. L. R. 66; *Raoji v. Ratansi*, 54 B. 696: 32 Bom. L. R. 389: A. I. R. 1930 Bom. 431: 126 I. C. 305.

**Compromise made by Hindu widow or daughter.**—A compromise made by a Hindu widow or daughter is not binding on the reversioners.—*Gobind Erishna v. Khunni Lal*, 29 A. 497; *Mahadei v. Baldeo*, 30 A. 75;

*Asharam v. Chandi Okurn*, 13 C. W. N. 147; *Imrit Konwur v. Roop Narain*, 6 C. L. R. 76; *Sheo Narain v. Bishen Prosad*, 10 C. L. R. 337. But in *Sankar Nath v. Bejoy Gopal*, 13 C. W. N. 201, a different view seems to have been taken.

In addition to the cases noted above, see the rulings in 13 C. W. N. lxxxvi (86-n) under heading "The law relating to compromise."

**Authority of counsel or pleader to compromise.**—It is not competent to a counsel or pleader to enter into a compromise on behalf of his client without his express authority to do so.—*Jagapati v. Ekambara*, 21 M. 274; *Carrison v. Rodrigues*, 13 C. 115; and *Nundo Lal Bose v. Nistarini Dassi*, 27 C. 428; 4 C.W. N. 169. But a counsel has, by virtue of his retainer, and without further authority, full power to compromise a case on behalf of his client.—*Jang Bahadur v. Shankar Rai*, 13 A. 272 (F. B.).

When a case is compromised by a counsel or vakil on the instruction of a person who watches the case on behalf of the party: *Held* that, even if the person instructed has no authority to bind the party, the compromise is binding on the latter if he ratifies and acts on the compromise. The appointment of a counsel or a vakil by a party to conduct a case does not necessarily authorize him to make a binding compromise on behalf of his client unless there is express authority for it.—*Bhut Nath v. Ram Lal*, 6 C. W. N. 82.

Where a consent-decree is passed by a Court on confession of judgment by a party's pleader it must be assumed that the Court must have satisfied itself before the passing of the consent-decree that the pleader confessing judgment had authority on behalf of the party to act in the manner in which he did. The person challenging the authority must prove to the contrary by positive evidence.—*Paran Kuer v. Manni Lal*, A. I. R. 1929 Oudh 211; 121 I. C. 283.

See notes under S. 2 ante, and the cases collected in 13 C. W. N. at p. 86-n.

**Compromise by minor's guardian.**—A compromise by a guardian *ad litem* without the express sanction and approval of the Court will not bind the infant, and will be set aside at his instance.—*Sharat Chunder v. Kartik Chunder*, 9 C. 810; 12 C. L. R. 453; *Rajagopal v. Muttupalem*, 3 M. 103. See also *Karmali v. Rahimbhoy*, 13 B. 137; *Manishankar v. Bai Muli*, 12 B. 686; *Virupakshappa v. Shidappa*, 26 B. 109; *Shib Ram v. Abdul Ghani*, A. I. R. 1928 Lah. 792; 112 I. C. 695. In order to make a compromise binding on the minor, the guardian must ask and obtain the express permission of the Court.—*Kalavati v. Chedi Lal*, 17 A. 531. It must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained.—*Manohar Lal v. Jadu Nath*, 33 I. A. 128; 28 A. 585 (P. C.); 4 C. L. J. 8; 10 C. W. N. 898; 16 M. L. J. 291; 8 Bom. L. R. 489. See also *Govindasami v. Alagirisami*, 29 M. 104 (26 B. 109 followed) and *Krishna Pershad v. Romes Chunder*, 8 C. L. J. 274; 13 C. W. N. 163. See, however, *Amar Singh v. Narain Singh*, 20 A. 98; *Sitala Das v. Bhut Nath*, 62 I. C. 688.

A guardian or manager appointed by the Court of Wards or by the civil Court under any local law on behalf of infants has power to compromise proceedings in a civil Court to which the infants are parties; upon the

r. 3.

guardian entering into the compromise without the leave of the Court such compromise is without the necessity of the Court. *Nakimo Dewan v. Pemba Dichen*, 48 C. L. J. 211 : 48 C. 469 : 59 I. C. 911.

A certificated guardian can compromise a suit without obtaining the sanction of the District Judge, under S. 29 of the Guardians and Wards Act (VIII of 1890).—*Biku Halwai v. Mohesh Halwai*, 8 C. L. J. 266.

It was held that the agreement to refer to arbitration had not been lawfully entered into, as the submission related to the rights of minors, who were parties to the suit, and leave of the Court had not been obtained under S. 462, C. P. Code, 1882 (Or. XXXII, r. 7), either before the submission to arbitration or after the award; and that the adjustment was in consequence not binding on the minors.—*Lakshmana v. Chinnathambi*, 24 M. 326.

A decree passed on a compromise with a minor is a nullity.—*Ganganand v. Rameshwar*, 6 P. 388 : 103 I. C. 449 : A. I. R. 1927 Pat. 271. So is a decree passed on compromise with a guardian *ad litem* of a minor after the latter has attained majority.—*Sanyasi v. Lakshman Naidu*, 51 M. 763 : A. I. R. 1928 Mad. 294.

When the guardian of a minor defendant consented to accept the oath of the plaintiff and the oath was taken and a decree was passed accordingly, *Held* that, the minor defendant was bound by the consent of his guardian, since there was no evidence of fraud or negligence on the part of the latter, although the Court had not sanctioned the agreement under S. 462, C. P. Code, 1882 (Or. XXXII, r. 7).—*Chengal Reddi v. Venkata Reddi*, 12 M. 483.

Where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time, instead of its being totally concealed from the Court.—*Abdool Ali v. Muzuffar Hossein*, 16 W. R. 22 (P. C.).

Where a suit was compromised by the next friend of a minor plaintiff and it appeared that the infant had no separate interest from the adult members of the family, who took part in the compromise and assented to it and the Court having had its attention drawn to it, approved of it *Held* that, the compromise cannot be set aside.—*Rameswar Pershad v. Ram Bahadur*, 34 C. 70 (P. C.) : 11 C. W. N. 178 : 5 C. L. J. 175 : 17 M. L. J. 59.

Besides the cases noted above, see also the cases noted under Or. XXXII, r. 7.

Agreement to be bound by oath is not compromise—The mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other, is in itself an adjustment of the suit.—*Konnappalen v. Perotta*, 4 M. H. C. R. 422 and Ap. 3 ; *Vasudeva Shanbog v. Naraina*, 2 M. 356 ; *Muhammad Zahur v. Cheda Lal*, 14 A. 141. See also *Thoyi Ammal v. Subbaroya*, 22 M. 234.

Consent decree—Its effect and admissibility in evidence.—When a state of facts is accepted as the basis of a compromise, whereby a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who are parties to it and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that

the real state of things was otherwise.—*Nilakandhen v. Padmanabha*, 18 M. 1 (P. C.), page 7 : 21 I. A. 128 (6 B. L. R. 202 : 13 M. I. A. 497, referred to). See also *Nicholas v. Asphar*, 24 C. 216, where it has been held that a consent-decree is as binding on the parties to the proceedings in which it is made as a decree made after a contentious trial (18 M. 1 (P. C.) followed : 6 B. L. R. 202 : 13 M. I. A. 497 referred to); and *Laksmishankar v. Vishnuram*, 24 B. 77.

A consent-decree does not stand on a higher footing than a contract between the parties ; and the Court has jurisdiction to set aside a consent-decree upon any ground which would invalidate an agreement between the parties, and as it is essential to the validity of a contract that all contracting parties should be competent to contract, and as a person, who by reason of infancy is incompetent to contract, cannot make a contract within the meaning of the Contract Act, it follows that a compromise entered into with a minor is entirely void and cannot be given effect to in a Court of law ; *Ganganand v. Rameshwar Singh*, 6 P. 368 . 102 I. C. 449 : A. I. R. 1927 Pat. 371. A consent-decree or order is a mere creature of agreement and no greater sanctity can be placed upon the decree than upon the agreement itself.—*Sasadhar v. Raghab*, 125 I. C. 123 : A. I. R. 1930 Pat. 234.

Where the parties to a suit have by mutual agreement, made certain terms, and informed the Court of them, and the Court has sanctioned the agreement, and made an order in conformity with it, and the agreement has been acted upon, neither party is at liberty to resile from it.—*Sheo Golan v. Beni Prasad*, 5 C. 27 . 4 C. L. R. 29.

A consent-decree in a previous suit to which the parties in a subsequent suit are parties, being a decree of a Court having jurisdiction over the subject-matter of the suit and over the parties, is admissible in evidence in the latter suit.—*Lala Shit Lal v. Lala Gouri Prasad*, 3 C. W. N. 174.

In a suit for rent, the plaintiff landlords are entitled to rely upon a compromise decree in a previous title-suit brought by a third party against the tenants and to which the landlords were parties. Such a compromise cannot be said to have been beyond the scope of the former suit merely because the money was payable to a third party and not to the plaintiffs in that suit, such a decree is *inter partes* and is admissible in evidence.—*Ramdhari Koer v. Ramakanta*, 9 C. L. J. 16 : 13 C. W. N. 217.

A *bona-fide* purchaser *pendente lite* is not bound by the consent-decree.—*Kishory Mohun v. Mahomed Munzaffar*, 18 C. 183 (8 B. L. R. 474, and 8 C. 79 referred to).

A tenant compromised a case with his landlord agreeing to pay rent at a certain rate. The *jote* was sold in execution of the consent-decree and purchased by the defendant. In a suit by the landlord against the auction-purchaser, held, that the *solehnama* was binding upon the defendant, and he was liable for rent under its terms irrespective of any question as to whether the quantity of land mentioned therein was correct or not.—*Satyendra Nath v. Nilkantha*, 21 C. 383.

A compromise decree in so far as it gives effect to the settlement touching properties in suit operates as *res judicata*.—*Gurdeo Singh v. Chandrikah Singh*, 5 C. L. J. 611 : 36 C. 193. But any thing which forms part of the compromise, but which is not part of the subject-matter of the suit, cannot.

he regarded as finally settled between the parties.—*Purna Chandra v. Panchlari*, 5 C. L. J. 15.

**Petition of compromise, if admissible in evidence without registration.**—It was held that it was not necessary that the deed of compromise should be registered in order to make it admissible in evidence.—*Gupta Narain v. Bijoya Sundari*, 2 C. W. N. 663; *Chellaram v. Seth Kimatram*, 14 S. L. R. 246; 61 I. C. 118.

It was held that the *razinama*, in so far as it was submitted to and was acted upon judicially by the Court, was itself a step of judicial procedure not requiring registration. . . . of it, constituted *res judicata*. . . . *kshmi Annee*, 26 I. A. . . . See also *Kali Charan v. Ram Chandra*, 30 C. 783; *Muthayya v. Venkataratnam*, 25 M. 553, *Birbadra v. Kalpataru*, 1 C. L. J. 398; and *Bindesri Naik v. Gangasaran*, 25 I. A. 9 20 A 171 (P. C.); 2 C. W. N. 129, where it has been held that S. 17 of the Registration Act (III of 1877) does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or orders made by the Court (followed in *Gorinda Chandra v. Dwarka Nath*, 7 C. L. J. 492; 35 C. 837; 12 C. W. N. 849). See also *Jasimuddin v. Bhuvan*, 34 C. 456, where it has been held, that if a compromise goes beyond the subject-matter of the suit and a decree is made on the basis of it, the terms of the compromise are binding upon the defendant, although the decree in respect of the surplusage cannot be enforced in execution.

A petition of compromise, in so far as it relates to the properties in suit, does not require registration. But if it relates to extraneous properties, the parties must fall back upon the petition itself, which without registration cannot declare or create a title to immoveable properties.—*Gurdeo Singh v. Chandrika Singh*, 36 C. 193; 5 C. L. J. 611 (22 M. 508, 1 C. L. J. 388, 30 C. 783, 29 M. 365, 25 M. 7 and 553, referred to; 28 A. 78, disapproved).—*Sashi Bhusan v. Hari Narain*, 25 C. W. N. 990.

A *razinama* does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge.—*Patha Muthammal v. Esup Rowther*, 29 M. 365 (22 M. 508 (P. C.), followed) But see *Raghubans v. Mahabir*, 28 A. 78, where it has been held that a compromise relating to the land in suit as well as relating to other lands, which had been incorporated in the decree of the Court in the previous suit, does not require registration.

When a suit is properly compromised but the adjustment consists of an agreement which is not acted upon by the Court, the Court is not bound by it. . . . use of the Court is not binding upon the parties. . . . with the portion of the compromise which lies outside the suit.—*Musst. Arunbati v. Ram Nirangan*, 2 P. L. T. 38; 58 I. C. 299. But see *Har Sarup v. Tohfa Singh*, 111 I. C. 156; A. I. R. 1923 All. 534 noted ante.

An unregistered compromise petition, which was the root of the plaintiff's claim to an increased rent and was filed in previous criminal proceedings, was not incorporated in the order in such proceedings. Held, it was



not admissible in evidence in a latter civil suit.—*Biraj Mohinee v. Kedar Nath*, 35 C. 1010 : 12 C. W. N. 854.

Where a petition of compromise merely contained a recital of a previous oral agreement to lease, it does not require registration or stamp. It is evidence of oral agreement but not an agreement in itself.—*Pitambar Gain v. Uddhab Mondal*, 12 O. W. N. 59.

A compromise entered into between the parties to mutation proceedings before the Court of Revenue, purporting to vary the terms of a registered mortgage-deed is inadmissible in evidence.—*Sadaruddin v. Chajju*, 31 A. 13 (F. B.).

**Stamped paper, whether necessary.**—When the parties to a suit compromise, all that the Court is required to do under Or. XXIII, r. 3 is to ascertain that the suit has been adjusted by a lawful compromise, and to put the fact on record. It is not necessary that a *solehnama* on stamped paper should be filed.—*Mahadeo Prasad v. Basdeo Tiwari*, 29 I. C. 511.

**Mode of enforcing compromise decree.**—Where a compromise is filed in Court and a decree is passed in accordance therewith, the remedy for enforcement is by execution and not by a fresh suit.—*Ram Mohan v. Lakhi Narayan*, 4 B. L. R. A. C. 207 : 13 W. R. 151.

A compromise must be treated as a new and positive contract. A breach of its stipulations may be a ground in a suit for its enforcement, but not for a revival of the original right.—*Ram Sahae v. Dhunookdharee*, 1 W. R. 266 ; *Bishnu Coomar v. Hurish Chunder*, 2 W. R. 209. See also *Ameer Begum v. Noor Begum*, 1 Agra (F. B.) 1.

Where a plaintiff is seeking to enforce by original suit a right of forfeiture contained in a consent decree passed under S. 375, C. P. Code, 1882 (Or. XXIII, r. 3), whereby the status of a landlord and tenant is established between the plaintiff and the defendant, the Court is not precluded from granting such relief against forfeiture, as it might have granted had the status arisen from contract or custom. The difference between a consent-decree and the agreement of the parties themselves, where the one or the other is sought to be enforced, goes no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made.—*Krishnabai v. Hari Govind*, 31 B. 15 (F. B.) : 8 Bom. L. R. 813 : 1 M. L. T. 370 (10 B. 435 dissented from).

**Mode and effect of setting aside a consent-decree.**—For the purpose of setting aside a consent-decree on the ground that it was obtained by fraud and misrepresentation, there are two available modes of procedure : (1) by suit, (2) by review of judgment sought to be set aside ; the latter being the more regular mode of procedure.—*Aushootosh v. Taraprasanna*, 10 C. 612 (6 B. L. R. 649, and 13 B. L. R. Ap. 11 followed). See also *Biraj Mohini v. Chinta Moni*, 5 C. W. N. 877. Followed in *Rakhal Moni v. Adwytia Prasad*, 30 C. 613 : 7 C. W. N. 419 ; *Foolcoomary v. Woodoy Chunder*, 25 C. 649, *Mirali Rahimbhoy v. Rehmoobhoy*, 15 B. 594 (affirming 13 B. 137) ; and *Virupakshappa v. Shidappa*, 23 B. 620. See also *Surendra Nath v. Hemangini*, 34 C. 83, and *Barkamdeo Prasad v. Banarsi Prasad*, 3 C. L. J. 119 (13 B. 137 followed ; 6 C. 687 ; 10 C. 357 ; 13 B. L. R. Ap. 11, dissented from). Where a decree is passed on adjudication, no separate suit lies to

set aside the decree except on the ground of fraud; but where it is passed simply upon compromise, a suit lies upon grounds other than fraud—*Biku Halwai v. Mohesh Halwai*, 8 C. L. J. 266 (34 C. 83 followed).

Principles upon which the Court acts in setting aside compromises considered.—*Ram Nirunjun v. Prayag Singh*, 8 C. 138; 10 C. L. R. 66. The question whether time was of the essence of the contract embodied in the consent-decree would depend upon the facts and circumstances of each case. Where a consent-decree in a suit for specific performance directed the plaintiff to execute a conveyance within a week from the date thereof and the defendant to pay the price within four months therefrom: *held*, the term did not make time essence of the agreement and that the defendant was bound to pay though the conveyance was executed only two weeks later.—*Sasadhar v. Raghab*, 125 I. C. 123; A. I. R. 1930 Pat. 231.

It was held that the effect of setting aside a compromise was to remit both parties to their original rights and if the plaintiff was allowed to be heard against so much of the original judgment as was unfavourable to her, the defendant must similarly be heard against so much of the same judgment as was unfavourable to him.—*Khajooroonissa v. Rowshan Jehan*, 3 I. A. 291; 2 C. 184 (P. C.); 26 W. R. 36.

A suit will lie to set aside a compromise sanctioned by the Court under . . . . . the compromise is set aside . . . . . the former suit at the time . . . . .  
7: 8 C. L. R. 169.

The mode of setting aside a compromise decree is either by an application for review or by a suit to set it aside (10 C 612, *referred to*). When however, a party has elected to proceed by way of review and the matter has been decided against him, he cannot be allowed to have recourse to the remedy by way of suit. The decision in the review proceedings is *res judicata*—*Ram Gopal v. Prasanna Kumar*, 2 C. L. J. 503; 10 C. W. N. 529 (25 C. 571 and 28 C. 78 *relied on*)

Appeal.—An order under this rule recording or refusing to record a compromise is appealable under Or. XLIII, r. 1, Cl. (m). The appeal is apparently intended to be the proper procedure for a party who wishes to . . . . . of consent etc.  
Singh v. Khazan  
Bai, 119 I. C. 673; A. I. R. 1929 Nag. 275. . . . . amdutt v. Basanti

An appeal lies from an order recording an agreement, on the ground that (a) there was no compromise at all; *Goculdas v. James Scott*, 16 B. 202; *Talamand v. Fateh Din*, 88 P. R. 1918; (b) the compromise was not lawful; *Goculdas v. James Scott*, 16 B. 202; *Sridharan v. Puramathan*, 23 M. 101; or (c) the compromise contains matters extraneous to the suit; *Venkatappa v. Thimma*, 18 M. 410; *Pragdas v. Gudhardas*, 26 B. 76; *Manager of Sri Meenakshi v. Abdul Kasim*, 30 M. 421. The fact that a decree has been passed in terms of the compromise does not preclude an appeal from the order recording the compromise, *Megh Raj v. Tulsi Ram*, 6 L. L. J. 187; 80 I. C. 696; A. I. R. 1924 Lah. 466; *Satyannarayanamurthi v. Butcheyya*, 87 I. C. 124; 48 M. L. J. 249; A. I. R. 1925 Mad. 606; *Sabitri v. F. A. Savi*, 8 P. 523; 10 P. L. T. 293; 117 I. C. 189; A. I. R. 1929 Pat.

# ORDER XXIV.

## PAYMENT INTO COURT.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim. [S. 376.]
- Deposit by defendant of amount in satisfaction of claim.

## COMMENTARY.

This rule exactly corresponds to S. 376, C. P. Code, 1882.

"Suit to recover a debt or damages."—A suit for injunction for obstruction to light and air is not a suit "to recover a debt or damages" within the meaning of this rule.—*Luxumonnana v. Moroba*, 21 B. 502.

"May deposit in Court."—A deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt.—*Eshahug Molla v. Abdul Bari*, 31 C. 183. A mere allegation of willingness to pay, made in the written statement, is not equivalent to payment in Court, and it does not stop interest from running; *Haji Abdul v. Haji Noor*, 16 B. 141. The provisions of Or. XXIV contemplate an unconditional deposit of a sum of money in Court by defendant, which sum of money is at the disposal of the decree-holder if he desires to withdraw it; *K. M. Bose & Co. v. Allen Bros.*, 97 I. C. 479.

Order in execution directing defendant to pay money into Court—Appeal by plaintiff against the order—Payment into Court by defendant—Refusal of plaintiff to take money out of Court pending appeal—Attachment of the money so paid by another creditor of the defendant and payment of the money to him—Subsequent application by plaintiff in execution for payment of the money. Held, that the plaintiff's refusal to take money out of Court did not justify the Court in treating the money as the defendant's, and in ordering it to be paid to another creditor of the defendant.—*Lakshman Dadaji v. Damodar*, 15 B. 681. Where money is paid to the credit of a suit or ear-marked for a suit, the money belongs to the plaintiff in the event of his success and cannot pass to the general creditors of the person who pays it in or to any persons who claim under him.—*Maganlal v. A. Aziz*, 5 R. 753 : 106 I. C. 77 : A. I. R. 1927 Rang. 278 (following 36 B. 156 and 41 M. 1053).

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application. [S. 377.]
- Notice of deposit.

## COMMENTARY.

This rule corresponds to S. 377, C. P. Code, 1882, with the omission of the words "in writing" which occurred in the old section after the word 'notice.'

The omission seems to have been made in view of S. 143 of the present Code which requires that all orders and notices under the Code shall be in writing. Form of notice is given in Sch. I, Appendix H, Form No. 3.

"Unless the Court otherwise directs."—The words "*unless the Court otherwise directs*" mean that the Court has a discretion to refuse to allow the plaintiff to withdraw the money deposited by the defendant, and it should be exercised only when there are conflicting claims. But where the defendant admits liability in part and deposits the money, the money cannot be kept in Court.—*Dwarka Dass v. Girish Chunder*, 26 C 766: 3 C. W. N. cclxii (262-n). See also *Haji Abdul Rahman v. Haji Noor Mahomed*, 16 B. 141.

**3.** No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof. [S. 378.]

Interest on deposit not allowed to plaintiff after notice.

### COMMENTARY.

This rule exactly corresponds to S. 378, O. P. Code, 1892.

**Tender and payment—Effect of refusal to accept.**—A mere offer by a debtor by letter to pay an amount cannot be treated as a tender either in law or in equity. In order to stop interest, a strict tender should be proved.—*Kamaya v. Devapa*, 22 B 440.

A plea of tender before action must to stop interest be accompanied by a payment into Court after action, otherwise the tender is ineffectual.—*Haji Abdul Rahman v. Noor Mahomed*, 16 B. 141; *Arunachala v. Govindaswami*, (1931) M. W. N. 1226: 34 L. W. 848 (relying on 38 M 959, 16 B 141, 34 C. 305). In the case of mortgages, the rule is different and a tender alone has the effect, under S. 84, T. P. Act, of stopping interest from the date of tender.—*Ibid*.

If rent is tendered and not accepted, then deposit should be made under S. 61 of the B. T. Act, otherwise the defendant will be liable for interest.—*Raja Ransgit Singha v. Bhagabutty Charan*, 7 C. W. N. 720. But see *Jagat Tarini v. Naba Gopal*, 34 C. 305: 5 C. L. J. 270, where it has been held that a valid tender if improperly refused, stops interest. In this case the question of a valid tender has been fully discussed.

Deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt.—*Prayag v. Shyam Lal*, 31 C. 138

Payment to one of several co-mortgagees, who gives a discharge without the knowledge of the other mortgagee, is a full discharge of the entire mortgage debt.—*Barber Maran v. Ramana Goundan*, 20 M. 461: 7 M. L. J. 269. But this case has been doubted in *Ahinsa Bibi v. Abdul Kader*, 25 M. 26, where it has been held that the principle is not applicable to the case of co-heirs, who are not joint promisees.

Where the defendant does not deposit the amount admitted by him in Court, the running of interest on the plaintiff's claim is not stopped.—*Rakkhal v. Baikuntha*, 32 C. W. N. 1032: A. I R. 1923 Cal. 874: 117 J. C. 687.

**Execution proceedings.**—A decree-holder is not bound to accept a sum tendered to him in part satisfaction of his decree. He is entitled to require payment of the principal and interest in full, and the refusal to receive a part of what is due to him will not deprive him of his right to interest.—*Kunhya Singh v. Tooydun Singh*, 7 W. R. 20. But where money is paid into Court by the judgment-debtor in satisfaction of a decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such payment may not in fact be the whole amount due under the decree; *Amtul v. Muhammad Yusuf*, 40 A. 125.

Order XXIV, rr. 1, 2 and 3 do not apply to proceedings in execution. Primarily they would seem to apply to original suits in which, in order to save costs, an opportunity is given to the defendant to deposit so much of the claim as he admits in Court, and in such a case, the plaintiff will not be allowed costs; *K. M. Bose & Co. v. Allen Bros.*, 97 I. C. 479.

**4. (1)** Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

**Procedure where plaintiff accepts deposit as satisfaction in part.**

**(2)** Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation. [S. 379.]

#### Illustrations.

(a) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court. *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) *B* sues *A* under the circumstances mentioned in illustration (a). On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A*'s conduct having shown that the litigation was necessary.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being

filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A*'s costs.

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 379, C. P. Code, 1882, with some verbal changes only.

The word "*where*" has been substituted for the word "*if*," the word "*only*" has been added in sub-rule (1) after the words, "*in part*" and the word "*shall*" has been substituted for the word "*must*" which occurred in the old section.

In sub-rule (2) the words "*where*" and "*pronounce*" have been substituted for the words "*if*" and "*pass*" respectively.

**"Prosecute his suit for the balance."**—Under this rule, the plaintiff is entitled to draw out the money paid into Court by the defendant as part satisfaction of his claim, and may prosecute the suit for the balance, notwithstanding the objection of the defendant.—*Dwarka Dass v. Girish Chunder*, 26 C. 766: 3 C. W. N. cclxii (262).

**Apportionment of costs.**—At the settlement of issues the defendant paid money into Court, which plaintiff took out in part satisfaction of his claim and raised an issue as to damages. The plaintiff subsequently accepted the sum paid in full satisfaction, and withdrew the suit. *Held* that the plaintiff was entitled to his costs up to and including those of the settlement of the issues.—*Ardesir Limji v. Sorabji*, 1 B. H. C. R. 70.

In cases, not being suits to recover a debt or damages, where money is paid into Court, the principle underlying this rule ought to regulate the discretion of the Court in directing the payment of costs.—*Luxmon v. Moroba*, 21 B. 502.

Under sub-rule (2) the Court must, before making an order as to costs, distinctly find which of the parties is most to blame for the litigation;—*Jayanti Kistappa v. Jayanti Chinnappa*, 13 I. C. 188.

# ORDER XXV.

## SECURITY FOR COSTS.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

When security  
for costs may be  
required from  
plaintiff.

[S. 380, PARA. 1.]

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

Residence out of  
British India.

[S. 382.]

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

[S. 380, PARA. 2.]

## COMMENTARY.

Alterations in the rule.—Sub-rule (1) corresponds to para. 1 of S. 380, C. P. Code, 1882, with the following alterations:—The words "*where at any stage of suit*" have been substituted for the words "*if at the institution or*" the words "*other than the property in suit*," words "*independent of the property in suit*," "*fixed by it*," have been substituted for the "*ordered by the order*," which occurred in the old section.

Sub-rule (2) exactly corresponds to S. 382, C. P. Code, 1882.

Sub-rule (3) corresponds to para. 2 of S. 380, C. P. Code, 1882, with some verbal changes only.

The words "*suit for payment of money*" have been substituted for the words "*suit for money*" which occurred in the old section; and the words.

"independent of the property in suit," which stood after the words "British India" in the old section have been omitted.

"The Committee have deleted the last words of this sub-rule because the nature of the suit excludes the possibility of the property in suit being immoveable."—See *the Report of the Special Committee*.

Except the change of some words and phrases, no change seems to have been made in the meaning.

**Object of the rule.**—The object of the rule is to provide for the protection of the defendants in cases specified in the rule where, in the event of success, they may have difficulty in realizing their costs from the plaintiff; *Prem Chand, In the goods of*, 21 C. 832.

When security for costs may be required from plaintiff.—A plaintiff may be required to give security for the costs of a defendant; (1) *where the plaintiff is residing out of British India*, or, where there are more plaintiffs than one, all the plaintiffs are residing out of British India and none of the plaintiffs has sufficient immoveable property within British India other than the property in suit; (2) *where the plaintiff is a woman*, and where her suit is for the payment of money, and she does not possess sufficient immoveable property within British India.

If a party to a suit or appeal desires to apply for security for costs, he must do so promptly: otherwise the order made on such an application may have the effect of stifling the suit or appeal and should not be passed.—*Sachindra v. Secretary of State*, 129 I. C. 319: A. I. R. 1930 Cal. 520.

**Meaning of the words "immoveable property" in this rule.**—Leasehold property is "immoveable property" within the meaning of this rule.—*Ullman v. Justices of the Peace for Calcutta*, 7 B. L. R. Ap. 60.

The provisions of S. 34, Act VIII of 1859 (this rule), were not intended to apply to a case where the plaintiff brought a suit for administration and partition of property in which they were entitled to a share, the extent of the share being in dispute.—*Russick Lall v. Jadub Ram*, 10 B. L. R. Ap. 25.

**"Resides."**—The "residence" intended in this rule, is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided.—*Mahomed Shuffli v. Laldin Abdula*, 3 B. 227.

When an inhabitant of a foreign territory sues within British territory, it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant in the suit, even though the defendant also is a resident of a foreign territory.—*Koroona-moyee v. Ooma Churn*, 12 W. R. 465.

The plaintiff who resided in a Native Indian State arrived in January 1921 in Bombay to file a criminal complaint against the defendants. In July of the same year he filed a suit in the Bombay High Court against the defendants. The defendants having applied in October 1921, under Or. XXV, r. 1, C. P. Code, for security for their costs from the plaintiff; held, making the order, that inasmuch as the plaintiff was staying in Bombay only for the purpose of taking proceedings against the defendants, such



residence of his would not enable him to escape the application of Or. XXV, r. 1 of the C. P. Code.—*Hanif Maula Baksh v. Kulsam*, 46 B. 589: 64 I. C. 703: A. I. R. 1922 Bom. 299.

Where the plaintiff, a resident of a Native State, was for a great length of time residing in British India and filed a suit and there was no reason to think that he will not be forthcoming when the suit is decided; *held*, that the plaintiff was not "residing out of British India" and, consequently no order for security for costs should be made under Or. XXV, r. 1.—*Mahomed Habibulla v. Amila Automobile Co*, 32 Bom. L. R. 411: 125 I. C. 719: A. I. R. 1930 Bom. 220.

"British India."—For the purposes of this rule, Aden is within British India; *Aden Laws Regulation*, 1891, S. 2; but the Cantonment of Secunderabad is not within British India; *Hossain Ali v. Abid Ali*, 21 C. 177; nor is the Civil Station at Rajkot; *Queen-Empress v. Abdul Latib*, 10 B. 186; nor is the Cantonment of Wadhwan; *Emperor v. Chimanlal*, 14 Bom. L. R. 876 (dissenting from *Triccam v. B. B. & C. I. Ry. Co.*, 9 B. 244); nor are the Kathiawar States; *Hem Chand v. Azam*, 33 I. A. 1: 33 C. 219: 10 C. W. N. 361: 3 C. L. J. 395: 3 A. L. J. 250: 16 M. L. J. 115: 8 Bom. L. R. 129.

**Leaving British India.**—Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and if no security be furnished, the Court will pass judgment against the plaintiff by default. But if the defendant neglects, the appellate Court cannot call for security for the costs of the lower Court.—*In the matter of the petition of Calcutta and S. E. Ry. Co.*, 8 W. R. 217.

**In a suit for money where the plaintiff is a woman.**—Sub-rule (3) has been enacted in view of the provisions of S. 56 of the Code, which provides that no woman can be arrested or detained in the Civil prison in execution of a decree for the payment of money.—*Prem Chand, In the goods of*, 21 C. 832. Suits which are not exclusively for money, but which will result in a decree for money on the relief sought, come within the purview of this rule.—*Sonabai v. Tribhovan Das*, 32 B. 602: 10 Bom. L. R. 337.

A suit to recover certain specified articles and money or to recover the value thereof, is a suit for money within the meaning of this rule. The term "suit for money" as there used being wider than a suit for debts.—*Digumbari v. Aushootosh*, 17 C. 610.

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within Or. XXV, r. 1 (3), C. P. Code.—*Amulyasundari v. Syama Sundar*, 68 I. C. 607. A suit for the administration of an estate consisting largely of immoveable property is not a suit for the payment of money but in fact a suit relating to immoveable property though it may ultimately be necessary to sell the estate and distribute the proceeds in money.—*Amina Bibi v. K. K. Moideen*, 3 R. 211: 89 I. C. 620: A. I. R. 1925. Rang. 300.

A suit for recovery of ornaments or in the alternative for their value is a suit for payment of money.—*Anandamoi v. Gokul*, 16 C. W. N. 763.

The power given to the Court under this rule, to order security for costs, is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case, and unless it is shown that the exercise of the power is necessary for the protection of the defendant, the Court ought not to interfere. In a suit by a female plaintiff against the executors for the amount of legacy under a will, the Court would not order the plaintiff to give security for costs, although she was not in possession of any immoveable property within British India. The meaning of the words "may" and "shall" explained.—*Prem Chand In the goods of*, 21 C. 832. In *Shama Sundary v. Rash Behary*, 3 C. W. N. 753, it has been held that the Court has a discretion in exercising the powers conferred by this rule, and it will not order the plaintiff to give security for costs unless grounds are shown tending to show that the defence is true. In *Bai Porebai v. Devji Meghji*, 23 B. 100, it has been held that save in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs (followed in *Man Bai v. Lodd Govind Doss*, 18 M. L. J. 155). In *Bomani v. Nusserwanji*, 27 B. 100, the Court, distinguishing 23 B. 100, directed the plaintiff to give security for defendant's costs. But in the exercise of its discretion, the Court will not as a general rule require security for costs from a woman-plaintiff if the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* and has become almost ripe for hearing.—*Namubai v. Daji Govind*, 35 B. 421: 8 I. C. 1055.

**Ground for requiring security for costs**—The mere fact that the plaintiff is a poor man and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground for requiring security for the costs from him; it is otherwise where he is not the real litigant, but a mere puppet in the hands of others.—*Khajah Assenoolajoo v. Solomon*, 14 C. 533. In *Ram Coomar v. Chunder Canto*, 4 I. A. 23: 2 C. 233 (P. C.) it has been held that, where it appears that the plaintiff is a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs and to stay the proceedings till it is given.

Very special grounds should be required before a suitor *in forma pauperis*, is required to give security for costs. A mere suggestion that somebody else is financing is not such a ground; *Ma Saw v. Maung Shwe Gon*, 2 Bur. L. J. 78: 75 I. C. 309: A. I. R. 1923 Rang. 244.

A plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt.—*E. D. Murray v. East Bengal Mahajan Flotilla Co. Ltd.*, 46 C. 156: 22 C. W. N. 1018: 48 I. C. 622

A plaintiff who sues for the benefit of his creditors, he cannot be said to be a nominal plaintiff [*Covell*

v. *Taylor*, (1885) 31 Ch. D. 34 and *Cook v. Whellok*, (1890) 24 Q. B. D. 658 rel. on].

Mere poverty is no ground for requiring an appellant to give security for the costs of the appeal.—*Maneckji Limji v. Goolbai*, 3 B. 241; *Seshayyengar v. Jainulavadin*, 3 M. 66; *Jogendro Deb v. Funindro Deb*, 18 W. R. 102; and *Lakshmi Chand v. Gatto Bai*, 7 A. 542.

In a suit by the representatives of the testator to enforce the due performance of charitable and religious trusts in which they are not personally interested, the plaintiffs ought to be required to give security for costs.—*Brojo Mohun v. Hurro Lal*, 5 C. 700: 6 C. L. R. 58.

The fact that the appellant has no money of her own is not in itself a sufficient ground for demanding security for costs. When it appeared that the appeal was not vexatious (the appellant's suit having been decreed by the Court) the fact that the appellant had relations who have money to pay was not a sufficient ground for demanding security.—*Mathuranath v. Priyasashi*, 19 C. W. N. 446: 28 I. C. 598.

No security for costs ought to be demanded from a person who has been allowed to sue as a pauper. This rule does not apply to such a case.—*Hafizan v. Abdul Karim*, 12 C. W. N. 163: 7 C. L. J. 312 (17 W. R. 68 referred to; followed in *Ma Gum v. Tha Hnin*, 36 I. C. 320).

✓✓ Where plaintiff is a pauper.—A person allowed to sue as a pauper ought not to be required to furnish security for costs, as the effect of the order would be to render nugatory the permission to sue as a pauper; *Hafizan v. Abdul Karim*, 12 C. W. N. 163: 7 C. L. J. 312; *Nusseerooddeen v. Ujjul*, 17 W. R. 68; *Ma Gum v. Tha Hnin*, 36 I. C. 320; *Har Kaur v. Chamba*, A. I. R. 1928 Lah. 960: 113 I. C. 911.

Where plaintiff is a minor.—Except in exceptional cases neither a minor plaintiff nor his next friend ought to be required security for costs; *Bai Porebai v. Devji Meghji*, 23 B. 100; *Main Bai v. Ladd Govind Dass*, 18 M. L. J. 155; even if both the minor and his next friend are residing out of British India and have no immoveable property in British India; *Bhai Shankar v. Mulji*, 35 B. 339.

Liability of person standing surety.—A person who offered himself as surety, on behalf of a plaintiff who had been directed to give security for costs, gave a bond making some property liable for the costs, and if it was not sufficient, making himself personally liable. The plaintiff's suit having been dismissed with costs, the defendant sought to enforce the surety bond. Held, he was not bound to proceed against the plaintiff first, but could straight enforce the surety bond, *Ala Husain v. Mustafa Husain*, 92 I. C. 546: A. I. R. 1926 All. 657.

Mode of enforcing surety bonds.—The proper mode of proceeding to put a bond to secure the costs of an appeal in suit, is to move upon affidavits, showing a breach of the conditions of the bond, for a rule nisi, calling upon the obligor and securities to show cause why the Court should not order that the bond be assigned to some person named in the rule.—*Poynor Bibee v. Nujjoo Khan*, 5 C. 437: 5 C. L. R. 524.

For the proper mode of enforcing a surety-bond; see notes under S. 145.

**Appeal from an order under this rule.**—Ordinarily there is no appeal under the Code from an order under this rule, but an appeal lies against an order by a Judge sitting on the Original Side of the High Court requiring security from a woman under this rule. Such an order is a judgment within the meaning of Cl. 15 of the Letters Patent.—*Sanabai v. Tribhovan Das*, 32 B. 602; 10 Bom. L. R. 337. See also *Seshagiri v. Nawab Ashur Jung*, 26 M. 502.

**Revision.**—Where an order is erroneously made for security for costs to which this rule does not apply, *e. g.*, where an order is erroneously made for security for costs against a woman in a suit which is not "a suit for payment of money" within the meaning Or. XXV, r. 3 the case is one of an illegal exercise of jurisdiction and the High Court has power to interfere in revision.—*Amina Bibi v. K. K. Moideen*, 3 R. 211; 89 I. C. 620; A. I. R. 1925 Rang. 300.

2. (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant. [S. 381.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 381, with some alterations and omissions.

The words "*under the provisions of S. 373, or shown good cause why such time should be extended, in which case the Court may extend it*" which occurred in the concluding portion of para. 1 of the old section have been omitted. The reasons for the omissions are that the words "*under the provisions of S. 373,*" are superfluous; and the remaining words have been omitted in view of S. 148 of the present Code by which the Courts are authorized in their discretion, to enlarge time.

Sub-rule (2) exactly corresponds to para. 2 of the old section

Sub-rule (3) corresponds to para. 3 of the old section with the omission of the words "*in writing*" which occurred in the old section after the word "notice" in view of S. 142 of the present Code, which provides that all orders or notices shall be in writing.

Paragraph 4 of the old section which contained the provision for limitation for an application to set aside a dismissal for default to furnish security for costs, has been omitted, as Art. 163 of the present Limitation Act IX of 1908, contains the period of limitation (30 days).

**Res judicata.**—Dismissal of a suit on default of plaintiff to give security for costs, does not operate as *res judicata*.—*Rungraj Ravji v. Sidhi Mahomed*, 6 B. 482. See also *Hariram v. Lalbai*, 26 B. 637.

**Notice.**—No order affecting a party should be made without notice to him, calling upon him to show cause why the order should not be made.—*Sirajul Haq v. Khadim Hussain*, 5 A. 380. See also *Timmu v. Deva Rai*, 5 M. 265.

**Appeal.**—Held by the Full Bench, that an appeal lies from an order passed under this rule, dismissing a suit for failure of the plaintiff to furnish security for costs as ordered, such order being the "decree" in the suit.—*Williams v. Brown*, 8 A. 108 (F. B.). See also Or. XLIII (n).

**Limitation.**—An application by a plaintiff for an order to set aside a dismissal for failure to furnish security for costs must be made within 30 days from the day of dismissal.—Limitation Act, 1908, Art. 163.

The Court has power to enlarge time for furnishing security.—*In the matter of the petition of Soorjumukhi*, 2 C. 272; *Burjore v. Bhagana*, 11 I. A. 7: 10 C. 557 (P. C.); *Fazulunnissa v. Mulo*, 6 A. 250; *Badri Narain v. Sheo Koor*, 17 I. A. 1: 17 C. 512 (P. C.) (1 A. 687 overruled). See, however, *In the matter of Lalla Gopeenath*, 2 C. 128 and *Foneendro Deb v. Jogendro Deb*, 23 W. R. 220.

# ORDER XXVI.

## COMMISSIONS.

### COMMISSIONS TO EXAMINE WITNESSES.

**1.** Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. [S. 383.]

### COMMENTARY.

**No alteration.**—This rule exactly corresponds to S. 383, C. P. Code, 1882. The rule contained in this Order are to be read with the provisions of Ss. 75, 76, 77 and 78 of the Code, which are subject to the conditions and limitations prescribed by the rules of this Order.

**Meaning of the words "may issue"** in rr. 1 and 4.—Ordinarily in the case of a witness not under the control of the party asking for a commission, who resides beyond the limit fixed under Or. XVI, r. 19 (b), a commission should issue as a matter of right, unless the Court is satisfied that the party is merely abusing the Court's authority to issue process. It is not for the Court to decide whether the party will be benefited or not, that is a matter entirely for the party.—*Jagannatha Sastri v. Sarathambal Ammal*, 46 M. 574; 44 M. L. J. 202; 71 I. C. 530 A. I. R. 1923 Mad. 321.

A Judge has the power to alter an order of his predecessor with regard to the issue of a commission. Such an order is not a final one and it relates more to the routine of the case than to the merits of the case.—*Chettyar Firm v. Maung Ba Chit*, 128 I. C. 589; A. I. R. 1930 Rang. 315.

**When Court may issue a commission.**—The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which Courts can issue a commission to examine witnesses are ordinarily those specified in Or. XXVI, r. 1.—*Panachand v. Manoharlal*, 42 B. 136; 20 Bom. L. R. 1; 43 I. C. 729.

The issue of a commission for the examination of a witness is discretionary with the Court, and where it appeared that the lower Court in the proper exercise of its discretion refused to issue a commission for the examination of a *pardanashin* lady, the defendant in the suit, and where it also appeared that the refusal to issue the commission did not affect the merits of the case, both the High Court and the Judicial Committee declined to interfere with the discretion exercised by the lower Court.—*Akikunnissa Bibi v. Ruplal Das*, 25 C. 807 (P. C.). See also *Mowji v. Nemchand*, 23 B. 626.

A commission should not be issued for the examination of the head of a *mutt*, though it may be alleged by him that it is derogatory to a person in his position to appear personally in Court as a witness; *Veerabadran v. Nataraja*, 28 M. 23.

For further notes, see S. 132, *ante*.

"Who is exempted under this Code."—Amongst those exempted from personal appearance are women who according to the custom and manners of the country, ought not to be compelled to appear in public (see S. 132). Such women should be examined on commission, even though they may have appeared in public before.—*Mohesh Chunder v. Manick Lall*, 26 C. 650; *Chamatkar v. Mohesh*, 26 C. 651; *Balakeshwari v. Jnanananda*, 45 C. 697; 22 C. W. N. 197; 26 C. L. J. 319; 41 I. C. 610; *Rahimannessa v. Shaik Halim*, A. I. R. 1928 Cal. 814; and though an allegation of immorality is made against them.—*Benodini v. Kala Chand*, 5 C. W. N. cccxxii (232). A lady belonging to a high family, who has entirely abandoned the protection of the *purdah* and who has no intention of resuming it, ought not to be compelled, having regard to her social position and the feelings of her class, to appear in the witness-box, but should get the privilege of being examined on commission; *Solomon v. Jyotsna*, 45 C. 492; 22 C. W. N. 147; 44 I. C. 157. But a *purdanashin* woman has no right to be examined on commission as a witness at a place of her own choice or where she happened to be at the time of the issue of the commission; *Khitipati v. Dharani*, 48 C. 448.

For further notes, see S. 132, *ante*.

"Sickness or infirmity."—If sickness or infirmity is alleged, the character and gravity of that sickness or infirmity have got to be assessed and the risk consequent upon a refusal to issue a commission will have to be taken into consideration. At the same time the importance of having the witnesses present before the Court, the advantages that would follow from their examination and cross-examination in the presence of the Court, and the emergency which might arise of having them confronted or identified, should not be altogether lost sight of; *Panch Kari v. Panchanan*, 39 C. L. J. 598; 84 I. C. 9; A. I. R. 1924 Cal. 971.

Arbitration.—It is competent to the Court to issue a commission for the examination of witnesses, even in cases referred to arbitration under Sch. II; *Rabiabai v. Rahimabai*, 7 Bom. L. R. 560.

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined. [S. 384.]

## COMMENTARY.

Alterations.—This section corresponds to S. 384, C. P. Code, 1882, with some alterations. The words "an order for the issue of a commission for the examination of a witness" have been substituted for the words "such order" which occurred in the old section. No other change has been made.

Scope.—It is competent to a Court acting under Or. XXVI, r. 2, C. P. Code, to issue a commission for the examination of witnesses acting *suo moto*; *Nanhu v. Abdus Samud Khan*, 4 A. 81 (Rev.).

An application for the issue of a commission should be supported by some reason other than the mere distance of place of residence of the witness. If the witness is a stranger, a commission will be right and

reasonable, but not if he is a servant of the party applying.—*Amrith Nath v Dhunput Singh*, 20 W. R. 253.

When a party elects to go to trial without the evidence of a particular witness who at the time was ill, the Court will be justified in refusing to issue a commission for examining him when the application for that purpose is made at the end of the trial.—*Pramatha v. Bhagwandas*, 35 C. W. N. 705.

There is nothing in law to authorise a commissioner to try the issue referred to him with the aid of assessors.—*Municipal Board, Etah v. Asghari Jan*, 30 A. L. J. 117; A. I. R. 1932 All. 264. There is nothing in the Code authorising a Court to issue a commission to a person directing him to hear a woman sing and then to report not only as to her skill as a singer, but also as to her occupation in life as far as it could be deduced from her musical talents.—*Ibid.*

When the party obtains a commission for the purpose of examining a witness on interrogatories, he is entitled to get a copy of the cross-interrogatories filed by the opposite party before such commission issues. It is reasonable that each side should know the questions the other proposes to put.—*Application of Bibi Saran*, 10 S. L. R. 210. 39 I. C. 944.

**3.** A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it. [S. 385.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 385, C. P. Code, with some verbal changes. The words "*the same*" which stood after the words "to execute" in the old section have been omitted.

**Applicability.**—A Deputy Collector is competent to depute an officer of his Court to take evidence on commission if the place where the witness is examined is within his jurisdiction.—*Ram Chand v. Kameenes Debea*, 10 W. R. 236.

Where the examination of a witness was taken *de bene esse* pursuant to an order of Court and the examination took place before the Deputy Registrar, though no commission was issued to him under Or. XXVI, r. 3 of the Code of Civil Procedure, and no objection, notwithstanding it, related to jurisdiction was taken before the examination commenced, *held*, that the objection was capable of being waived; *Dina Nath v. Metharam Navalras & Co.*, 33 C. L. J. 577.

**4.** (1) Any Court may in any suit issue a commission for the examination of—

Persons for whose examination commission may issue.

(a) any person resident beyond the local limits of its jurisdiction;



(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) any Civil or Military Officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court. [S. 386.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 386, C. P. Code, 1882, with some alterations and omissions.

The alterations made in sub-rule (1) are merely verbal.

In sub-rule (3) some important alterations have been made. The words "*or the Court of the Recorder of Rangoon*" and the words "*subject to any rules of the High Court in this behalf*," which occurred in para. 2 of the old section, have been omitted. The other changes are merely verbal.

"May."—For the meaning of the word "may," see notes under Or. XXVI, r. 1.

"Court may issue a commission."—The issue of a commission to examine a witness or witnesses in a suit is a matter of judicial discretion. An application for the examination of a witness on commission will not be granted unless the Court is satisfied: *first*, that the application is made *bona fide*; *secondly*, that the issue in respect of which the evidence is required is one which the Court ought to try; *thirdly*, that the witness to be examined would give evidence material to the issue; and *fourthly*, there are some good reasons why the witness cannot be examined in Court.—*A. E. Saleji v. A. Musaji Saleji*, 19 L. C. 643; *Hures Das v. Meer Moazzum*, 15 W. R. 447; 8 B. L. R. Ap. 16; *Mowji v. Nem Chand*, 23 B. 626; *Panchkari v. Panchanan*, 39 C. L. J. 598; 84 I. C. 9; A. I. R. 1924 Cal. 971. The last case has been distinguished and disapproved in *Ramalinga v. Sankaranarayana*, 114 L. C. 843; A. I. R. 1929 Mad. 192, where it has been held that the power of the Court to issue commissions is not more restricted under Or. XXVI, r. 4 than under Or. XXVI, r. 1; and while considering the medical evidence that the witness is too ill to attend Court it cannot be said that a more stringent view should be taken if the witness is living at such a distance from the Court that he is not compellable by summons than if he lived within its jurisdiction. The words "may issue a commission" are used in this rule in the same sense in which they are used in r. 1, and mean "is given authority to issue a commission"; *Jagannatha Sastri v.*

*Sarathambal Ammal*, 46 M. 574 : 44 M. L. J. 202 : 71 I. C. 530 : A. I. R. 1923 Mad. 321.

The examination of a witness on commission as provided under this rule stands on a slightly different footing from the issuing of summons to a witness under Or. XVI, r. 1. In the former case the matter is in the discretion of the Court whereas in the latter case summonses are to be issued as a matter of course though the Court may not permit an adjournment of the case if the application is made too late.—*Baikunth v. Jai Kishan*, 51 A. 341 : 113 I. C. 266 : A. I. R. 1929 All. 449.

The provisions of this rule are exhaustive and where the conditions enumerated therein exist, it is competent to the Court to issue the commission. But the Court has power to prevent abuse of its process. An order under this rule is appealable.—*Peerabadran v. Nataraja*, 23 M. 23 (7 W. R. 349 referred to).

An order under this rule for the examination a witness on commission, can only be made on one of the grounds mentioned in the Code, and a Court usurps a jurisdiction not vested in it by law when it orders such examination in the absence of any such ground. The High Court can interfere with such order.—*Somasundaram v. Manicka Vasaka*, 31 M. 60.

A commission will be granted as a matter of course to examine a material witness who is out of the jurisdiction of the Court if the witness cannot be brought into Court by its ordinary process. But the commission will not be granted for the examination of a party, except under very strong circumstances, such as serious illness.—*Doucett v. Wile*, 1 Ind. Jur. 11, 13, 357.

When the appellate Court remands a case for the examination of an expert in handwriting, it is not obligatory on the part of the trial Court to examine the expert before it. It has a discretion in the matter, but it will not do this simply for the reason that the expert resides beyond its jurisdiction as it is possible to obtain the appearance of a handwriting expert in any Court by payment of the necessary fees.—*Gonda v. Tularam*, 120 I. C. 335 : A. I. R. 1930 Nag. 27.

A party to a suit has a legal right to apply to a Court for a commission to examine a witness. The Court should grant the application as a matter of course, without considering whether the applicant can derive any advantage therefrom.—*Huree Das v. Moazzum*, 15 W. R. 447 : 8 B. L. R. Ap. 16.

A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission.—*Edwards v. Muller*, 5 B. L. R. 252.

Discretion as to granting of noncommission, how should be exercised—A Court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. Each case depends on its own circumstances and no rule as to the exercise of that discretion could be laid down. If the appellate Court deems that the discretion was wrongly exercised, if it deems that the case in all its bearings was not laid before the

Court below, if it sees that the Court below misapprehended an important part of the case, the Court will interfere. The High Court in revision set aside the order of the lower Court, where that Court overlooked the distinction which should be observed in the treatment of an application by the defendant as distinguished from a similar application by the plaintiff and ordered the defendant to be examined on commission on payment of costs to the plaintiff for cross-examination; *Kumar Sarat Kumar v. Ram Chandra*, 35 C. L. J. 78: 68 I. C. 9: A. I. R. 1922 Cal. 42.

The plaintiff and the defendant in a suit instituted in the Court of the District Munsif of Devakottah were both residents of Rangoon, and the defendant was served with summons at Rangoon. The plaintiff was allowed to examine himself on commission at Rangoon. An application by the defendant to examine himself on commission at Rangoon was, however, disallowed by the Munsif on the ground that his demeanour could not be watched by the Court. Held, that the Munsif acted with material irregularity in disallowing the application and that his order was liable to be set aside in revision *Visvanathan v. Somasundaram*, 46 M. L. J. 131: 78 I. C. 407: A. I. R. 1924 Mad. 541.

**Commission to examine plaintiff or defendant as his own witness —** The Court will refuse the application of a plaintiff asking for a commission to examine himself unless a very strong case is made out; *Ross v. Woodford*, (1894) 1 Ch. 38; *Nawab Syed Muhammad Akbar Ali v. Herbert Francis*, 3 P. 863: 84 I. C. 993: A. I. R. 1925 Pat. 125. But where an application is made by a defendant, and specially by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice; *Ross v. Woodford*, (1894) 1 Ch. 38; *New v. Burns*, (1894) 64 L. J. Q. B. 104; *Kumar Sarat Kumar v. Ram Chandra*, 35 C. L. J. 78: 68 I. C. 9: A. I. R. 1922 Cal. 42; *Visvanathan v. Somasundaram*, 46 M. L. J. 131: 78 I. C. 407: A. I. R. 1924 Mad. 541.

**Appeal.**—It has been held by the Bombay High Court that an order directing the issue of a commission for the examination of a witness, is not a "judgment" but an interlocutory order, and therefore no appeal lies from such order; *Miya Mahomed Haji v. Zorabi*, 11 Bom. L. R. 241: 2 I. C. 157. On the other hand, it had been held by the Madras High Court that an order refusing to issue a commission or directing issue of the same for the examination of a witness is a "judgment" within the meaning of Cl. 15 of the Letters Patent, and is therefore appealable; *Marutha Muthu v. Krishnamachariar*, 30 M. 143 (dissented from in *Tuljaram v. Alagappa*, 35 M. 1 (F. B.)). No appeal lies from an order refusing a commission.—*Mahomed v. Hoosain*, 3 R. 293: 90 I. C. 967: A. I. R. 1925 Rang. 290; *Abdul Gaffor v. Official Assignee*, 3 R. 605: 93 I. C. 211: A. I. R. 1926 Rang. 64; *Toremull v. Kunj Lall*, 31 C. L. J. 162: 55 I. C. 766.

**Revision.**—No revision lies from an order refusing examination on commission; *Nihal Chand*, 102 I. C. 821: A. I. R. 1927 Sind 55 C. 748: 32 C. W. N. 128: 106 I. C. 880:



**7.** Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit. [S. 389.]

Return of commission with depositions of witnesses.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 389, C. P. Code, 1882, with some alterations of a verbal character.

**"Duly executed."**—The examination of witness under a commission is of the same nature as an examination in open Court. The return should show on the face of it that the oath was administered to the Commissioner as well as to the interpreter.—*Pran Krishna v. Biswa Nath*, 8 B. L. R. Ap. 101.

It is the duty of the party obtaining a commission for the examination of witnesses to take such steps as may be necessary to secure the attendance before the Commissioner of the witnesses he desires to examine.—*Lekhraj v. Palee Ram*, 2 N. W. P. H. C. R. 210.

A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the commission.—*Gregory v. Dooley Chund*, 14 W. R. (C. J.) 17.

Evidence taken on commission, though not read over and signed by the witness, is not alone sufficient to make it inadmissible; but evidence taken on commission without full opportunity for effectual cross-examination is inadmissible in evidence.—*J. Boisgommoff v. The Nahapiet Jute Company*, 5 C. W. N. ccxxx.

**"Shall form part of the record."**—Evidence taken on commission shall be subject to r. 8, form part of the record in the suit and any party is entitled to refer to such evidence as a matter of record.—*Man Gobinda v. Sashindra Chandra*, 35 C. 28.

**8.** Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

When depositions may be read in evidence.

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot,

in the opinion of the Court, attend without detriment to the public service, or

- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same. [S. 390.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 390, C. P. Code, with the addition of the words "*or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service*" in Cl. (a), which did not occur in the old section.

"Shall not be read as evidence."—The evidence taken on commission on behalf of the defendant was allowed to be read on behalf of the plaintiff without the deposition being put in as part of plaintiff's case as being part of the record.—*Nistarini Dass v. Nundo Lall*, 26 C. 591: 8 C. W. N. 239-n. (*Dwarka Nath v. Gunga Dayi*, 8 B. L. R. Ap. 102, followed). See also *Man Govinda v. Shashindra Chandra*, 35 C. 28 and *Dhanuram v. Murli*, 36 C. 566: 13 C. W. N. 525: 11 C. L. J. 150. According to the practice prevailing on the Original Side of the High Court of Calcutta, evidence taken on commission is not treated as evidence in the suit until the same has been tendered and read as evidence in the suit by the party on whose behalf it has been taken; *Kusum v. Satya Ranjan*, 30 C. 799: 7 C. W. N. 784; *Hemanta Kumari v. Banku Behari*, 9 C. W. N. 794.

"A party who wishes to rely on evidence taken on commission, must either obtain the consent of the party against whom he offers it, to its being read as evidence in the suit, or have it read as evidence in the suit after complying with one of the conditions laid down in Or. XXVI, r. 8 (a) or persuade the Court in its discretion to dispense with the proof of any of the circumstances mentioned in (a) and to authorize the evidence being read as evidence in the suit, notwithstanding the want of proof of the existence of such circumstances. Each of the alternatives involves a request to have the evidence read as evidence in the suit (9 C. W. N. 794 not approved).—*Jetha Devji v. Nirmal Singh*, 122 I. C. 396: A. I. R. 1930 Sind 89.

The practice in the mofussil Courts of treating the deposition of a witness examined on commission as evidence in the case even though it has not been formally tendered is not only consistent but also in strict accordance with the provisions of rr. 7 and 8.—*Nistarini Dass v. Nundolal*, 26 C. 591: 3 C. W. N. 239-n; *Man Govinda v. Shashindra Chandra*, 35 C. 28; *Dhanuram v. Murli*, 36 C. 566: 13 C. W. N. 525: 11 C. L. J. 150. This last case has been commented upon and it has been held that r. 8 of Or. XXVI is as much a rule of procedure in the mofussil as anywhere else; and that the mere fact that a commission has been ordered for the examination of a witness is no reason whatever for anyone to look at it unless it is found that at the time of the hearing, sickness or infirmity or other reason prevents the

witness from giving his evidence in the ordinary way.—*Phanindra v. Promotho*, 55 C. 748 : 32 C. W. N. 128 : 106 I. C. 880 : A. I. R. 1928 Cal. 421. See also *Satish Chandra v. Satish Kantha*, 28 C. W. N. 327 : 73 I. C. 391 (P. C.) : A. I. R. 1923 P. C. 73.

Where the defendant did not consent to the evidence of the plaintiff taken on commission being read against him, but on the contrary insisted all along upon the presence of the plaintiff in Court, it is for the plaintiff to show that he was beyond the jurisdiction of the Court at the time when the evidence was going to be read in Court ; *Mahim v. Naba Chandra*, 44 C. L. J. 288 : A. I. R. 1927 Cal. 43 : 98 I. C. 852.

A Court may legally refuse to hear the deposition of a defendant taken by commission read in evidence, where there is no evidence to prove that the defendant was from sickness unable to attend personally at the time of the trial, or the Court declines to dispense with the proof of such circumstances.—*Pruthee Bullubh v. Haradhun*, 22 W. R. 331.

Evidence taken in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible.—*Ram Chand v. Kameenee*, 10 W. R. 236

Where no objection was taken in the trial Court to the admission of the deposition of a witness taken on commission, the lower appellate Court cannot reject that evidence on the ground that the witness was not ill, for the trial Court could have cured the defect if it was proved that the witness was able to depose in Court.—*Girish Chandra v. Ramsaran*, A. I. R. 1929 Cal. 591.

Commissioners appointed by the Court are officers of the Court.—*Rajendra v. Ram Narayan*, 3 B. L. R. Ap. 3.

**Admissibility of documents.**—Where a document is produced before a Commissioner and no objection is taken as to its admissibility, no such objection can be taken before the Court hearing the suit to which the commission is returned.—*Struthers v. Wheeler*, 6 C. L. R. 109. But if the admissibility of the documents is objected to before the Commissioner on any ground, the party so objecting is not precluded from objecting to its admissibility at the trial on any other ground.—*Ralli v. Gaukim Swee*, 9 C. 939.

"Unless the Court in its discretion dispenses."—The Court has a discretion under Cl. (b) of r 8 to dispense with proof of any of the circumstances mentioned in Cl. (a) and allow evidence on commission being read as evidence in the suit, but it is necessary that the Court must have applied its mind to the matter and exercised its discretion ; *Mahim v. Naba Chandra*, 44 C. L. J. 288 : A. I. R. 1927 Cal. 43 : 98 I. C. 852.

## COMMISSIONS FOR LOCAL INVESTIGATIONS.

**9.** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such

Commissions to  
make local investi-  
gations.

person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules. [S. 392.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 392 of the C. P. Code, 1882, with some alterations and omissions.

The words "*or proceeding*" which stood after the words "in any suit" and the words "*and the same cannot be conveniently conducted by the Judge in person*" which occurred in the old section after the words "annual net profits" have been omitted. The word "*proceeding*" has been omitted in view of S. 141 of the Code, which covers proceedings; and the words "*and the same cannot be conveniently conducted by the Judge in person*," have been omitted probably to enlarge the Court's power, as they imposed upon the Court a condition precedent to the issuing of a commission.

**Commission to make local investigation.**—A Commission for the purpose of local investigation is to issue only when such investigation cannot be conveniently conducted by the Judge in person.—*Raikishori v. Kumudini*, 15 C. L. J. 138.

It is within the discretion of a Judge to order or refuse a local enquiry.—*Rash Beharee v. Sahob Roy*, 12 W. R. 76, and *Graham v. Lopez*, 1 W. R. 141.

When neither of the parties desire it . . . . . Court has no power to direct an investigation remand the case for that purpose, but is bound to take evidence before it.—*Jatinga Valley Tea Company v. Chera Tea Company*, 12 C. 45.

In a suit for possession of land, the boundaries of which were disputed, the Sub-Judge directed a local investigation, but the District Judge refused to allow the investigation to proceed. *Held*, that the District Judge had no authority to stay an investigation. All that the District Judge was entitled to do under Circular Order No. 25, dated 25th August, 1870, was to express his opinion as to the propriety or otherwise of the Sub-Judge's order. The Subordinate Court should record a proceeding according to the High Court Circular Order, and forward a copy of the proceeding to the District Judge.—*Nirod Krishna v. Wooma Nath*, 4 C. 718: 3 C. L. R. 234

Where a Commissioner was appointed to ascertain the amount of mesne profits and in ascertaining that he entered into the question of possession of the land, recorded evidence and arrived at a finding and the Court acted on the evidence so recorded; *held*, that it was not within the scope of the Commissioner's duty to decide the question of possession and take evidence and that the procedure adopted by the lower Court was *ultra vires* and illegal.—*Saraswati v. Suraj Narain*, 9 P. L. T. 259: 109 I. C. 641: A. I. R. 1928 Pat. 278.



In suits for enhancement of rent, it is a proper course of procedure to appoint an Amin to make a local investigation in order to enquire as to the description of the land and as to the rates paid in the neighbourhood for similar land.—*Gaur Chandra v. Rash Behari*, 1 B. L. R. S. N. 1 : 10 W. R. 43.

A commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment.—*Sundar Lal v. Sita Ram*, 51 I. C. 399.

The practice of the Court in the Malabar District of issuing several commissions in succession and arriving at valuations regarding the compensation to tenants from the several reports is to be condemned.—*Kunjuni Nair v. Achuta Menon*, 55 M. 656 : 138 I. C. 114 : (1932) M. W. N. 56 : A. I. R. 1932 Mad. 482 : 62 M. L. J. 629.

**Necessity and object of local investigation.**—The object of local investigation is not so much for the purpose of collecting evidence which can be taken in Court, as to obtain evidence which, from its peculiar nature, can only be obtained on the spot.—*Bhawance Dutt v. Beer Singh*, 2 N. W. P. H. C. R. 196.

An Amin should be appointed to hold a local investigation only when it is necessary to inspect the land which is the subject of dispute, to take maps of localities, to obtain information with regard to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, and to identify the maps with one another with the aid of objects to be found on the land. When, however, any fact can be proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner and not by an Amin.—*Bindabun Chunder v. Nobin Chunder*, 17 W. R. 232.

The local investigation referred to in this rule presupposes the existence on the record of independent evidence which requires to be elucidated, but it does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is bound to try.—*Sangili v. Mookan*, 16 M. 350.

**Local investigation by Judge.**—A judgment based on knowledge gained by the Judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him.—*Syed Ahmed Sahib Shutari v. Magnesite Syndicate Ltd.*, 29 I. C. 60 : 17 M. L. T. 387 : 2 L. W. 460.

Order XXVI, r. 9 gives no power to a Court to itself hold a local inspection. A Judge can hold a local inspection for the purpose of understanding the evidence and for no other purpose; *Dwarka Prasad v. Makhulal*, 52 I. C. 241. It is doubtful whether under the provisions of the present C. P. Code it is legal for the Court in person to hold any local investigation. In case the Court holds any local investigation, the result of such investigation should be made a matter of record and should be used only for the purpose of enabling the Judge to understand the evidence; *Anant Lal v. Gokul Sahu*, 35 I. C. 344. See also *Raikishori v. Kumudini*, 15 C. L. J. 138.

Order XXVI, r. 9 does not prohibit a local inspection by the Judge himself in person. The effect of the Commission, in r. 9 of the present Code, of the words "and the same cannot be conveniently conducted by the Judge in person," which occurred in the old section is that, under the new Code, the issue of the commission is not restricted to cases where the Judge is unable conveniently to make the investigation himself. It therefore follows that a Judge has power to make a local investigation in person in any case in which he sees fit to do so, or he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person; *Sabapathy v. Perumal*, 44 M. 640: 62 I. C. 790: 40 M. L. J. 554.

**Appeal from orders directing local investigation and power of appellate Court to interfere.**—No appeal lies from the order of a Judge directing a local investigation by an Amin.—*Bahadur Ali v. Bhabo Soonduree*, 7 W. R. 425.

"... is a mere discretion in which no special... *Lopez*, 1 W. R. 141; *Poorna Persad v. Ch...*... *Vath v. Pearcemonce*, 1 W. R. 196; and *Raj Kishin v. Huro Mohun*, 5 W. R. 248.

An appellate Court should not interfere with the result of a local investigation or enquiry except upon very clearly defined and sufficient grounds.—*Sarat Sundari v. Prasanna Kumar*, 6 B. L. R. 677: 13 M. I. A. 607: 15 W. R. 20 (P. C.); *Monkee Dumber v. Monkee Bhullundur*, 15 W. R. 423.

Interference by a Court with a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated (13 M. I. A. 607; 15 W. R. 423; 60 I. C. 434 followed). It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner for local investigation whose report is unquestioned, whose careful and laborious execution of his task was proved by his report and who had not blindly adopted the assertions of either party; *Rani Amrita Sundari v. Munshi Serajuddin*, 28 C. W. N. 318.

An appellate Court ought not to reverse the decision of a first Court based upon a very careful inspection of the land in dispute, except under a very clear and strong opinion upon the evidence, and upon recording sufficient and satisfactory reasons for such opinion.—*Brindaban v. Dhunnujy*, 18 W. R. 452.

The deputation of an Amin to ascertain the respective liabilities of several judgment-debtors is not an improper course for a Court to pursue, and at all events is not a ground for interfering in special appeal.—*Kristo Chunder v. Brojo Mohun*, 22 W. R. 183.

**Commissioner report.**—In a suit as to a right of way, a Commissioner was appointed under this rule, to prepare a map of the locality in question. Held, that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence.—*Shittwa v. Bhimappa*, 24 B. 43: 1 Bom. L. R. 493.

The report of a Commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under S. 164

of the Agra Tenancy Act, is admissible in evidence; *Bakhtawar Lal v. Sheo Prasad*, 39 A. 694: 15 A. L. J. 766: 42 I. C. 720.

A decree based on an incomplete report of the Commissioner should be set aside.—*Shankar v. Firm of Nanhe Mal*, A. I. R. 1927 Lah. 736.

**10.** (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(8) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. [S. 393.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 393, C. P. Code, 1882, with some additions and alterations.

The words "or as to his report" have been added in the concluding part of sub-rule (2).

Sub-rule (3) is new. There was no similar provision in the old section.

**Functions and powers of Commissioners appointed to hold local investigation.**—The functions of an Amin appointed to hold a local investigation under the Civil Procedure Code discussed.—*Iswar Chandra v. Jugal Kishor*, 4 B. L. R. Ap 33: 21 W. R. 281-note.

It is the duty of the Amin to return his report to the Court ordering the investigation.—*Lalljee Sahoo v. Rajendur Pertab*, 14 W. R. 418.

It is not the intention of the Legislature, to allow witnesses to be examined out of Court by Amins, except with reference to points for the determination of which local investigation is required.—*Sadhoo Sing v. Ramanoograha*, 9 W. R. 83.

A Civil Court is not warranted in deputing its functions to an Amin, and an Amin is bound not to go beyond the points referred to him for inquiry.—*Ram Dhun v. Ram Monee*, 21 W. R. 280; *Iswar Chandra v. Jugal Kishor*, 4 B. L. R. Ap. 33: 21 W. R. 281-note; and *Buroda Churn v. Ajoodhya Ram*, 23 W. R. 286.

Where an Amin was improperly deputed to inquire into the fact of possession; held, that even if the Court's order was improper, the deputation of the Amin was legal, and the evidence taken by him was legal evidence to be considered on its own merits.—*Ram Churn v. Surubjeet*, 9 W. R. 494.

An Amin deputed to make a measurement under the provisions of the Bengal Rent Act, 1869, is bound to record the state of things as actually existing, and has no business to record what he thinks ought to be the rates.—*Bala Thakoor v. Meghburn Singh*, 14 W. R. 269.

An Amin, when directed to make an inquiry as to mesne-profits, ought not, in the execution stage of the suit, to enter into inquiries as to the dates of possession, which must be taken to have been determined by the decree.—*Bejoy Gobind v. Kallee Prosunno*, 16 W. R. 294.

**Report of local investigation and its evidentiary value.**—(a) *Report of a Commissioner appointed by the Court.*—When a Court Amin is appointed a Commissioner under the Civil Procedure Code, his report is only evidence on the points to which the commission refers; any report he chooses to make on any other point is no legal evidence in the case.—*Abdool Ali v. Mullick Sudderosdeen*, 14 W. R. 493; and *Doorgachurn v. Nem Chand*, 24 W. R. 208.

Report of a Commissioner not challenged in the first Court and acted upon by it without further corroborative evidence, should be accepted as correct by the appellate Court. The appellate Court ought not to go behind that report and examine materials on which the report was founded and come to a different finding.—*Govinda Priya v. Ratan Dhupi*, 4 C. L. J. 37: 10 C. W. N. 88-n.

The report of an Amin upon a local investigation is sufficient evidence to support a decree, if it is believed by the Court, and considered sufficient without further evidence to corroborate it.—*Seetaram v. Ram Narain*, 6 W. R. 51.

The report of the Civil Court Amin and the depositions taken by him are admissible as evidence under the provisions of this rule.—*Nathoo v. Ghunnessam*, 8 W. R. 267; *Abdool Gunnee v. Bhuttoo Sheikh*, 22 W. R. 350; *Bhyrub Roy v. Nobin Roy*, 9 W. R. 601; *Dole Gobind v. Chamoo Singh*, 10 W. R. 312; *Sarat Chandra v. Collector of Chittagong*, 2 B. L. R. Ap. 3. But depositions of the witnesses without the report of the Amin are not admissible in evidence.—*Debnarayan v. Kali Das*, 6 B. L. R. Ap. 70: 14 W. R. 397 (affirming on appeal, 13 W. R. 412).

When the local inquiry is ordered by a lower Court, and evidence is taken by an Amin, and a report is made, the return made by the Amin becomes legal evidence which the appellate Court is not justified in refusing to consider.—*Rajnath v. Doorga Lall*, 12 W. R. 136; and *Sheo Doyal v. Hodgkinson*, 24 W. R. 342.

An Amin's report is evidence without any specific documents corroborating his finding.—*Eshan Chunder v. Huree Churn*, 2 W. R. 278; and *Gouree Narain v. Modhoo Soodun*, 2 W. R. Act X, 1.

The report of an Amin under S. 73 of Act X of 1859 is receivable as evidence, and a decision can be legally based upon it.—*Sujan Koor v. Heitoo*, 1 N. W. P. H. C. R. 243.

Where an order for a local investigation is not objected to by the opposite party at the time it is made, the Court is justified in receiving as evidence the report of the Commissioner, and the depositions taken by him, being a part of the record.—*Ram Rukha Roy v. Gobind Doss*, 15 W. R. 291.

The report of an Amin as to local inquiry upon a matter which no personal inspection on his part could decide, and in regard to which the depositions of parties acquainted with the place could afford proper information, was held to be in no way irregular, simply by reason of his having examined witnesses on the spot.—*Sheo Narain v. Budh Singh*, 11 W. R. 423.

The report of an Amin, and the depositions of parties and witnesses examined by him, must be considered, even though the Court exercised its discretion unwisely and wrongly in giving him too extensive powers.—*Umbica Churn v. Goluck Chunder*, 9 W. R. 596.

Unless there be good grounds for dissenting and differing from reports made upon local investigations, the Courts, even in India, and, *a fortiori*; the Privy Council in England, in dealing with boundary questions, ought to give great weight to, and be guided by them.—*Ram Gopal v. Gordon, Stuart & Co.*, 17 W. R. 285 (P. C.); 14 M. I. A. 453; *Protab Chunder v. Surnomoyee*, 19 W. R. 361.

As to the value of a local inquiry report made by a competent official.—See *Sarut Sundari v. Prossanno Kumar*, 6 B. L. R. 677 (P. C.); 13 M. I. A. 607; 15 W. R. 20 (P. C.); *Kalee Doss v. Khetto Pal*, 17 W. R. 472; and *Chunder Coomar v. Joy Chunder*, 19 W. R. 213.

It is necessary that oral testimony should be taken in order to effect a measurement, or that an Amin's report must have depositions attached to it to make it legal evidence.—*Chundermonee v. Nilambur*, 7 W. R. 43.

When an Amin's map is received in evidence by consent and admitted by both parties to be topographically correct, the Court is entitled to look at the Amin's report as explanatory of the map.—*Mahomed Anwar v. Raj Chunder*, 17 W. R. 521.

It is not compulsory on the appellate Court to direct a fresh investigation when it is dissatisfied with the map and report of the Amin. No error of law is committed in deciding on the other evidence before it.—*Manindra v. Saradindu*, 27 C. L. J. 599; 23 C. W. N. 593; 45 I. C. 408 (30 C. 291 referred to).

in law in taking and them the sole basis and other evidence on the

In a suit for rent upon a *jungleburi* lease, which provided that the area of land brought under cultivation should be ascertained by measurement, the only evidence of measurement was a report of an Amin in a previous suit, the accuracy of which was not proved in the present suit. Held, that the report itself was not admissible in evidence.—*Denobundhu v. Nistarini*, 12 C. L. R. 50.

Amin giving credit to local rumour.—*Held*, that the Judge had no right to take the report of an Amin who gave credit to the defendant's witnesses on account of something he heard in the neighbourhood, but that he ought himself to have examined those witnesses.—*Tweedie v. Poorno Chunder*, 12 W. R. 138.

(b) *Report of Amin on question of possession*.—The report of an Amin, however valuable in clearing up difficulties as to the identity and position of land, is, generally speaking, of no value in determining questions connected with the possession of land in dispute in past times.—*Pran Nauth v. Mrinmoyee*, W. R. Sp. Number (F. B.) 39. Amin's report held not sufficient of itself to prove possession.—*Amcenooddeen v. Asgar Ali*, 8 W. R. 464. A Judge is bound to take notice of, and pronounce an opinion upon, evidence taken by an Amin as to possession.—*Jannabee Chowdhraie v. Collector of Mymensingh*, 8 W. R. 287.

(c) *Report of local investigation by Judicial Officers*.—Under the present Code, the Court has power to inspect any property or thing at any stage, see Or. XVIII, r. 18.

A Munsif's report of a local investigation, when not shown to be substantially erroneous in its data or reasoning, should convey the greatest weight as evidence of the facts it sets forth.—*Wise v. Amceroonissa*, 3 W. R. 219.

Facts observed by a Judge, but not proved by any evidence, should be taken notice of, and the Judge should put the result of his investigation upon paper.—*Joy Coomar v. Bundhoo Lall*, 9 C. 363 : 12 C. L. R. 490.

The information derived from a local investigation by a Judge, though not evidence as defined in the Evidence Act, is a matter which he can take into consideration, in order to determine whether a fact is "proved" within the meaning of the Act.—*Dwarka Nath v. Prosunno Kumar*, 1 C. W. N. 682 (9 C. 363 referred to).

A Judge is at liberty himself to inspect the property in dispute and inform himself by the observation of his senses of matters which may help him in understanding the evidence and in deciding the case, and specially such matters which do not require scientific knowledge. He can do so without giving notice to the parties. It is generally desirable that a Judge should place upon record the result of his investigation.—*Moran v. Bhagbat Lal*, 33 C. 133 : 2 C. L. J. 100-n (9 C. 363 : 1 C. W. N. 682, referred to).

At the desire of the parties, the Judge proceeded to the spot, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken by a clerk in vernacular. *Held*, that the procedure was not illegal.—*Ramaya v. Devappa*, 30 B. 109 : 7 Bom. L. R. 642.

(d) *Report of investigation by ministerial officers*.—The report of a Nazir deputed to inquire into the condition of property in dispute is admissible in evidence, although he was not an Amin appointed under Act XII of 1856.—*Buzl Ruhim v. Lutafut Hossen*, W. R. (1864) 171.

The report of a Sheristadar, after local investigation, cannot be legal evidence unless it is shown that no Civil Court Amin was available for the

duty in the district.—*Goluck Chunder v. Dookhee Ram*, 12 W. R. 209 ; *Byjnath Singh v. Indurjeet Koer*, 8 W. R. 331.

The proviso to r. 9 has made it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local inquiry.—*Ram Doss v. Nil Kanto*, 8 W. R. 6 ; *Byjnath v. Indurjeet*, 8 W. R. 331 ; *Bahadur Ali v. Domun*, 7 W. R. 27. But since the repeal of the Civil Court Amin's Act (XII of 1856) by Act II of 1899, B. C., the Courts are not bound to employ the Civil Court Amins for the purpose of local investigation.

"May examine the Commissioner personally."—A Court cannot arbitrarily withhold permission to examine a Commissioner for accounts asked for by one of the parties to the suit. The object of the Legislature in enacting r. 10 (2) of Or. XXVI is to afford protection to the Commissioner who is a quasi-judicial officer. Such protection is afforded on grounds of public policy, so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination.—*Sitaram v. Ramprosad Ram*, 19 C. L. J. 87 : 18 C. W. N. 697 : 22 I. C. 858.

It is within the discretion of a Judge to accept the Commissioner's Report. A Court is bound to see that there is some real ground for examining a gentleman who had undertaken the duty of a Commissioner. It has a discretion in such matter to permit or refuse a party to examine the Commissioner.—*Jadavendra v. Gajendra*, 28 C. L. J. 203 : 47 I. C. 650.

Objections to Commissioner's report.—A Court is bound to inquire into charges against a Civil Court Amin (such as can be readily inquired into and their truth either disproved or proved).—*Abdool Kureem v. Campbell*, 8 W. R. 172.

Objections to the Amin's report should be inquired into if taken within a reasonable time from the return of the report, even when the case has been struck off the file.—*Issur Chunder v. Syam Khan*, 11 W. R. 95.

When clear instructions as to a local inquiry ordered by the Court are given to an Amin in the presence of both the parties, and no objection is made to them by either party then and there, they have no ground of complaint, after the Amin has carried out his instructions, if the Court acts upon his report.—*Bissessar Roy v. Kanchan Roy*, 11 W. R. 155.

A party who refuses to appear before an Amin at the time he holds his local inquiry is not at liberty afterwards to take any objection to the Amin's report.—*Bamun Doss v. Brojo Kishore*, 6 W. R. 130.

Reasonable notice must be given of the time fixed for hearing objections to the report.—*Ram Narain v. Goburdhun Lall*, 21 W. R. 2.

Report of the Commissioner is not binding.—A Commissioner's report is only evidence in a case, but it is no way binding on the Court. If such report is not satisfactory, it is in the Court's discretion to order another Commissioner to be appointed ; *Sone Kuer v. Baidyanath*, 96 I. C. 327 : A. I. R. 1926 Pat. 462 (distinguishing *Tirthabasi v. Bepin Krishna*, 23 C. L. J. 600).

"Where the Court is for any reason dissatisfied with proceedings of the Commissioner."—It is not compulsory on the appellate Court to direct a fresh investigation when it is dissatisfied with the map and report

of the *Amin*. No error of law is committed in deciding on the other evidence before it; *Manindra v. Saradindu*, 27 C. L. J. 599 : 23 C. W. N. 593 : 45 I. C. 408 (30 C. 291 *refd. to*). Where the result of a local investigation is unsatisfactory, the Court is not bound to order another inquiry. It can decide the case on the other evidence on record, *Goribullah v. Madhu*, 50 I. C. 301; *Jadavendra v. Gajendra*, 23 C. L. J. 203 : 47 I. C. 650.

Further evidence after Commissioner's report.—Under Or. XXVI, rr. 9 and 10 there is no absolute right in any party to a local investigation, to adduce evidence before the Court after a Commissioner's report, and the question of adducing further evidence must be decided on general principles according to the facts of each case.—*Girish Chunder v. Soshee Shikhareswar*, 27 I. A. 110 : 27 C. 951 (P. C.) : 4 C. W. N. 631 (17 W. R. 270, *commented on*).

Disregard of a report on local investigation is not any error or defect in the procedure within the meaning of S. 584, C. P. Code, 1882 (S. 100).—*Lakhi Narain v. Jadu Nath*, 21 I. A. 39 : 21 C. 504 (P. C.).

The practice of appointing a second Commissioner without formally recording objections to the first Commissioner's report and without considering whether the first Commissioner's report should be superseded or not is a practice which cannot be too strongly condemned. Reasons for superseding the first Commissioner's report must be recorded in writing by the Court.—*Visvanadham v. Mangamma*, 120 I. C. 737 : A. I. R. 1930 Mad 236 (following 45 M. 79). See also *Kunhi Kutti v. Muhammad Haji*, 54 M. 239 : (1930) M. W. N. 1113 : 60 M. L. J. 450 : 130 I. C. 470 : A. I. R. 1931 Mad. 73.

## COMMISSIONS TO EXAMINE ACCOUNTS.

**11.** In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment. [S. 394.]

Commission to examine or adjust accounts.

## COMMENTARY.

No alteration.—This rule exactly corresponds to S. 394, C.P. Code, 1882.

"Is necessary."—The words of this rule clearly show that no order can be made for the appointment of a Commissioner unless the examination or adjustment of accounts is considered necessary; *Bharat Chandra v. Kiran Chandra*, 52 C. 766 : 90 I. C. 944 : A. I. R. 1925 Cal. 1069.

Commissioner to take accounts—Procedure on taking accounts.—Commissioner appointed to examine accounts—Duty of Commissioner pointed out—Commissioner when to take evidence—Commissioner is not a Judge or an arbitrator—Value of the decision of the Commissioner.—*Tincowri Debi v. Suttia Doyal*, 6 C. L. J. 105.

The principles on which accounts will have to be taken in different classes of cases have been elaborately explained in the case of *Bharat Chandra v. Kiran Chandra*, 52 C. 766 : 90 I. C. 944 : A. I. R. 1925 Cal. 1069.

As a general rule, it is better for the Court itself to settle the exact terms of the order to the Commissioner, that is, not to make him a sort of



inferior Judicial officer. It is generally the business of the Court to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like and it is as a general rule desirable that these matters should be decided before a Commissioner is appointed, *Assarmal v. Hundomal*, 91 I. C. 766.

No objection can be taken to the order of a Judge appointing a Commissioner for taking accounts from a guardian of property. It is impracticable for him to determine precisely what property came into the hands of the guardian at different times which is the work to be done by a Commissioner.—*Gauri Lal v. Raja Babu*, A. I. R. 1929 Pat. 626.

A question whether a certain contract is authorized or not cannot be referred to a Commissioner for taking accounts under Or. XXI, r. 11, C. P. Code. The report of a Commissioner is only to be treated as evidence in the case and is not a decision which has to be accepted; *Vishindas v. Nazarali*, 75 I. C. 1014.

It is as a rule inexpedient to refer to a local Commissioner mixed questions of law and fact, *e.g.*, whether a particular business was of a gambling nature. The distinction between contracts which are genuine and legitimate trading transactions of a speculative nature and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination, and such a question cannot safely be left to the decision of a local Commissioner.—*Sri Thakur Ram Krishna v. Ratanchand*, 53 I. A. 173; 53 A. 190; 29 A. L. J. 458; 35 C. W. N. 841; 53 C. L. J. 561; 33 Bom. L. R. 988. (1931) M. W. N. 733; 61 M. L. J. 665; 132 I. C. 613; A. I. R. 1931 P. C. 136.

In a suit by a principal against his agent for account and for recovery of money that may be found due: *Held*, that no decree could be made for the sums mentioned, or any other sum, until an account had been taken and the amount due from the defendant ascertained. Method to be followed on taking of accounts in the mofussil stated.—*Annoda Persad v. Dwarka Nath*, 6 C. 754; 8 C. L. R. 321.

In a suit for an account by a principal against his agent, the procedure prescribed by Ss. 394 and 395, C. P. Code, 1892 (Or. XXVI, rr. 11, 12) should be followed. If the defendant is found liable to render an account for a certain period, the Court should make an interlocutory decree declaring that he is so liable and direct him to file an account within a fixed period. This decree may be enforced under S. 260, C. P. Code, 1892 (Or. XXI, r. 32). When the accounts have been taken the Court must determine the amount due, and the final decree should be for the payment of this amount, and also, if necessary, for the delivery of any papers, vouchers or other documents which have come into the hands of the agent in the course of his employment.—*Dejamber v. Kally Nath*; 7 C. 654; 9 C. L. R. 265.

In a suit against a *gomasta* to obtain accounts of moneys which had come into his hands, it was held that it was not enough for the lower Courts to make a decree ordering the defendants to render *nikash* papers to plaintiff; it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties.—*Shushee Shekhar v. Suleem Biswas*, 22 W. R. 191.

Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands, and it is always open to the decree-holder to show that this has not been done.—*Wooma Nath v. Sree Nath*, 15 W. R. 260.

Suit by a principal against his agent for account—Object of a decree for an account as distinguished from a decree made upon the hearing—Method to be followed in taking accounts.—*Hurri Nath v. Krishna Kumar*, 13 I. A. 123: 14 C. 147 (P. C.).

Observations on the procedure to be adopted and the burden of proof on the taking of the account.—*Thiru Kumaresan v. Subbaraya*, 20 M. 313.

Where a defendant refused to render accounts and there was evidence of the destruction of the account-books, the Court charged him with the principal sum for which he was accountable, with interest at 12 per cent. per mensem in lieu of the profits he failed to account for.—*Ram Pershad v. Sheo Churn*, 10 M. I. A. 490.

Where the plaintiff had filed his account books in Court, and did not allege that they had been falsified, he should have balanced the account himself, and the lower Court should not have deputed an Amin to investigate the accounts.—*Chand Ram v. Brojo Gobind*, 19 W. R. 14.

Form.—For form of commission to examine accounts, see App. H, Form No. 9.

**12. (1)** The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

Proceedings and report to be evidence Court may direct further inquiry.

**(2)** The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit. [S. 395.]

### COMMENTARY.

Alterations in the rule.—This rule corresponds to S. 395, C. P. Code, with some additions and alterations.

The only change made in sub-rule (1) is the omission of the word "detailed" which stood before the word "instructions" in the third line.

In sub-rule (2) the word "report" has been added after the word "proceedings," and the words "but where the Court has reason to be dissatisfied with them, it may direct such further enquiry as it shall think fit," have been substituted for the words "unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite." By this substitution no change has been made in the meaning, but the provisions have been made more clear. Under the provisions of

this subrule, the proceedings and report of the Commissioner shall be evidence in the suit only if the Court has no reason to be dissatisfied with it; but his report cannot be considered as a decision.

**Report of Commissioner to examine accounts and its value.**—Duty of a Commissioner appointed to examine accounts—Value of his report—Commissioner is not a Judge or arbitrator.—*Tincowri Devi v. Sultya Doyal*, 6 C. L. J 105.

Although a Commissioner's report should have very great weight attached to it, it is not absolutely binding.—*Kankatala v. Poleshetti*, 6 M. H. C. R. 36 (*Venkata Reddi v. Venkataramaiah*, 1 M. H. C. R. 418, *dissented from*). A party dissatisfied with the report is not precluded from adducing evidence in support of his contention. Nor can it be said that the Court should accept the report of the Commissioner at its face value and should refrain from adjudicating upon the objections raised by the parties. It is the duty of the Court to afford the party a reasonable opportunity to produce evidence in support of their objections and then to come to an independent finding upon these objections.—*Hans Raj v. Nathu Mal*, 30 P. L. R. 501: 119 I. C. 490: A. I. R. 1929 Lab. 782. There is nothing in Or. XXVI, which prevents a Court from accepting evidence on a debatable point between the parties where a Commission has been appointed to examine and report on the accounts.—*Joti Prasad v. Hardwari*, 53 A. 54: 187 I. C. 334: A. I. R. 1932 All. 128.

An error in the principle on which an account is taken is not the only ground on which a Court should enquire into the correctness of the report of a Commissioner. It is competent to an appellate Court to examine the accounts even if no exception has been taken to them in the Court appointing the Commissioner.—*Ahmed Valad Nanhubhai v. Khasaji Valad Karimbhai*, 6 B. H. C. R. 189 (*Sarapu v. Malai*, 1 M. H. C. R. 1; and *Venkata Reddi v. Venkataramaiah*, 1 M. H. C. R. 418, *dissented from*).

The report of the Commissioner, if accepted by the Court, is only evidence in the suit of facts found by him, but is not a decision upon it. . . . . rt to make it operative as a judgment confirming the report of the Court to deal with the report on matters of fact, and its powers are not limited to questions of principle when examining such report.—*R. M. S. Chetty v. Mohamed Essa*, 5 C. W. N. 693 (*referring to* 6 B. H. C. R. 149, 6 M. H. C. R. 36 and 1 I. A. 346; and *distinguishing* 4 C. W. N. 809).

The nature of a certificate or report of the Commissioner appointed to examine accounts and what it should contain, considered.—*Rustomji v. Kessowji*, 3 B. 161.

**Quere.**—Whether it would be competent to the Court to re-open a question of account against a clear finding upon a question of fact relating to the account, and made by the Commissioner upon the evidence properly before him.—*Watson v. Aga Mehdjee Sherazee*, 1 I. A. 346.

**Motion to vary or discharge Commissioner's report.**—In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the

Prothonotary's office, and upon the evidence taken by, and the proceedings before the Commissioner, and not on affidavit made for the purpose of the motion. In such a motion, affidavits should only be filed (a) when ordered by the Court if it desires fresh evidence; or (b) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.—*Sumar Ahmed v. Ismail Haji*, 1 B. 158.

A party desiring to move to vary a report made by the Commissioner must not only file his exceptions to such report, but must also make his motion to vary it within 20 days after the filing of the report; or, if the Court has allowed him further time for such application, then within the further time so allowed.—*Narottam v. Hari Chand*, 13 B. 368.

In making an application to discharge or vary a report, it is necessary that notice should be given within the time required by Rule No. 565 of the Rules of the High Court, and that such notice should be accompanied with the grounds of exceptions relied on by the party objecting to the report.—*Lutchmee Narain v. Byjanauth*, 24 C. 437.

Appeal against order directing accounts to be taken.—In a suit for dissolution of partnership and an account, an order directing accounts to be taken is a decree within the meaning of S. 2, Civil Procedure Code, and is therefore appealable.—*Biswa Nath v. Bankanta*, 23 C. 406. See also the observations of Maclean, C. J., in *Khadem Hossein v. Emdad Hossein*, 5 C. W. N. 617 (F. B.) at p. 619: 29 C. 758. But an order directing an account in an administration suit is not an order in the nature of a final decree and is therefore not appealable.—*Sree Nath v. Radha Nath*, 9 C. 773.

Order of a Judge confirming the report of the Commissioner for taking accounts by which he refused to require the defendants to give inspection of certain books, is not appealable as a decree.—*Rustomji Burjorji v. Kessowji*, 8 B. 287.

During the pendency of an appeal against a preliminary order directing accounts to be taken, the High Court has jurisdiction to make an order staying the carrying out of such order.—*Balkishen v. Khugnu*, 31 C. 722 (F. B.): 8 C. W. N. 572.

As for costs of commission, see notes under r. 15.

### COMMISSIONS TO MAKE PARTITIONS.

**13.** Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree. [S. 396, PARA. 1.]

### COMMENTARY.

Alterations.—This rule corresponds to para. 1 of S. 396, C. P. Code, 1882. The language of the present rule is quite different from that of the C. P. C.—124

this subrule, the proceedings and report of the Commissioner shall be evidence in the suit only if the Court has no reason to be dissatisfied with it; but his report cannot be considered as a decision.

**Report of Commissioner to examine accounts and its value.—**Duty of a Commissioner appointed to examine accounts—Value of his report—Commissioner is not a Judge or arbitrator.—*Tincowri Devi v. Suttja Doyal*, 6 C. L. J. 105.

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The report of the Commissioner, if accepted by the Court, is only evidence in the suit of facts found by him, but is not a decision upon it. It requires affirmation by an order of Court to make it operative as a judgment of a Court. In an appeal from an order confirming the report of the Commissioner, it is open to the appellate Court to deal with the report on matters of fact, and its powers are not limited to questions of principle when examining such report.—*R. M. S. Chetty v. Mohamed Essa*, 5 C. W. N. 693 (*referring to* 6 B. H. C. R. 149, 6 M. H. C. R. 36 and 1 I. A. 346; and *distinguishing* 4 C. W. N. 808).

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As for costs of commission, see notes under r. 15.

## COMMISSIONS TO MAKE PARTITIONS.

**13.** Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree. [S. 396, PARA. 1.]

## COMMENTARY.

Alterations.—This rule corresponds to para. 1 of S. 396, C. P. Code, 1882. The language of the present rule is quite different from that of the C. P. C.—124

old section ; but no change seems to have been made in the meaning. In the old section the word " person " was used in the plural number and hence there was diversity of judicial opinion regarding its meaning. The old section ran as follows :—

*" In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights."*

*" Issue a commission to such person as it thinks fit."*—The singular " person " has been substituted for the plural " persons " which occurred in the corresponding S. 396 of the old Code. Under the old section it was held that the use of the plural " persons " showed that the Court could not issue a commission to make a partition to a single Commissioner ; *Mul Chand v Muhammad Ali*, 29 A. 235 (F. B.) ; 4 A. L. J. 76; *Bhujaji v. Narayan*, 6 Bom. L. R. 596 ; *Kanshi Nath v. Balak Das*, 124 P. R. 1893. The present rule makes it clear that a commission to make a partition may be issued to a single Commissioner.

Where no application was made for the appointment of a Commissioner to make the partition and the plaintiff did not turn up on two successive dates fixed for the purpose and the suit was consequently dismissed, and subsequently an application for restoration of the suit was dismissed as being out of time and also an application for a final decree was dismissed on the ground that the Court had no jurisdiction to pass a final decree in the suit which was not on its file : *Held* in revision that the order of the lower Court was valid in law and that the remedy of the aggrieved party was to have the order dismissing the suit revised by the High Court.—*Sreeramulu v. Naghambushanam*, (1928) M. W. N. 542 : 113 I. C. 19 : A. I. R. 1928 Mad. 963.

**14.** (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order of the Commissioner under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports, it shall pass a decree in accordance with the same as confirmed or varied ; but where the Court sets aside the report or reports, it shall either issue a new commission or make such other order as it shall think fit. [S. 396, PARAS. 2 & 3.]

### COMMENTARY.

**Alterations in the Rule.**—This rule corresponds to paras. 2 and 3 of S. 396 of the C. P. Code, 1882, with some additions and alterations.

In sub-rule (1), which corresponds to para. 2 of the old section, the words "*after such enquiry as may be necessary*" have been substituted for the words "*ascertain and inspect the property*" which occurred in the old section. The other changes are merely verbal.

In sub-rule (2), which corresponds to para. 3 of the old section, the words "*or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports*" have been added, and the words "*shall confirm, vary or set aside the same,*" have been substituted for the words "*shall either quash the same.*" Under the wordings of the old section it was held that the Court must either accept the report or reject the report and that it had no power to vary it; *Janki Prasad v. Gouri Sahai*, 28 A. 75 · 2 A. L. J. 709: (1905) A. W. N 188. The word "vary" has been added in sub-rule (2) to enable the Court to modify the report in a proper case.

Sub-rule (3) is almost new with the exception of the words "*pass a decree in accordance*" and the words "*either issue a new commission*" which occurred in the concluding part of para. 3 of the old section. The object of the above amendment is to meet the case of *Janki Prasad v. Gouri Sahai*, 28 A. 75 · 2 A. L. J. 709: (1905) A. W. N 188, where it has been held that in a suit for partition of immoveable property where a Commissioner has been appointed to ascertain the shares of the parties, the Court when passing its final decree must either accept or reject the report of the Commissioner *in toto*, but is not competent to modify it. The old section was rather defective and in order to remedy the defect, sub-rule (3) has been inserted.

**Resistance to Commissioner.**—Where a commission has been issued to make a partition, the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of a suit.—*Masumunnissa v. Latifan*, 32 A. 319 · 5 I. C. 872 7 A. L. J. 196.

**Partition of non-revenue paying immoveable property.**—The intention of this rule is that, upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain the several persons interested in the property, and their rights therein, and shall direct by a preliminary decree or order that Commissioners be appointed to make the partition. The word "Commissioners" in this rule may be read in the singular number.—*Gyan Chunder v. Durga Churn*, 7 C. 318: 8 C. L. R. 415 In the present rule (r. 14) the word "Commissioner" has been used in the singular and thereby *Mulchand v. Muhammad*, 29 A.



235 (F. B.): 4 A. L. J. 76, in which a contrary view was taken has been rendered obsolete.

**Mode of effecting partition.**—In making a partition of joint family property, if it appears that some of the members have enhanced the value of a portion of the lands of the joint estate and that other lands of similar description are not available, compensation should be allowed to each co-sharer for any private expenditure.—*Kaltian Banerji v. Modhu Sudan Banerji*, 8 C. L. R. 259.

It is a well-known principle of equity, which must be adopted in all partition cases that where partition is inconvenient, the property must be left in the possession of the person in occupation, and the other person who cannot conveniently get actual possession, compensated.—*Basant Kumar v. Moti Lal*, 6 C. L. J. 8-n.

Where, in a suit for partition, possession was sought of a definite share of a property consisting of a number of houses, held, that the principle in such cases is, that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made, but where partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given.—*Ashanullah v. Kali Kinkur*, 10 C. 675.

The casting of lots by a Commissioner appointed to make a partition for the purpose of allotting shares to the parties, is not opposed to the provisions of Cr. XXVI, r. 14, and is the most equitable way of assigning properties to co-parceners in a division.—*Ananta v. Subraya*, 29 I. C 215.

In execution of a decree for partition of family dwelling-house, the Court, with the consent of all the co-parceners, is competent to order that any part of the property should remain joint.—*Raj Coomaree v. Gopal Chunder*, 8 C. 514.

In a suit for partition, the land in dispute being in the exclusive possession of a single co-sharer, should fall as a whole in the share of one or other of the co-owners, and not be sub-divided among them.—*Puddomonee v. Dwarka Nath*, 25 W. R. 335.

Where a party concerned objects to a partition of land fairly allotted according to value, as not being convenient, it is not enough to show that his own convenience would have been better consulted by a different arrangement. He is bound to show some arrangement which would better satisfy all parties and be more equitable for all.—*Summun Jha v. Bhooput Jha*, 18 W. R. 498.

Where A mortgaged to the plaintiff his undivided share in certain land which he held jointly with B, and subsequent to the mortgage, by a decree in a partition suit, to which the plaintiff was not a party, the mortgaged property was allotted to B, other property in substitution being allotted to A: Held, in a suit to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property, which had been allotted on partition to B, but should be allowed to proceed against that which had been allotted in substitution to A, his mortgagor.—*Hem Chunder v. Thako Moni*, 20 C. 533 (*Byjnath v. Ramoodin*, 1 I. A. 106 : 21 W. R. 233 (P. C.). followed).

**Partition Act IV of 1893—Partition of joint family dwelling-house.**—Muhammadans are not excluded from the benefit of S. 4 of the Partition Act IV of 1893.—*Sultan Begam v. Debi Prasad*, 30 A. 324 (F. B.): 5 A. L. J. 352 (29 A. 308, overruled; 13 A. 232, referred to).

Where, in a suit for partition, a Commissioner appointed under this rule to make a partition after the preliminary decree had been passed, submitted a report and the Court, in consideration of the report, was of opinion that the land in suit was very small and could not be conveniently partitioned and then passed an order for sale of the property under S. 3 of Act IV of 1893: *Held*, that the Court could pass an order under S. 2 of the Act for sale of the property, and the fact that a preliminary decree had been passed was no bar to his proceeding under that section.—*Hiramon v. Radha Churn*, 5 C. W. N. 128.

Section 2 of the Partition Act applies not only where a Court has to pass a decree for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this rule.—*Bai Hira Kore v. Trikamdas*, 32 B. 103: 10 Bom. L. R. 23 (24 M. 639 5 C. W. N. 128, followed).

Section 2 of the Partition Act (IV of 1893), which empowers a Court to order a sale of property instead of a division, in partition suits, may be applied though a preliminary order defining the share of a plaintiff and directing partition has been passed.—*Kadir Bacha v. Abdul Rahman*, 24 M. 639.

It is only in the event of a suit being one for partition, and the person desirous of buying being a member of the family, that the privilege conferred by S. 4 can be rendered available.—*Kali Kumar v. Brahmananda*, 7 C. L. J. 98: 12 C. W. N. xvi (16-n).

Section 4 of the Partition Act (IV of 1893), applies only where the transferee sues for partition. Where the suit is brought by the sharer against the transferee, S. 2, must be applied. In cases where the section applies the Judge should make a valuation of the share of the transferee only, and direct its sale.—*Balshet v. Miran Saheb*, 23 B. 77.

Section 4 of Act IV of 1893 applies to a dwelling-house belonging to an undivided joint family; but re-acquisition by members of such family after it has been sold to a stranger, does not give any right under that section as against such stranger.—*Vaman v. Vasudev*, 23 B. 73.

*Held*, that S. 10 of Act IV of 1893 would apply to a suit for partition in the stage where an interlocutory decree for partition has been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose.—*Abdus Samad v. Abdur Razzaq*, 21 A. 409.

**Partition suit pending till final decree—Final decree to be engrossed on stamped paper.**—A suit for partition is a pending litigation, until the Court signs the final decree. A decree for partition to be operative must be engrossed on stamped paper, as required by the Stamp Act (II of 1899), S. 2 (15), Sch. I, Art. 45, and until the Judge signs the decree so

agrossed, it cannot be said that the suit has terminated; and no order directing a party to be added under S. 32, C. P. Code, 1882 (Or. I, rr. 8, 10, 11) can be made in such a suit before it has actually terminated.—*Jolindra Mohan v. Bejoy Chand*, 32 C. 483.

A decree for partition must be stamped as an instrument of partition under S. 2 (15) of the Indian Stamp Act (II of 1899).—*Balaram v. Ram Krishna*, 29 B. 366; 7 Bom. L. R. 308.

It is not obligatory, but discretionary with the Court to appoint a partition suit to appoint a Commissioner under r. 13; and such a decree is not, in all cases, to be considered pending till action is taken under that rule.—*Krishnamachariar v. Kuppammal*, 31 M. 540.

**Preliminary decree in a partition suit—Appeal.**—Where a preliminary decree in a partition suit not followed by action under r. 13, is treated by the Court and by the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final.—*Krishnamachariar v. Kuppammal*, 31 M. 540.

Order declaring the rights of parties to a partition suit in certain specific shares is a decree within the meaning of S. 2 of the C. P. Code, and is therefore appealable.—*Dulhin Golab Koor v. Radha Dulari*, 19 C. 463 (followed in *Doloram Dey v. Ram Chundra*, 23 C. 279). See also *Bhola Nath v. Senamont*, 12 C. 273; *Dipin Behari v. Lal Mohun*, 12 C. 209; *Krishna Sami v. Rajagopala*, 18 M. 73; and *Khadem Hossein v. Emdad Hossein*, 5 C. W. N. 617 (F. B.): 29 C. 753.

Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made of the exact rights of each of the parties: *Held* that it was a mere interlocutory order and no appeal would lie from it.—*Bhoobun Moyi v. Shurut Sundery*, 12 C. 275.

An order passed in a suit for partition, subsequent to the preliminary decree appointing a Commissioner to make the partition, is an interlocutory order pending the suit which has not been finally decided, and is not an order in execution, and is therefore not appealable under S. 244, C. P. Code, 1882 (S. 47). In an appeal against the final decree the appellant can take objection to such an order.—*Jogodishury v. Kailash Chundra*, 24 C. 725 (F. B.): 1 C. W. N. 374 (16 C. 203 followed; 23 C. 679 overruled).

The definition of the expression "preliminary decree" is given in the explanation attached to S. 2. Section 97 of the present Code provides that if no appeal is preferred against the preliminary decree, the party aggrieved by such a decree shall be precluded from disputing its correctness in an appeal preferred against the final decree.—*See notes under S. 97.*

**Objection to Commissioner's report.**—An appellate Court has the same powers in dealing with objections to the report of a Commissioner as the Original Court, and a party cannot be heard in the appellate Court unless he had filed his objections before the Original Court.—*Ma Deve v. Ma Tin Lun*, 12 Bur. L. T. 228 (5 C. W. N. 692 followed). A party who does not object to the Commissioner's report in the lower Court is not justified in urging the objections after coming up to the High Court in appeal, although the Court has power to consider whether the report of the Commissioner was—

outside or within the scope of his warrant under Or. XXVI, r. 14.—*Krishna v. Ramantuja*, 114 I. C. 232 : A. I. R. 1929 Mad. 492.

In a partition suit, the Court has inherent power to fix a time within which objections to the Commissioner's report are to be filed, and if its order is not complied with the Court is justified in refusing to hear the objections.—*Sheikh Sirajuddin v. Sheikh Sharfuddin*, 17 A. L. J. 498 : 50 I. C. 152.

**Appeal.**—No appeal lies against an order of Court confirming or varying the report of a Commissioner made in a partition suit under Or. XXVI, r. 14 (3); *Pirthipal v. Bhaskor*, 91 I. C. 317 : A. I. R. 1926 Oudh 195.

### GENERAL PROVISIONS.

**15.** Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued. [S. 397.]

Expenses of Com-  
mission to be paid  
into Court.

### COMMENTARY.

**No alteration.**—This rule exactly corresponds to S. 397, C. P. Code, 1882.

**Expenses of commission—Mode of payment and realization.**—The Court will not order the costs of a commission to examine a defendant, who is a *pardanashin* lady, to be paid by her, or order the estimated cost of the commission to be paid into Court, although the application for the commission is made by the lady herself.—*Monindro Bhoosun v. Shoshee Bhoosun*, 5 C. 866.

When after the issue of a commission it is found that the work is in excess of the amount paid in for the costs of commission, and the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realized is by making the amount part of costs of the suit and entering the same in the decree.—*Tadhin Proshad v. Sardar Coomar*, 10 C. W. N. 234.

The Commissioner's fee in a partition suit should be realised from the decree-holder and the decree should not be drawn up until such sum has been deposited.—*Nanda Lal v. Benode Behary*, 15 C. W. N. 221.

Where a Commissioner was appointed to take accounts at the request of the plaintiffs and his costs were not prepaid. *Held*, in a suit by the Commissioner against the plaintiffs for remuneration of his labour, that the plaintiffs were liable.—*Gopalaratnamayyar v. Bupala Narasimma*, 4 M. 399.

Where, in a suit in India, a commission to take evidence has been issued in England, costs of such commission to be taxed on the same scale, and on the same principle as would be adopted in England.—*Goculdas Bulabdas v. Scott*, 15 B. 209.

A Court cannot refuse to use the Amin's reports and the evidence taken by him as evidence in the event for failure of a party to pay the Amin's fees, inasmuch as a commission issued to an Amin to hold a local investigation is not a process within the meaning of S. 20 of the Court Fees Act; and, therefore, the rules framed by the High Court under that section regarding process fees are *ultra vires*, and cannot be enforced.—*Jagat Kishore v. Dina Nath*, 17 C. 281.

The Code of Civil Procedure does not authorize the dismissal of a suit on refusal or failure of a party to deposit the amount ordered by the Court as remuneration to a Commissioner appointed under S. 394, C. P. Code, 1882 (Or. XXVI, r. 11), to examine accounts. The remuneration of a Commissioner, appointed by the Court to examine accounts should, as a rule, be a definite amount and not at a monthly allowance.—*Ragava Chariar v. Vedanta Chariar*, 3 M. 259.

Under S. 36 of the present Code, the order of the Court regarding payment of Commissioner's costs may be executed as a decree. There was no such express provision in the old Code.

Reduction of Commissioner's bills, when justified.—There must be some confidence reposed in the Commissioners, who are pleaders and officers of the Court, and their reports as to the amount of work done by them can only be set aside on substantial and definite grounds; *Bhagwat Sahai v. Brijbhukhan Prasad*, 1 P. L. T. 171 : 57 I. C. 291.

The District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending.—*Panchanan v. Madhu Sudan*, 44 I. C. 496.

**16.** Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;
- (b) call for and examine documents and other things relevant to the subject of enquiry ;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order. [S. 398.]

### COMMENTARY.

No alteration.—This rule exactly corresponds to S. 398, C. P. Code, 1882.

Powers of Commissioner.—There are no limits to the powers conferred by the Code on a Commissioner for the purpose of making an investigation.—*Mohun Lall v. Unnopoorna*, 9 W. R. 566. He has the widest power and

discretion to enquire into the matters referred to him for investigation unless limited by the wordings of the commission; *Shibo Soonduree v. Ram Chunder*, 17 W. R. 469; but he cannot go beyond the points referred to him for enquiry; *Ram Dhun v. Ram Monce*, 21 W. R. 280; *Bustee Sahoo v. Jee Narain*, 24 W. R. 338.

An Amin appointed to hold a local investigation has power to examine witnesses relative to the matter he has to enquire into, but the Court has no power to direct the Amin to try the whole case.—*Raghu Nath v. Raj Krishna*, 1 B. L. R. S. N. 2. A Commissioner has power under this rule to take evidence in the matter referred to.—*Tincowri Devi v. Suttia Doyal*, 6 C. L. J. 105.

It is the duty of the party obtaining a commission for the examination of witnesses to take such steps as may be necessary to secure the attendance before the Commissioner of the witnesses he desires to examine.—*Lekhraj v. Palee Ram*, 2 N. W. P. H. C. R. 210.

17. (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purpose of this rule the Commissioner shall be deemed to be a Civil Court.

Attendance and  
examination of  
witnesses before  
Commissioners.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness; and such Court may, in its discretion, issue such process as it considers reasonable and proper. [S. 399.]

### COMMENTARY.

**Alteration in the rule.**—Sub-rule (1) corresponds to S. 399, C. P. Code, 1882, with some verbal changes only.

**Sub-rule (2).**—Sub-rule (2) is new. There was no similar provision in the old section. It has been framed to meet the case of *Mahomed Ali v. Wazid Ali*, 23 C. 404, noted below. Under the old section although the Commissioner had all the powers of a Civil Court to summon witnesses and to examine them, he had no machinery to cause the service of processes, etc., and hence sub-rule (2) has been inserted.

On an application to the High Court to authorize a Commissioner to issue process for the purpose of compelling the attendance of witnesses before him, held, that the Commissioner should return the commission to the High Court. The High Court may then send the commission to a Civil

A Court cannot refuse to use the Amin's reports and the evidence taken by him as evidence in the suit for failure of a party to pay the Amin's fees, inasmuch as a commission issued to an Amin to hold a local investigation is not a process within the meaning of S. 20 of the Court Fees Act; and, therefore, the rules framed by the High Court under that section regarding process fees are *ultra vires*, and cannot be enforced.—*Jagat Kishore v. Dina Nath*, 17 C. 291.

The Code of Civil Procedure does not authorize the dismissal of a suit on refusal or failure of a party to deposit the amount ordered by the Court as remuneration to a Commissioner appointed under S. 394, C. P. Code, 1893 (Or. XXVI, r. 11), to examine accounts. The remuneration of a Commissioner, appointed by the Court to examine accounts should, as a rule, be a definite amount and not at a monthly allowance.—*Ragava Chariar v. Vedanta Chariar*, 3 M. 259.

Under S. 36 of the present Code, the order of the Court regarding payment of Commissioner's costs may be executed as a decree. There was no such express provision in the old Code.

**Reduction of Commissioner's bills, when justified.**—There must be some confidence reposed in the Commissioners, who are pleaders and officers of the Court, and their reports as to the amount of work done by them can only be set aside on substantial and definite grounds; *Bhagwat Sahai v. Brijbhukhan Prasad*, 1 P. L. T. 171: 57 I. C. 291.

The District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending.—*Panchanan v. Madhu Sudan*, 44 I. C. 498.

**16.** Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

Powers of Commissioners.

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of enquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order. [S. 398.]

### COMMENTARY.

**No alteration.**—This rule exactly corresponds to S. 398, C. P. Code, 1893.

**Powers of Commissioner.**—There are no limits to the powers conferred by the Code on a Commissioner for the purpose of making an investigation.—*Mohun Lall v. Unnopoorna*, 9 W. R. 566. He has the widest power and





Court within the limits of whose jurisdiction the witnesses to be examined reside.—*Mahomed Ali v. Wazid Ali*, 23 C. 401.

During the examination of a witness on commission one of the parties died and in spite of the fact that the same was brought to the notice of the Commissioner the examination was finished and the commission was returned. *Held*, that the proceeding before the Commissioner was invalid and that the evidence was inadmissible. *Held* also that the remedy of the party was to take out a fresh commission and not to continue the examination from the stage when the death of the party was known.—*Sabitri v. Suraj Mohan*, 115 I. C. 240; 10 P. L. J. 51; A. I. R. 1929 Pat. 101.

Statements recorded on commission are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such a statement notwithstanding that it was not read over to the witness.—*Feroza Jan v. Mirza Amir Ali*, 9 O. L. J. 593; 74 I. C. 445.

**18.** (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence. [S. 400.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 400, C. P. Code, 1882, with some verbal alterations.

In sub-rule (2), the words "where all or any of the parties" have been substituted for the words "if the parties," and the words "in their absence" have been substituted for the word "ex parte" which occurred in the old section.

**Parties to appear before the Commissioner.**—Though there is no express provision in the Code to that effect, yet it is necessary to give notice to parties of the time when a local investigation ordered by the Court is to be held.—*Kistomnee v. Eglinton*, 12 W. R. 139.

A party who refuses to appear before an Amin at the time he holds his local investigation, is not at liberty afterwards to take any objection to the Amin's report.—*Bamun Doss v. Brojo Kishore*, 6 W. R. 130.

A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the commission.—*Gregory v. Dooley Chund*, 14 W. R. O. C. 17.

Where evidence was taken in the absence of the other side, *held* that that fact by itself was not a reason to exclude the deposition of the witness as inadmissible.—*Ram Chand v. Kaminee Debee*, 10 W. R. 236.

When the Commissioner examined the witness *ex parte* in the absence of the defendant, the Court ordered the issue of a fresh commission for the examination of the witness, on condition that the costs of such commission

## ORDER XXVII.

### SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case. [NEW.]

#### COMMENTARY.

Addition.—This rule is new. There was no similar section in the old Code.

Suits by or against Government.—See S. 79, *post*.

Notice in suits against Secretary of State or public officer.—See S. 80, *post*.

2. Persons being ex-officio or otherwise authorised to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government. [S. 417.]

#### COMMENTARY.

In the Punjab all Government pleaders are authorised to act for Government as their recognised agents without any power of attorney. Such pleaders are recognised agents within the meaning of this rule.—*East Indian Ry. Co. v. Piyare Lal*, 10 L. 360: 112 I. G. 736: A. I. R. 1928 Lah. 774.

3. In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council." [S. 418.]

4. The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court. [S. 419.]

(b) upon an application by a law officer of the Local Government acting under instructions from the Local Government.

**21.** A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its Ordinary Original Civil Jurisdiction, to any person whom the Court thinks fit to execute the commission.

**22.** The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign Court.

### COMMENTARY.

**Additions.**—The heading with rr. 19 to 22 were added by Act No. X of 1932 (an Act to further amend the Code of Civil Procedure, 1908 for certain purposes).

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**5.** The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion. [S. 420.]

**6.** The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person. [S. 421.]

**7. (1)** Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary. [S. 423.]

**8. (1)** Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits. [S. 426.]

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest nor his property to attachment, otherwise than in execution of a decree. [S. 427.]

### COMMENTARY.

**Alterations.**—These rules are almost similar to the corresponding sections of the old Code. The changes introduced in these rules are of a mere verbal character.

# ORDER XXIX.

## SUITS BY OR AGAINST CORPORATIONS.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. [S. 435.]

### COMMENTARY.

Alterations in the rule.—This rule corresponds to S. 435, C. P. Code, 1882, with some alterations and omissions. The words "or by a company authorized to sue and be sued in the name of an officer or of a trustee," which occurred in the old section, have been omitted and the reason of such omission, as stated in the Report of the Select Committee, is that "companies authorized to sue and be sued in the name of an officer or of a trustee must be very few, if indeed any exist, and they do not appear to call for special treatment."

The above omission seems also to have been made on the ground that the word "corporation" includes a company registered under the Indian Companies Act of 1882, and most companies are now-a-days registered.

The words "or against" have been added so as to include a defendant corporation; hence the word "pleading" has been substituted for the word "plaint" which occurred in the old section.

The word "corporation" has not been defined in this Code. It means "a fictitious body invested by law with the attributes of a person having a corporate name, by which it can sue and be sued and hold property, but enjoying immortal existence by reason of a perpetual succession of its members."—See *Williams on Real Property*, 20th Ed., pp. 295-296.

Form of suit by or against corporations.—A corporation or company should be sued in its corporate name, and not in the names of its agents or servants.—*Ram Das Sen v. Collector of Moorshedabad*, 2 B. L. R. S. N. 6: 10 W. R. 366; and *Nubeen Chunder v. Stephenson*, 15 W. R. 534.

Order XXIX, r. 1 applies only to corporations strictly so called, i.e., to bodies authorized by law to act as a person in law and not to unincorporated bodies or associations of men; *Ma Gyi v. Pat Lon*, 9 Bur. L. T. 247: 38 I. C. 572.

In the case of an unincorporated or unregistered company, the plaintiff, if he does not know of what persons the company is composed, may sue the company by the name under which they are carrying on business, stating in his plaint his inability to describe them better.—*Koylash Chunder v. Ellis*, 8 W. R. 45. But see *Ganesh Singh v. Mundi Forest Company*, 21 A. 346; and *Panchaiti Akhara, etc. v. Gouri Kuar*, 20 A. 167, in which

A European soldier doing duty as an army schoolmaster, not being liable to a Court of Requests, is not exempted from the jurisdiction of a cantonment Court of Small Causes. The Military Acts give soldiers no privileges as to liability to jurisdiction on actions.—*Marwady Deejarajoo v. Haynes*, 6 M. H. C. R. 83.

Section 99 of the Military Act (30 and 31 Vict., cap. 13) exempts officers in all places in India, where anybody of Her Majesty's force may be serving, from the jurisdiction of the Civil Courts in respect of personal actions.—*Hossein v. Dickenson*, 2 B. L. R. S. N. 3: 9 W. R. 112.

### COMMENTARY.

Reference to the High Court regarding the amenability of European soldiers and their native wives to Small Cause Courts in actions for debt.—*Denis Kefee v. Liset Christie*, 5 W. R. S. C. C. Ref. 21.

**2.** Any person authorized by an officer, *soldier or air-man* to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, *soldier or air-man* could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, soldier or airman. [S. 466.]

**3.** Processes served upon any person authorized by an officer, *soldier or air-man* under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person. [S. 467.]

### COMMENTARY.

**Alterations.**—The words in italics have been inserted by S. 2 and first Schedule of the Repealing and Amending Act X of 1927.

The provisions of S. 463 of the C. P. Code of 1882, which prescribed the rules for service of summonses on military officers, have been embodied in Or. V, rr. 28 and 29.

# ORDER XXIX.

## SUITS BY OR AGAINST CORPORATIONS.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. [S. 435.]

## COMMENTARY.

**Alterations in the rule**—This rule corresponds to S. 435, C. P. Code, 1882, with some alterations and omissions. The words "*or by a company authorized to sue and be sued in the name of an officer or of a trustee,*" which occurred in the old section, have been omitted and the reason of such omission, as stated in the Report of the Select Committee, is that "companies authorized to sue and be sued in the name of an officer or of a trustee must be very few, if indeed any exist, and they do not appear to call for special treatment."

The above omission seems also to have been made on the ground that the word "*corporation*" includes a company registered under the Indian Companies Act of 1882, and most companies are now-a-days registered.

The words "*or against*" have been added so as to include a defunct corporation; hence the word "*pleading*" has been substituted for the word "*plaint*" which occurred in the old section.

The word "*corporation*" has not been defined in this Code. It means "a fictitious body invested by law with the attributes of a person having a corporate name, by which it can sue and be sued and hold property, but enjoying immortal existence by reason of a perpetual succession of its members."—See *Williams on Real Property*, 20th Ed., pp. 295-296.

**Form of suit by or against corporations.**—A corporation or company should be sued in its corporate name, and not in the names of its agents or servants.—*Ram Das Sen v. Collector of Moorshedabad*, 2 B. L. R. S. N. 6: 10 W. R. 366; and *Nubeen Chunder v. Stephenson*, 15 W. R. 534.

Order XXIX, r. 1 applies only to corporations strictly so called, i. e., to bodies authorized by law to act as a person in law and not to unincorporated bodies or associations of men; *Ma Gyi v. Pat Lon*, 9 Bur. L. T. 247: 38 I. C. 572.

In the case of an unincorporated or unregistered company, the plaintiff, if he does not know of what persons the company is composed, may sue the company by the name under which they are carrying on business, stating in his plaint his inability to describe them better.—*Koylash Chunder v. Ellis*, 8 W. R. 45. But see *Ganesha Singh v. Mundi Forest Company*, 21 A. 346; and *Panchaiti Akhara, etc. v. Gouri Kuar*, 20 A. 167, in which



it has been held that where a company is not registered under Act VI of 1882, a plaintiff bringing a suit against such company must make each individual member of the company a defendant in the suit, and he cannot escape from this obligation by stating his inability to do so. See also *The Muhammadan Association of Meerut v. Bakhshi Ram*, 6 A. 284; *Hriday Nath v. Akhil*, 49 C. L. J. 357 : A. I. R. 1929 Cal. 445.

When a suit is brought against two companies, they should be described by their proper names.—*India General S. N. & Railway Co. v. Lalmohon Saha*, 43 C. 441 : 23 C. L. J. 241. A suit against the agent may be treated as a suit against the company where the relief sought was really against the company, it being an error of misdescription.—*Radhe Lal v. East Indian Railway Co.*, 5 P. 128 : 90 I. C. 680 : A. I. R. 1926 Pat. 40.

Unless a company is incorporated under Act VI of 1882, and authorized to sue or be sued in the name of an officer, it cannot sue by any of its officers.—*Campbell v. Jackson*, 12 C. 41. See also *Ghulam Muhammad v. The Himalaya Bank*, 17 A. 292.

The Cantonment Committee of Poona is a body corporate, and is liable to be sued for damages in its corporate name on contracts entered into in its corporate character.—*Cantonment Committee, Poona v. Barjorji Bamanji*, 14 B. 286.

An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility, cannot be brought in the name of the Secretary of the club.—*Michael v. Briggs*, 14 M. 363.

The Secretary of a Government aided school can maintain an action for the benefit of the school.—*Sreehury Roy v. Hills*, 6 W. R. Civ. Ref. 21. See also *Bhoyabhai v. Hayern*, 22 B. 754.

**Foreign Corporation.**—A foreign corporation is entitled to sue in its corporate character in this country without being registered under the Indian Companies Act of 1913 or an Act of Parliament. Thus a plaint filed in the Delhi Court on behalf of the Singer Manufacturing Company, which is incorporated in the United States of America, may be verified by an agent holding a general power of attorney from the Company as a "principal officer" of the Company within the meaning of this rule; *Singer Manufacturing Co. v. Baijnath*, 30 C. 103; *Singer Manufacturing Co. v. Yar, Mahmud*, 8 P. R. 1912.

**Subscription and verification of pleadings.**—Section 51, C. P. Code, 1882 (Or. VI, rr. 14, 15), regulating proceedings by or on behalf of ordinary plaintiffs, does not apply in the case of a corporation or company, but this rule is applicable. An acting manager of a corporation or company is a principal officer within the meaning of this rule, and can subscribe and verify the plaint on behalf of the company or corporation.—*Delhi and London Bank v. Oldham*, 20 I. A. 139 : 21 C. 60 (P. C.). See also *Allen Brothers v. Aruri Mal*, 7 L. L. J. 66 : 88 I. C. 546 : A. I. R. 1925 Lah. 338.

Order XXIX of the C. P. Code deals with the subscription and verification of pleadings in suits by or against a corporation. It says nothing about the manner in which the suit itself is to be framed; *Sinehi Ram Bihari Lal v. The Agent East India Ry. Co.*, 2 P. L. T. 679.

## r. 1.

This rule does not require a "principal officer" of a corporation to verify a plaint from actual personal knowledge. The rule shows that a verifier may depose upon his information and belief.—*The Port Canning and Land Improvement Co. v. Dharnidhar*, 9 C. W. N. 603.

Where a suit was filed by an agent of an unincorporated society, viz., the Board of Foreign Missions of the Presbyterian Church of New York; held that it was not a corporation or company authorized to sue or be sued in the name of an officer or trustee within the meaning of this rule, and also that as the person signing the plaint did not profess to be suing on his own possessory title to the land in respect of which objection was claimed, the suit must be dismissed.—*Yusuf Beg v. Board of Foreign Missions*, 16 A. 420.

It was held that a plaint in a suit by a bank in liquidation in which the plaintiff was described as "The Official Liquidator, Himalaya Bank," and which was also subscribed and verified in the same terms was not a valid plaint.—*Ghulam Muhammad v. Himalaya Bank*, 17 A. 292.

The signing of a plaint by the principal officer of a corporation is, notwithstanding that he is an Ammuktear, a sufficient compliance with the provisions of this rule.—*Chandra Sekhar v. Ram Coomar*, 20 C. L. J. 39.

Order XXIX is merely permissive and not mandatory. The words "other good cause" in Or. VI, r. 14 apply to the case of a company. The company can therefore always authorise some person to sign on behalf of the company. If the company does not choose to do that, it can act under Or. XXIX, r. 1, i.e., it can rely on that order as in fact constituting an agent to sign without the necessity of giving an express authority (20 I. A. 139 explained).—*Calico Printers' Association v. Karim*, 32 Bom. L. R. 1305: 123 I. C. 557; A. I. R. 1930 Bom. 566. See also *Osborne Garrett v. Abdulla*, 134 I. C. 1170; A. I. R. 1931 Sind. 178; *Ramjas Aggarwal v. Mangat Ram*, 32 P. L. R. 655.

"Who is able to depose to the facts of the case"—Where a petition by the Bank of Bengal was verified by a person described as the officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorized to sue or verify the petition on behalf of the Bank at Chittagong, or that he was not able to depose to the facts of the case: Held, that the petition was properly verified under this rule.—*Ram Komal v. Bank of Bengal*, 5 C. W. N. 91.

A plaint or a written statement may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case, *Sreenath v. East Indian Railway Co.*, 22 C. 263.

Where the defence raises the question of the competency of the director to sign and verify the plaint, the defendants are entitled so to cross-examine him. It is only when all comes to a finding as to the case.—*Ram Raghubir v. United Refineries Burma Ltd.*, 130 I. C. 813; A. I. R. 1931 Raig. 54.

The fitness of the person purporting to verify any pleading in a suit by a corporation must be proved by affidavit.—*International Continental Caoutchouc Co. pagnie v. Mehta & Co.*, 31 C. W. N. 1030: 105 I. C. 563; A. I. R. 1927 Cal. 780.

**Dismissal of suit.**—Where the plaint is signed and verified by an officer other than the principal officer of the corporation, the suit ought to be dismissed; *Yusuf Beg v. Board of Foreign Missions*, 16 A. 420.

**2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—**

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. [S. 436.]

### COMMENTARY.

**Alterations.**—This rule corresponds to the first part of S. 436, C. P. Code, with some omissions and alterations. The section has been re-arranged, and except the change in its wording and phraseology, no other material change has been made.

**Service by post.**—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a Registered Office, and by this means the rule is brought into line with the provisions of the "Indian Companies Act."—*See the Report of the Special Committee.*

**Service on corporation.**—An Executive Engineer of a Railway Company is not an officer on whom a service may be made under this rule; and for the purposes of summons, a Railway Company must be deemed to dwell at its principal office—*Hanion v. Indian Branch Railway Company*, 1 Hyde. 197.

The Traffic Superintendent is not the Manager's Agent, and notice to him is not notice to the Railway Administration within the meaning of S. 77 of the Indian Railway Act (IX of 1890).—*Secretary of State v. Dipchand*, 24 C. 306. *See also Perianan Chetti v. South India Railway Company*, 22 M. 137.

**3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.**

[S. 436, LAST PARA.]

### COMMENTARY.

**Alterations.**—This rule corresponds to the last para. of S. 436, C. P. Code, 1882, with the addition of the words "at any stage of the suit."

## ORDER XXX.

### SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

### COMMENTARY.

**Object and scope**—This order is new and is a reproduction of the principal rules comprised in Order XLVIII-A of the English Rules. It deals with suits by or against firms and persons carrying on business in names other than their own; *Ram Prosad v. Anundji & Co*, 49 C. 524 : A. I. R. 1922 Cal. 408.

"The Committee have adopted, with the necessary alterations, the English procedure in relation to suits against firms. This new procedure has been in force for sometime in the Presidency towns of Calcutta and Bombay and has worked satisfactorily. It is hoped that its general application will be found useful by the mercantile community, for the rules remove the technical obstacles which under the present procedure may seriously impede this class of litigation, as where a partner has died."—See *the Report of the Special Committee*.

The Code of 1908 merely provides a new procedure. It does not affect the law that a plaintiff bringing a suit against a firm may implead all the members of the firm as defendants.—*Kazmi Begam v. Lachhman Lal*, 9 P. 717 : 127 I. C. 575 : A. I. R. 1930 Pat. 239.

The word "firm" has not been defined in the Code. In S. 239 of the Indian Contract Act IX of 1872, the following definition has been given : "Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof. Persons who have entered into partnership with one another are called collectively a firm."

The Indian Partnership Act (IX of 1932), S. 4 says,—

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm," and the name under which their business is carried on is called the "firm name."

The provisions of Or. XXX are applicable to suits only and do not apply to proceedings under the Arbitration Act—*E. D. Sassoon & Co. v. Shuji Ram*, 115 I. C. 536 : A. I. R. 1929 Lah. 228. The provisions previous to an award which is subsequently filed in Court and becomes enforceable as a decree though leading up to the decree cannot be said to be a suit so as to attract the provisions of Or. XXX, and Or. XXI, r. 50 (1).—*Bombay Co. v. Kahan Singh*, 134 I. C. 1026 : A. I. R. 1931 Lah. 736. Order XXI, r. 50 should be read subject to the provisions of Or. XXX. It is open to a partner against whom execution is applied for of a decree obtained against the firm to deny in the first instance that he is a partner and in the alternative if that plea is unsuccessful to plead that the decree cannot be executed as none of the partners had any authority to enter into the transaction which gave rise to the liability. *In re Malabar Forests and Rubber Co. Ltd.*, 34 Bom. L. R. 617 : A. I. R. 1932 Bom. 334.

Where a party objects to proceed against a firm, the question whether a particular person is or is not a partner of such firm and is bound by the decree or the award as the case may be is a question which can be dealt with either in execution proceedings or in a separate suit.—*Babu Kirparam v. Jawahar Singh*, 34 Bom. L. R. 737 : A. I. R. 1932 Bom. 375.

If an action is brought for recovery of a debt against a firm, one of the partners cannot bind the firm by consenting to the Judge's order referring all matters in dispute to arbitration.—*Bhagwan v. Hiraji*, 34 Bom. L. R. 1112 : A. I. R. 1932 Bom. 516.

A decree obtained by a firm consisting of one partner only cannot be executed by the son of the decree-holder without the production of a succession certificate.—*Bhagwan v. Hiraji*, 34 Bom. L. R. 1112 : A. I. R. 1932 Bom. 516.

A firm is dissolved by the death of one of the partners but a decree passed in its favour is nonetheless executable at the instance of the surviving partners.—*Ganesh Das v. Hari Singh*, 33 P. L. R. 290.

The mere fact that a certain person was partner with a firm in respect of certain transactions does not make him a partner of that firm as such, and a suit brought in respect of the particular transactions without making him a party is not maintainable.—*Firm of Khanumal v. Karim Mahomed & Co.*, A. I. R. 1932 Sind 78.

Two or more persons carrying on business in the name of a firm in British India are liable to be sued in British India in the name of the firm, and would be amenable to the jurisdiction of any competent Court in British India irrespective of whether they are British subjects or foreigners.—*Tarabai v. Ohogmal*, 28 N. L. R. 118 : A. I. R. 1932 Nag. 114.

A plaintiff in the name of a firm may be signed by one of the partners in such capacity.—*Haji Karim Bux v. Rahman*, 1 N. L. R. 116.

A firm may sue on a promissory note passed to one of its members though the note has been passed to him in his name.—*Brojo Lal v. Budh Nath*, 55 C. 551 : 105 I. C. 549 : A. I. R. 1928 Cal. 148.

"Any two or more persons."—A firm consisting of one proprietor cannot bring a suit in the name of the firm but must sue in his own name.—*Samratihrai v. Kasturbhai*, 127 I. C. 412: 32 Bom. L. R. 212: A. I. R. 1930 Bom. 216; *Bhagwan v. Hiraji*, 34 Bom. L. R. 1112: A. I. R. 1932 Bom. 516.

The position of a single person carrying on business in a firm name is only that of a person with an *alias*; if he dies during the suit, substitution must be made.—*Hari Bandhu v. Hari Mohan*, 57 C. 931: 126 I. C. 118: 34 C. W. N. 36: A. I. R. 1930 Cal. 327: 51 C. L. J. 30 Such a wrong frame of the suit may be allowed to be amended.—*Neogi Ghose & Co. v. Nehal Singh*, 134 I. C. 1200: 35 C. W. N. 432: A. I. R. 1931 Cal. 770.

"Carrying on business in British India."—The rule applies to the case of persons who are carrying on business in partnership in British India. "Carrying on business" means the possession in British India of a place of business held in the name of the firm, whether business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm. It makes no difference whether the partners are or are not out of British India, or whether or not they have another place out of British India. If they are carrying on business in British India in the firm's name, they can be sued as an Indian firm; *Worcester & Co. v. Fir Bank Pauling & Co.*, (1894) 1 Q. B. 784; *Shepherd v. Hirsch & Co.*, 45 C. D. 231; *Lysaght v. Clark*, 1 Q. B. 552. A firm can be an agriculturist within the meaning of S. 2 of the Dekkhan Agriculturists Relief Act 1879, if that firm by itself or by its servants or by tenants earns its livelihood wholly or principally by agriculture. The mere fact that one or all the members of the firm earn their livelihood principally from agricultural income does not make the firm itself an 'agriculturist' within the meaning of that Act.—*Dharamsey v. Balkrishna*, 53 B. 787: A. I. R. 1929 Bom. 378.

"At the time of the accruing of the cause of action."—These words indicate that a suit contemplated by this rule may be brought by or against a firm in the firm's name, even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the dissolution; *Pulin v. Mahendra*, 34 C. L. J. 405; *Harjibandas v. Bhagwandas*, 49 C. 394: 69 I. C. 236: A. I. R. 1922 Cal. 390. A suit against a firm is maintainable even if one of the partners is dead on the date of the institution of the suit provided the cause of action arose before such death.—*Baldeo Prasad v. Haji Ali*, 27 A. L. J. 73: 112 I. C. 715.

Suing of partners in name of firm.—The effect of the provisions regarding suits against partners in the firm's name is merely to give a compendious mode of describing in the writ the partners who compose the firm; in effect the partners are sued individually. The firm's name is a mere expression and not a legal entity; *Ramprosad Chimonlal v. Anundji & Co.*, 49 C. 524: A. I. R. 1922 Cal. 408; *Gopal Das v. Baij Nath*, 48 A. 239: A. I. R. 1926 All. 235

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Under the old law in suits by or against a firm, all persons who were members of it were necessary parties, that is, in suits concerning partnership business, all the members of the firm were necessary parties. *See*, 25 W. R. 118; 7 C. L. J. 266; 31 O. 487 (P. C.); 8 C. W. N. 442. In *Yeknath Babaji v. Gulabchand*, 1 B. H. C. R. 85, it was held that in an action against a firm, the names of the partners should be specified in the plaint. To remove all these technical obstacles the present rules have been framed.

Under the present rule a firm may sue or be sued in the name of the firm, without first ascertaining the names of all the members of the partnership. But at the same time it has been provided in sub-rule (1) that any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons, who were, at the time of accrual of the cause of action, partners in such firm, that is, who were partners of the firm before the dissolution of the partnership.

Sub-rule (2) provides that in suits concerning partnership business, pleadings, etc., may be signed and verified by one of the members of the firm.

Where a suit is instituted by one of the partners on behalf of the firm as its agent, the suit cannot be dismissed on account of the non-joinder of the other parties. All that the defendant is entitled to is the disclosure of the names of those parties. If the other partners are added as plaintiffs even after the period of limitation, the suit cannot be held to be barred by S. 22 of the Limitation Act.—*Marayya Chetty v. Sami Chetti*, 28 I. C. 210; 2 L. W. 239. *See also* *Hari Singh v. Firm of Karan Chand*, 8 L. 1; 100 I. C. 721; A. I. R. 1927 Lah. 115.

Where a suit is brought against a firm by its managing partner it cannot be said to be against the managing partner personally.—*Prem Chand v. Newandmal*, 134 I. C. 397; A. I. R. 1931 Sind 121.

Where a suit was originally framed in the name of a partner as representing a firm carrying on business outside British India but objection was taken and an application was made for amendment, *held*, that the suit as framed was not maintainable at all because it was brought by an entity which had no legal existence, that assuming that the partner and not the firm was the plaintiff, the suit was bad because the other partners had not been impleaded and that an amendment should be allowed on payment of costs.—*Vyanakatesh Oil Mill Co. v. Velmahomed*, 109 I. C. 99; A. I. R. 1923 Bom. 191; 30 Bom. L. R. 117.

Where a suit was filed and a decree was obtained against a Hindu joint family partnership consisting of father and son, and the son was never individually served and never appeared nor admitted partnership nor was adjudged a partner, and the decree was sought to be executed against the property in the hands of the son, *held*, that this could not be done without an order of the decreeing Court under Or. XXI, r. 50 (2) of the Code, and that the son was at liberty to agitate all questions as regards his interest in a suit of his own.—*Satchidanand v. Pryag Sah*, 127 I. C. 573; A. I. R. 1930 Pat. 205.

Where the legal representatives of a deceased partner are not impleaded in a suit against a firm the personal estate of the deceased partner cannot be

rendered liable, and the decree is only capable of execution against the assets of the partnership.—*Ram Narain v. Ram Prasad*, 29 A. L. J. 913: A. I. R. 1931 All. 65.

**Minor.**—Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of Or. XXXII. Where the matter is referred to arbitration, it is not necessary that the Court should give assent under Or. XXXII, r. 7; *Sukha Nand v. Behari Ram*, 68 I. C. 750.

Where a suit is brought by one firm against another through their representatives, they can agree to refer the dispute to arbitration and the validity of the award is not affected by the fact that the minor members of the firm did not sign the reference to arbitration; *Firm Bishambar Mal Pala Mal v. Firm Ganga Sahai Nihal Chand*, 5 L. L. J. 5: 71 I. C. 734: A. I. R. 1923 Lah. 212.

**Suit against firm**—One partner cannot refer the case to arbitration so as to bind others.—Or. XXX, r. 1, sub-cl. (2) does not empower one partner to refer a case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. It could never have been in the contemplation of the Legislature to make an agreement for reference to arbitration by only one of the partners binding on all the partners, merely because the suit is against the firm as such; *Gopal Das v. Baij Nath*, 48 A. 239: 24 A. L. J. 235: 91 I. C. 930 A. I. R. 1926 All. 288.

**Title of suit.**—The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C." It was stated in para. 4 of the plaint "As the plaintiff the owner of the shop is a minor, this suit is not barred by limitation." The suit was dismissed by the trial Court holding that the plaintiff was the shop and not the minor. *Held*, the dismissal was wrong.—*Chanbasappa v. Malkappa*, A. I. R. 1923 Bom. 368

**Verification of plaint.**—Two or more persons carrying a business in the name of a firm can institute a suit in the name of the firm itself. When a suit is brought in the name of the firm any of the partners can sign and verify the plaint. It is not necessary that all or even two partners should sign or verify it.—*Swarath Ram Ram Saran Ram v. Sarup Lal Ram*, 12 A. L. J. 1020.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm. [New.]

### COMMENTARY.

**History and scope.**—This rule is new. It has been taken from Or. XLVIII-A, r. 2 of the English Rules.

Under this rule, where a suit is instituted in the name of a firm, the plaintiffs or their pleaders shall, on demand by or on behalf of any defendant disclose the names of the partners and in default the proceedings in the suit may be stayed.

**Disclosure of partner's names.**—If the plaintiff firm has not made a full disclosure of their partners, the proper procedure is not to dismiss the suit, but allow the firm to put in a further declaration making a full disclosure and thus remedy the defect.—*Imperial Pressing Co. v. British Crown Assurance Corporation Ltd.*, 41 C. 591, 585. See also *Lakshmansa v. Lakshmansa*, 54 B. 285 32 Bom. L. R. 56 124 I. C. 790 : A. I. R. 1930 Bom. 150.

**3.** Where persons are sued as partners in the name of their firm, the summons shall be served either—  
Service.

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable. [New.]

### COMMENTARY.

**History and scope.**—This rule is new, it has been taken from Or. XLVIII-A, r. 3 of the English Rules.

This rule provides the mode of service of summonses, notices, etc., in suits concerning a partnership business. Its provisions are somewhat similar to the proviso to S. 74, C. P. Code, 1882.

**Service of summons.**—This rule prescribes two alternative modes of service of summons in suits instituted against firms. The first mode is by service upon any one or more of the partners. The second mode is by service at the principal place of business of the partnership, within British India, upon the person who has the control or management of the partnership business. If service is effected in either of these modes in accordance with law, there is good service upon the firm as a corporate entity and it is immaterial whether all or any of the partners are within or without British India; *Baisnab Charan v. Bank of Bengal*, 19 C. W. N. 1008; 19 C. L. J. 581; *Adiveppa v. Praggi*, 26 Bom. L. R. 383. It must be remembered, however, that in the case of service on a partner, it is good service not only upon the firm but also upon the partner personally, though it is not service upon any other member of the firm so as to make such member not served liable in execution proceedings under Or. XXI, r. 50 (1) (c). On the other hand if there has been a service upon the person who has the control or management of the business but is not a partner himself, such service is good service upon the firm but it is not service on any member of the firm so as to make him liable in execution proceedings under Or. XXI, r. 50 (1) (c); *In re Ide*, 17 K. B. D. 755. Where the mandate to the bailiff is to serve the summons under Or. XXX, r. 3 (b), on the manager or the managing partner of the firm at the place where the firm is carrying on business, and the name of the person to be served is not specified in the summons, it is no duty of the bailiff to deviate from this mandate and attempt to ascertain for himself who the managing partner is or to attempt to serve the summons on such managing partner by affixing it to his residence. Such a service is not proper service under Or. XXX; *Manjimal v. Khubchand*, 95 I. C. 149; A. I. R. 1926 Sind 208.

Sections 74 and 76, C. P. Code, 1882 (Or. V, r. 11 and Or. V, r. 13), do not apply, where some of the defendants who are interested in the partnership are minors. Those sections are controlled by S. 443, C. P. Code, 1882 (Or. XXXII, r. 3).—*Jatindra Mohan v. Srinath Roy*, 26 C. 267; 3 C. W. N. 261 (14 C. 204 (F. B.) referred to).

In a suit instituted against a partnership firm, all the members whereof were non-residents at the place in which the business was carried on, service of summons could not be made under S. 80, C. P. Code, 1882 (Or. V, r. 17), on the refusal of the manager of the firm to accept service, by affixing a copy of the summons on the outer door of the house in which the business was located. Section 80, C. P. Code, 1882 (Or. V, r. 17), contemplates that the persons sought to be served should be residing at the house. But service so effected was properly made under S. 74, C. P. Code, 1882 (Or. V, r. 11), which contemplates service on the person having management of the business, unless the Court otherwise directs.—*Akhoy v. Nagendra*, 13 C. W. N. 490.

A person who has been served as a partner and has entered appearance under protest denying that he is a partner, is not entitled to have the question of his partnership tried in the suit. The proper stage to try the question is the execution proceedings.—*Jetha Devji & Co. v. Jachir Sing*, 26 S. L. R. 228.

Where service has in fact been made upon a partner in a firm, the service is not bad merely because the direction in Or. XXX, r. 3 has not.

been complied with.—*Keen Robinson & Co. v. Lily Biscuit Co.*, 59 C. 496. The words "as the Court may direct" do not occur in the corresponding English rule. If the method of service prescribed by the Court is followed, then *prima facie* there has been service on the firm.—*International Continental Caoutchouc Compagnie v. Mehta & Co.*, 54 C. 1057; 105 I. C. 356: A. I. R. 1927 Cal. 758.

**Service in case of suit against a dissolved firm.**—An *ex parte* decree was obtained against a firm which had been sued in the firm's name and served as such with the leave of the Court by registered post. It was alleged in an application to set aside the *ex parte* decree by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant. *Held*, a suit can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. Under Or. XXX, r. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service control or management of the partnership business. If r. 11 of Chapter VII of the High Court rules is applied, it is necessary that it should be so applied as to comply with Or. XXX, r. 3; *Haryibandas Gordhandas v. Bhagwandas Pursram*, A. I. R. 1922 Cal. 390. Where there has been dissolution of the partnership to the knowledge of the plaintiff, he cannot make an outgoing partner liable unless he served the writ of summons upon him. Similarly on the death of a partner his personal estate cannot be made liable unless his legal representative is joined.—*Mathuradas v. Ebrahim*, 51 B. 986: 105 I. C. 305: A. I. R. 1927 Bom. 531. Order XXI, r. 50 (2) is controlled by the proviso to this rule where there has been dissolution to the knowledge of the plaintiff. If the plaintiff was not aware of the dissolution at the time of the institution of the suit, the decree binds all the partners of the firm whether they have been served individually or not.—*Gordhandas v. Gautamchand*, 27 Bom. L. R. 541: 87 I. C. 1051: A. I. R. 1925 Bom. 331.

**Limitation.**—Where a suit is instituted against a joint-family firm which has been dissolved before the date of the suit and where one of the partners is served individually the date of institution of the suit as against that partner for the purposes of limitation is the date on which the suit was instituted and not the date on which the said service took place.—*Firm of Detaram Ratulal v. Firm of Vishandas Tarachand*, 105 I. C. 854: A. I. R. 1928 Sind 57.

"May direct."—The words "may direct" do not indicate express permission.—*Akhoy v. Nagendra*, 13 C. W. N. 490.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

Right of suit on  
death of partner.

r. 4.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors. [New.]

### COMMENTARY.

**Object and scope.**—This rule is new. Section 45 of the Indian Contract Act IX of 1882, to which reference has been made in this rule, runs as follows: "*When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly*"

This rule has been framed to meet the following rulings under S. 45 of the Indian Contract Act in which it has been held that S. 45 of the Contract Act relates to partners as well as to other co-contractors. In *Motilal Bechar Dass v. Ghellabhai*, 17 B. 6 (11) (following 6 B. 700), it has been held that the right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. This case has been approved in *Aga Gulam Husain v. Sassoon*, 21 B. 412 (421). See also *Gobin Prasad v. Chandar Shekhar*, 9 A. 486, and *Debi Das v. Nirpat*, 20 A. 365. In *Vaidyanath v. Rangasami*, 17 M. 108 (117), it has been held that a surviving partner can sue alone for the recovery of a partnership debt. In *Ram Narain v. Ram Chander*, 18 C. 86 (90), it has been held that the representatives of a deceased partner must always be made parties to suits as plaintiffs with the surviving partners. See also *Maung Shwe v. Ma Lon*, 7 R. 558. Order XXX, r. 4 was enacted to set at rest the doubt that existed in connection with S. 45 of the Contract Act and to provide that where two or more persons may sue in the name of the firm and any of such persons dies it shall not be necessary to join the legal representatives of the deceased partner, but it was not intended that the firm name should be deemed to include the personal representatives of a deceased partner. If the legal representatives of a deceased partner are served with the writ of summons though not added as parties to the suit, leave cannot be granted to the plaintiff to levy execution against the private estate of the deceased partner under Or. XXI, r. 50 (2). If the suit is brought against a firm in the firm name with the knowledge that the firm has been dissolved by death of a partner, the suit as framed does not include the legal representatives as parties, and in order to obtain judgment against their private assets as opposed to partnership assets, they should be made parties.—*Mathuradas v. Ebrahim*, 51 B. 986; *Mohamed Yusuf v. Mohamed Sadulla*, 57 M. L. J. 344 (F. B.). See also *Hars Singh v. Karam Chand*, 8 L. 1: 100 I. C. 721: A. I. R. 1927 Lah. 115.

On the death of a partner the right to sue in respect of debts due to the firm survives to the surviving partners.—*Bal Kissen v. Kanhya*, 17 C. L. J. 648: 21 I. C. 509



One of several joint contractees may sue to enforce his share of the obligation, if the other co-contractees are joined as defendants. As a general rule, all co-contractors ought to be joined as plaintiffs. A suit by one would not be had if the others are joined as defendants, and if there are good reasons for not joining them as plaintiffs.—*Shital Chandra v. Manik Chandra*, 9 C. L. J. 331 : 13 C. W. N. 509 (26 C. 409 referred to and followed ; 6 C. L. J. 558, 25 C. 787 referred to).

**Applicability of the rule.**—Order XXX, r. 4 of the C. P. Code applies only to a case where the suit is brought in the name of the firm.—*Monmohan v. Bidhubhusan*, 48 I. C. 309 : 29 C. L. J. 268.

Rule 4 is limited in its operation to suits instituted by or against partners in the name of their firm and not in their individual names. Hence in a suit filed by two partners individually, if one of them dies pending suit, but his legal representatives are not brought on the record, the suit shall abate : *Dost Mahomed v. Mohandas*, 91 I. C. 573 : A. I. R. 1926 Sind 81.

The rule applies to a suit on a mortgage in the name of a firm.—*Utanka Lal v. Tarak Nath*, 48 C. L. J. 357.

Where a suit was brought by the individual owners of a firm and a decree having been passed the defendants appealed, and during the pendency of the appeal the defendants died during the pendency of the appeal, and their legal representatives were not substituted, held that Or. XXX, r. 4 applied, and the appeal was not in the name of the firm, and that the decree being a joint one the whole appeal had abated.—*Shri Chand v. Bansidhar*, 135 I. C. 245 : 30 A. L. J. 219.

**5.** Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner. [NEW.]

### COMMENTARY.

**History.**—This rule has been taken from Or. XLVIII-A, r. 4 of the English Rules.

**Three capacities.**—This rule mentions three capacities in which notices may be served : (1) Notice may be as a partner ; (2) or as a person having the control or management of the partnership business ; (3) or in both characters. If the above provisions are not complied with, the person served shall be deemed to be served as a partner.

**Notice in what capacity served.**—The present rule provides that the person served with a summons under r. 3 should be informed, by notice in writing given at the time of the service, whether he is served as a partner of the firm or as a person having the control or management of the partnership business or in both characters. In default of notice, the person served will be deemed to be served as a partner.

**Appearance under protest.**—See r. 8, below.

In the absence of a written notice as in the capacity of the person on whom summons is served, the person served shall be deemed to be served as a partner and if he wants to contest that, he must appear under protest under r. 8; *Baisnab v. Bank of Bengal*, 19 C. W. N. 1008; 19 C. L. J. 581.

**6.** Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. [NEW.]

### COMMENTARY.

**History.**—This rule has been taken from Or. XLVIII-A, r. 5 of the English Rules.

**Meaning.**—Rule 6 implies the right of any partner who has been sued against in the name of the firm to appear in the suit, and if any partner considers that his rights will not be adequately represented by the other partner who has been impleaded or that his interest is adverse to that of the other partner it is just and fair that he should be allowed to appear individually and resist the claim.—*Sital Prasad v. Peary Lal*, 28 A. L. J. 1212; A. I. R. 1930 All. 701.

**"Individually."**—Under Or. XXX, r. 1 of the C. P. Code, a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld. Held also, that the word "individually" in r. 6 is not synonymous with "in person": no partner can service in for

*Shamas Din & Co*, 78 P. R. 1918; 155 P. W. R. 1918; 47 I. C. 422; *Lal Chand v. Firm of Dwarka Dass Badri Parshad*, 103 I. C. 528; A. I. R. 1928 Lah. 528. Where in a suit against a firm, summons was served on a person as partner and not in his individual capacity, and that person filed a written statement in his own name and not as a representative of the firm, but there was nothing individual in the defence, it was held that it was only a technical flaw which could be corrected even at the stage of argument by amending the written statement and converting it into one for the firm.—*Pokhardas v. Seivaram*, A. I. R. 1929 Sind 192.

**"All subsequent proceedings shall continue in the name of the firm."**—In every suit against partners sued in the firm's name, the plaint and all subsequent proceedings must be headed with the firm's name as defendants; *Ajit Sing v. Grunning & Co.*, 27 Bom. L. R. 998; A. I. R. 1925 Bom. 494; *Pulin v. Mahendra*, 34 C. L. J. 405; 67 I. C. 10.

**7.** Where a summons is served in the manner provided by rule 3 upon a person having the control or except by management of the partnership business, no partners. appearance by him shall be necessary unless he is a partner of the firm sued. [NEW.]

### COMMENTARY.

**History.**—This rule has been taken from Or. XLVIII-A, r. 6 of the English Rules.

**8.** Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared. [New.]

Appearance  
under protest.

### COMMENTARY.

**History.**—This rule has been taken from English Or. XLVIII-A, r. 7.

**Appearance under protest.**—The plaintiff filed a suit against the defendants and served the summons on one *N* as a partner in the defendants' firm. *N* entered an appearance under protest and filed a written statement denying that he was a partner in the defendants' firm. The plaintiff got an *ex parte* order for adjournment of the suit in order that he might serve a duplicate writ of summons on the defendants. *N* applied that the order should be vacated and that the suit should be placed on board for trial of the issue whether he was a partner in the defendants' firm. *Held*, that the order for adjournment should stand in order to enable the plaintiff to serve the summons on the defendants' firm; and that *N* had the right to have the question whether he was a partner in the defendants' firm decided by the Court.—*Vithaldas v. Hansraj*, 64 I. C. 698.

Where the plaintiff files a suit against the firm the alleged members of which put in their appearance under protest, he has the option of applying to strike out their names and appearance under protest. If he does not do so but simply obtains a decree against the firm, the defendants are entitled to apply to Court for provision to be made for their costs of appearance in the event of the plaintiff not applying for leave to issue execution against them within a reasonable period or so applying but failing to prove that they are partners.—*Kodoomal v. Mangatram*, 34 Bom. L. R. 640. Where an appearance is entered under protest, the effect is to nullify the service altogether as regards the defendant firm. A party appearing under protest under this rule is not entitled to file written statement on his own behalf even one denying that he is a partner.—*International Continental Caoutchouc Compagnie v. Mehta Co.*, 54 C. 1057; 105 I. C. 356; A. I. R. 1927 Cal. 758. But he is entitled to take any defence in a proceeding against him under Or. XXI, r. 50, in addition to the defence that he was not a partner of the defendant firm, unless to do so will be to negative the provisions of a rule of procedure.—*Chhattoo Lal v. Naraindas*, 56 C. 704; A. I. R. 1930 Cal. 53.

**9.** This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just. [New.]

Suits between  
co-partners.

## COMMENTARY.

**History.**—This rule has been taken from Or. XLVIII-A, r. 10 of the English Rules.

**Scope.**—Rules 6, 7, 8 and 9 are to be read with r. 50 of Or. XXI, which prescribes the mode of execution of a decree against a firm.

**Two firms with common partners.**—When all the members of one firm are also members of another, a suit cannot be brought by the one against the other for accounts or for balance due; the proper remedy is a suit for a partnership account.—*Pokhardas v. Sewaram*, A. I. R. 1929 Sind 192.

**Suit against person carrying on business in name other than his own.** **10.** Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply. [New.]

## COMMENTARY.

**History.**—This rule has been taken from Or. XLVIII-A, r. 11 of the English Rules.

**Scope of the rule.**—This rule applies to a single individual who carries on business under an assumed or trading name other than his own name; and in such case the foregoing rules of this Order will apply to such individual, who may be sued either in his own name, or in the trade name.

Such a person may be sued in his trade name but he cannot sue in that name.—*Samrathrai v. Kasturbhai*, 127 I. C. 412; 32 Bom. L. R. 212; A. I. R. 1930 Bom. 216; *Rampratab v. Gavrishankar*, 85 I. C. 464; 25 Bom. L. R. 7. A. I. R. 1924 Bom. 109. If a sole proprietor dies, a suit after his death must be brought against his legal representative and not against him in his trade name.—*Ibid*; *Habib Bux v. Samuel Fitz & Co. Ltd.*, 23 A. L. J. 961; 89 I. C. 22; A. I. R. 1926 All. 161.

See notes under heading "Any two or more persons" in r. 1, ante.

**Application of the foregoing rules.**—All the rules of this order relating to suits against firms have been made applicable by the latter part of this rule to suits against a person trading in a name other than his own, so far as the nature of the case will permit.

# ORDER XXXI.

## SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS

1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties. [S. 437.]

Representation of beneficiaries in suits concerning property vested in trustees, etc

### COMMENTARY.

**Changes.**—This rule exactly corresponds to S. 437, C. P. Code, 1852, with the substitution of the word "*where*" for "*when*."

**Definitions**—The word "*trustee*" has not been defined in this Code. For the definition of "*trustee*," see the Indian Trust Act (II of 1882).

For the definition of the words "*executor*" and "*administrator*," see S. 3 of the Indian Succession Act (X of 1865).

This rule applies only when the contention is between the person beneficially interested and a third party; but it does not apply where the contention is between beneficiaries and trustees or between the beneficiaries themselves.—See *Sathianama v. Saravanabagi*, 18 M. 266 (272), noted below.

**Scope.**—This rule applies only where the dispute is between the beneficiaries and a third person. It does not apply where the contention is between beneficiaries *inter se*. This rule does not purport to have been enacted for the purpose of enumerating the cases in which suits may be brought by or against a person in a representative character; they merely provide a mode of disposing of suits concerning property vested in trustees, executors or administrators.—*Raghunandan v. Parmeshwar*, 39 I. C. 779; 2 P. L. J. 306.

**Representation of beneficiaries.**—Having regard to this rule the persons acting as trustees in succession under the will of a Parsi testator, made before Act X of 1866 came into operation, but proved subsequently, adequately represented all persons beneficially interested in the estate in all suits relating to it.—*Ardesir Jehangir v. Hira Bai*, 8 B. 474.

Under the provisions of the C. P. Code, the representatives of trustees are necessary parties to a suit for the recovery of trust property.—*Annapurna Dabee v. Noni Mohun*, 7 C. W. N. (S. N.) lxviii (68).

A trustee represents the persons beneficially interested, when the suit is concerning property vested in the trustee, and the contention is between

## r. 1.

the persons beneficially interested and a third party.—*Sathianama v. Saravanabagi*, 18 M. 266 (272).

A trustee sufficiently represents the beneficiaries for the purposes of a suit, and the beneficiaries entitled under the declaration of trust need not be made parties.—*Beresford v. Ramasubba*, 13 M. 197.

An executor of the will of a deceased Mahomedan, since the coming into operation of the Probate and Administration Act (V of 1881), cannot claim to represent the estate of his testator until he has taken out probate.—*Fatma v. Essa*, 7 B. 266. Reversed in appeal.—See *Shaik Moosa v. Shaik Essa*, 8 B. 241.

Where a suit for possession was brought by an executor in September 1898 and the names of the beneficiaries who took possession of the estate during the pendency of the suit were substituted as plaintiffs in November 1900. *Held*, that no new plaintiffs were substituted within the meaning of S. 22 of the Limitation Act.—*Janhabi v. Brojo Mohini*, 7 C. W. N. 817.

The representatives of a testator are entitled to sue for the enforcement of the due performance of the trusts created by him for religious and charitable purposes, and in which they are not personally interested, but their suit will be dismissed, unless upon their plaint they substantially allege a state of circumstances which, if proved, will constitute a distinct breach of trust.—*Brojo Mohun v. Hurrolohl*, 6 C. L. R. 59; 5 C. 700.

Where a decree for foreclosure was obtained against S who was the executor of his father's estate, and subsequently A, brother of S, and M, a purchaser of some of the mortgaged properties from A, made an application to be made parties and to redeem: *Held*, that they were not entitled to be made parties.—*Mohananda v. Akhoy Kumar*, 6 C. W. N. 488.

A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either intermeddled with the estate or proved the will. An action commenced against the heir-at-law cannot be continued against him after the grant of probate, but the executor must be added as defendant.—*Dhirendra Kanta v. Kumar Saradindu*, 1 C. L. J. 29-n.

A beneficial owner is not a necessary party for setting aside an execution sale. It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner although his *benamdar* only, and not he, is made a party to the proceedings.—*Baroda v. Chunder Kanta*, 29 C. 682; 6 C. W. N. 706.

In the absence of fraud or collusion the decree obtained against an executor or administrator and the sale thereunder, are binding upon their successors.—*Bai Meherbai v. Maganchand*, 29 B. 96.

Section 85 of the Transfer of Property Act (IV of 1882), by reference to this rule, indicates, in very clear terms, who are to be regarded as representatives of persons, and they are trustees, executors and administrators.—*Lala Suraj Prasad v. Golab Chand*, 29 C. 517 (529); 5 C. W. N. 640.

In a suit by one legatee for a legacy bequeathed to him, the executor may apply for his protection that other legatees may be made parties, and in such a case it is discretionary with the Court to make the addition of parties.—*Purshottam v. Kala Gorindji*, 26 B. 301.

When a suit for reot was brought against two persons as *mutwallis*, but one of them who was a minor was not properly served and no guardian was appointed on his behalf: *Held*, that the *mutwallis* were trustees and the presence of all of them in the suit was essential, and the suit was properly dismissed for defect of parties.—*Syed Abdul Rab v. H. C. Eggar*, 12 C. W. N. 160.

Where letters of administration, which were obtained by fraud, are not revoked, the grantee to all intents and purposes alone represents the estate, and his receipts are valid discharges for all moneys received by him as administrator.—*Debendra Nath v. Administrator-General, Bengal*, 12 C. W. N. 802 (P. C.)

In an administration suit by a legatee, the executor is the only necessary party, and the other legatees need not be joined as party defendants.—*Pramatha v. Suprakash*, 58 C. 77: 132 I. C. 904.

When beneficiaries may be added as parties.—Beneficiaries are made parties when the trustee is either wholly uninterested or has no interest adverse to their interest.—*Beresford v. Ramasubba*, 13 M. 197; *Clegg v. Rowland*, L. R. 3 Eq. 369. Where a suit for recovery of possession was brought by an executor, and the names of the beneficiaries, who took possession during the pendency of the suit, were subsequently substituted as plaintiffs, it was held that no new plaintiffs were substituted within S. 22 of the Limitation Act; *Janhabi v. Brojo Mohini*, 7 C. W. N. 817. The beneficial owner can sue to get the benefit of a decree obtained by his trustee; *Juggobundhoo v. Nil Comul*, W. R. (1864) 190; but he is not a necessary party to a proceeding for setting aside an execution sale; *Baroda v. Ohunder Kanta*, 29 C. 682: 6 C. W. N. 706.

Joinder of trustees, executors and administrators.

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties. [S. 438.]

### COMMENTARY.

Changes.—This rule corresponds to S. 438, C. P. Code, 1882, with some additions and alterations.

The word "where" has been substituted for "when" and the word "trustees" has been added before the word "executors" and the words "outside British India" have been substituted for the words "beyond the local limits of the jurisdiction of the Court." By the above substitutions the scope of the section has been enlarged.

"Several trustees, executors or administrators."—Under this rule, where there are several executors, they must all be made parties, subject to the proviso that an executor living outside British India need not be made a party. The onus is upon the defendant to show that the executor is living within British India.—*Kumar Saradindu v. Dharendra Kant*, 2 C. L. J. 484.

Where a Mahomedan testator had by his will appointed three executors only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was held sufficiently well constituted for the purpose of a motion for receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit.—*Hafizabas v. Abdul Karim*, 19 B. 83.

In a suit against a temple, all the trustees are necessary parties even though there is an agreement between them authorizing one of them to represent the temple; *Adiraju v. Pattu*, A. I. R. 1922 Mad. 405 : 77 I. C. 842.

**3.** Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her. [S. 439.]

Husband of married executrix not to join.



# ORDER XXXII.

## SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Every suit by a minor shall be instituted in his name—  
Minor to sue by by a person who in such suit shall be called the  
next friend. next friend of the minor. [S. 440, PARA. 1.]

### COMMENTARY

**History.**—This rule corresponds to para. 1 of S. 440, C. P. Code, 1882, with some omissions. The last sentence of para. 1 of the old section which ran as follows: "*And may be ordered to pay any costs in the suit as if he were the plaintiff,*" has been omitted.

The second para. of S. 440, was added by S. 53-A of Act VIII of 1890, but that section has been repealed by the present Code, and the provisions contained in Ss. 53, 53-A, 53-B, 53-C, 53-D and 53-E, by which Ss. 440, 443, 446, 461 and 464 of the old Code were amended, have been now incorporated in the present Code in an amended form.

**Scope.**—Order XXXII has no direct application in execution-proceedings and in determining whether a minor is sufficiently represented in execution-proceedings the Court is at liberty to look at the substance of the transaction.—*Muhammad Shah v. Nawab*, 109 I. C. 521.

**Minor.**—Section 3 of the Indian Majority Act (IX of 1875) enacts that every person domiciled in British India who has not completed the age of 18 years is in law deemed a minor; but a minor of whose person or property a guardian has been appointed by the Court of Justice or whose property is under the superintendence of a Court of Wards shall attain his majority on completing the age of 21 years.

The age of majority of a European British subject not domiciled in British India is 21 years.—*Rohilkhand and Kumaun Bank Ltd. v. Row*, 7 A. 490.

When a person, who by his father's will is made a guardian of his minor brother, and obtains probate of the will, such a guardian is not one "appointed by a Court of Justice" within the meaning of S. 3 of the Majority Act (IX of 1875), and the minor attains majority on his completing the age of 18 years.—*Jogesh Chunder v. Umatarra*, 2 C. L. R. 577.

party to make the minor  
at 21 period of majority  
that such minor would, had for such appointment, have attained majority  
at 18.—*Suttya Ghosal v. Suttyanund*, 1 C. 388.

The intention of the Legislature to be gathered from S. 3 of the Majority Act (IX of 1875) would appear to be to extend minority to 21 years of

## r. 1.

age in cases where at the time the minor reaches the age of 18, his person or property is in the hands of a guardian.—*Yeknath v. Warubai*, 13 B. 285.

When a guardian has once been appointed to a minor under the provisions of Act XL of 1858 or Act VIII of 1890, the disability of infancy will last till the age of 21, whether the original guardian continues to act or not.—*Rudra Prokash v. Bhola Nath*, 12 C. 612; *Joyram v. Mahadeb*, 13 C. W. N. 643; *Gordhandas v. Harivalubhdas*, 21 B. 281; *Sadho Lal v. Murlidhar*, 29 A. 672 (F. B.); 4 A. L. J. 597; *Khwahish Ali v. Surju Prasad*, 3 A. 598. But see *Birj Mohun Lall v. Rudra*, 17 C. 944. But where the order of appointment is subsequently set aside, the period of minority does not extend to 21 years.—*Nagardas v. Anandrao*, 31 B. 590; 9 Bom. L. R. 495.

When an order is passed appointing a person to be guardian of a minor, the minor becomes a ward of the Court, even though no certificate be taken out by the person so appointed, and the period of this minority is extended to 21 years.—*Girish Chunder v. Abdul Selam*, 14 C. 55 (8 C. 714, and 9 C. 901 *dissenting from*, 8 C. 967 *followed*). See *Shivram Kondo v. Krishnabai*, 31 B. 80; 8 Bom. L. R. 897.

The words "any other person who has not completed the age of 18 years" in S. 3 of the Probate and Administration Act (V of 1881), read with S. 3 of the Majority Act (IX of 1875), mean any other person not domiciled in British India. Section 3 of Act V of 1881 therefore fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but any other persons whether they be aliens or not.—*In the goods of Sewnarain*, 21 C. 911.

**Evidence of minority.**—The minority should be decided on positive evidence, and not merely on the appearance of the alleged minor.—*Ehter Mohun v. Ramessur*, W. R. (1864) 304; *Kalee Halder v. Sree Ram*, W. R. (1864) 366.

A certificate of guardianship is not evidence of minority when the question of minority is in issue.—*Gunjra Kuar v. Ablakh Pande*, 18 A. 478; and *Satis Chunder v. Mohendro Lal*, 17 C. 849 (*followed in Hem Chandra v. Bhobo Prasad*, 2 C. L. J. 69-*n.*).

In a suit to set aside a decree on the ground of minority, the plaintiff relied upon a horoscope to prove his age. *Held*, that the horoscope was not admissible under S. 32 (b) of the Evidence Act.—*Satis Chunder v. Mohendro Lal*, 17 C. 849; and *Ram Narain v. Monce Bibee*, 9 C. 613. These cases have been distinguished in *Goundan v. Goundan*, 17 M. 134, where a horoscope which had been a public record from *ante litem motam* was admitted in evidence as an "admission" under Ss. 17 and 18 of the Evidence Act, to prove the plaintiff's age.

An entry in a school register as to the age of a boy is not admissible in evidence to prove the age.—*Amrita Lal v. Jatindra Nath*, 32 C. 165 (163).

**Object of having a next friend or guardian ad litem.**—As a minor is considered incapable of prosecuting or defending a suit himself, it is necessary that his interests in the suit should be watched by an adult person. Such person is, in the case of a minor plaintiff, called his *next friend*, and in the case of a minor defendant, his *guardian ad litem*. But it must be remembered

however that neither the next friend nor the guardian *ad litem* is a party to the suit.—*Rupchand v. Dasodha*, 30 A. 55.

**Representation of minors in suits.**—Where a suit was brought by a minor without a next friend, and the objection was not taken until the case came on in appeal, when the plaintiff had attained majority, *held*, that the irregularity was waived.—*Kamalakshi v. Ramasami*, 19 M. 127; *Fuli Bibi v. Khokai*, 55 C. 712: 111 I. C. 349: A. I. R. 1928 Cal. 537.

Where a suit was brought by a manager appointed by the Court of Wards, on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed as merely technical.—*Hardi Narain v. Ruder Perakash*, 10 C. 626 (P. O.).

Where the manager of the estate of a minor authorized the plaintiff, in order to save limitation to institute a suit on behalf of the Court of Wards, which refused afterwards to sanction the proceeding with the suit, *held*, that the Judge rightly ordered that the suit be rejected.—*Biseswar v. Shoshi Shikareswar*, 17 C. 688 (P. C.).

Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, *held* that the suit was wrongly brought having regard to this rule and that the plaint should have been returned for amendment.—*Sham Krishna v. Ram Das*, 20 A. 162 (13 C. 189 referred to).

The rule of Mshomedan law, that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle representing his infant nephew, under the Code of Civil Procedure as next friend in a suit.—*Abdul Bari v. Rash Behari*, 6 C. L. R. 413.

A minor may sue for possession in the Mamlatdar's Court by his next friend although the Mamlatdar's Courts Act (III of 1876) makes no provision for such a suit.—*Dattatraya Keshav v. Vaman Govind*, 21 B. 88.

A minor is not bound by the decree passed in a suit in which he was not properly represented as required by S. 2 of the Bombay Minors Act (XX of 1864).—*Vishnu Keshav v. Ram Chandra*, 11 B. 130. See also *Guru Churn v. Kali Kissen*, 11 C. 402, and *Shani Lal v. Ghasita*, 23 A. 459.

The eldest male member of a joint Mitakshara family, who is of full age, and who may have power to manage the estate, is not the guardian of the minor co-proprietors for the purpose of defending a suit brought against the minors, unless he has obtained a certificate under Act XL of 1858, S. 3.—*Durgapersad v. Keshapersad*, 8 C. 656 (P. C.): 11 C. L. R. 210 (P. C.); and *Shani Lal v. Ghasita*, 23 A. 459. But see *Padmakar v. Mahadev*, 10 B. 21.

**Defendant improperly impleaded as a minor.**—No objection raised by the defendant during suit. *Held*, that it was not competent to the defendant to sue subsequently for a declaration that the decree was not binding upon him; he is estopped from so doing.—*Gangaram v. Mihire Lal*, 28 A. 416.

Where a guardian had not obtained a certificate under the Bombay Minors Act (XX of 1864), the minor was held to be not properly represented in a suit in which a decree had been obtained against the guardian purporting to represent the minor.—*Daji Himat v. Dhirajram*, 12 B. 18.

No judgment or order passed in a suit to which a minor subject to the provisions of Act XL of 1858 is a party, will bind him on his attaining majority, unless he is represented in the suit by some person who has taken out a certificate, or has obtained the permission of the Court to sue or defend on his behalf without a certificate.—*Mrinamoyi v. Jogodishuri*, 5 C. 450 : 5 C. L. R. 361.

Suit on behalf of a person alleged to be, but not in fact, a minor.—Where in a suit instituted on behalf of a person alleged to be a minor through his next friend, it is found that the plaintiff was not in fact a minor at the date of the institution of the suit, the suit should not be dismissed but the plaint should be returned for amendment.—*Taqi Jan v. Obaidulla*, 21 C. 866 ; *Shamuga v. Narayana*, 40 M. 743 : 41 I. C. 510 ; *Amritsaria v. Gamun*, A. I. R. 1926 Lah. 82 : 89 I. C. 363. A contrary view was taken by the Allahabad High Court in *Sheorania v. Bharat*, 20 A. 90 ; *Ruhul Amin v. Shankar Lal*, 45 A. 701 : 77 I. C. 90 : A. I. R. 1924 All. 54, where it was held that in such circumstances the suit should be dismissed.

Where in a suit it was through a *bona fide* belief that the plaintiff was described as a minor and was represented by his mother as his next friend, held, that in as much as the suit was instituted by the right person, though through another purporting to act as his next friend, the suit was maintainable.—*Narayan v. Dulal*, 100 I. C. 469 : A. I. R. 1927 Cal. 477 ; *Taqi Jan v. Obaidulla*, 21 C. 866. But see *Sheorania v. Bharat*, 20 A. 90 at p. 91, where a contrary view was taken.

Decree against a major, treating him as a minor.—A decree obtained against a person treating him as a minor, while in reality he was a major at the date thereof, is not a nullity ; consequently, a sale in execution of a decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree.—*Seshagiri v. Hanumantha*, 39 M. 1031.

Sufficiency of	“ “ “ “ “ “	Where in a suit
the plaint was headed		and guardian
on behalf of the		the plaint not
having been framed in accordance with the provisions of this rule, proceedings were had in law.— <i>Shonai Bewa v. Monoram</i> , 11 C. L. R. 15.		

Where a suit is brought in violation of this rule or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint in order that the error may be rectified.—*Russick Das v. Preonath*, 10 C. 102.

Where a suit against a minor is early framed, the proceedings in was dismissed as against the 102. See also *Mongola Dossee v. Saroda Dossee*, 13 B. L. R. App. 2 : 20 W. R. 49 ; *Ganga Prosad v. Umbica Churn*, 14 C. 754 : 32 C. 296 (P. C.) : 9 C. W. N. 201 : 1 C. L. J. 534.

Where, on a construction of the plaint, it is found that the minor is the real plaintiff, the mere fact of the improper description of the minor is not a ground for setting aside the decree, but the decree must be taken to be in favour of the minor as if the suit had been properly framed.—*Alim Bulsh v. Jhalo Bibi*, 12 C. 48; *Bhaba Pershad v. Secretary of State*, 14 C. 159 (F. B.); *Jogi Singh v. Kunj Behari*, 11 C. 509; *Kedar Prosunno v. Protop Chunder*, 20 C. 11; *Suresh Chunder v. Jugut Chunder*, 14 C. 204. But see *Ganga Prosad v. Umbica Churn*, 14 C. 754.

**Estoppel.**—A minor, who, representing himself to be a major and competent to manage his affairs, collects rents and gives receipts therefor, is estopped by his conduct from recovering again the money once paid to him, by instituting a suit through a guardian.—*Ram Ratun v. Shew Nandan*, 29 C. 126; 6 C. W. N. 132. Similarly, a minor, who, representing himself to be of full age, sells certain property and executes a registered deed of sale, is estopped from seeking to have the sale set aside on the ground of his minority at the time of the sale.—*Ganesh v. Bapu*, 21 B. 198. A Court of equity will deprive a fraudulent minor of the benefit of the plea of infancy; but one who invokes the aid of the Court, must prove not only that the minor practised a fraud on him, but also that he was deceived into action by such fraud.—*Brohmo Dutt v. Dharmo Das*, 26 C. 381.

**Applicability of Or. XXXII to execution-proceedings.**—The provisions of Or. XXXII, C. P. Code, relating to "suits by or against minors" have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree. The *lis* in respect of which it is essential that a minor defendant should be represented by a duly appointed guardian is at an end after the decree is passed. In determining whether a minor was sufficiently represented in the execution-proceedings, Courts are at liberty to look at the substance of the transaction; *Pani Bhusan v. Surendra Nath*, 35 C. L. J. 9; 64 I. C. 25. See also *Mateur Rasul v. Abdul Soid*, 30 C. W. N. 86; 89 I. C. 765; *Bansi Dhar v. Mahammad Suleman*, 3 L. L. J. 464; 97 I. C. 181; A. I. R. 1926 Lah. 490.

**Liability of next friend for costs of the suit.**—Where a suit brought by a minor through his next friend is dismissed and the Court finds that the suit was not for the benefit of the minor, the Court may direct the next friend to pay the costs personally.—*Geereeballa v. Chunder Kant*, 11 C. 213; *Venkataraman v. Ponnusami*, 106 I. C. 131. But in such a case if the Court finds that there were reasonable grounds for instituting the suit and the next friend has acted in good faith the Court will not make the next friend liable for costs but direct its realisation out of the minor's estate.—*Devkabai v. Jefferson*, 10 B. 248.

Where suit is  
instituted without  
next friend, plaint  
to be taken off the  
file.

2. (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit. [S. 442.]

## COMMENTARY.

**Alterations**—This rule corresponds to S. 442, C. P. Code, 1882, with the substitution of the words "*where a suit is instituted*" for the words "if a plaint be filed" which occurred in the beginning of the old section.

**Taking the plaint off the file.**—This rule refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor.—*Beni Ram v. Ram Lal*, 13 C. 189 (followed in 44 M. L. J. 515); *Rattonbas v. Chabildas*, 13 B. 7.

Where the plaintiff who was a minor brought a suit without a next friend and his minority was not apparent on the face of the record but is proved on the trial of an issue in the suit itself, the Court might not to dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint (13 C. 189 *relied on*). It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so, he could affirm the previous proceeding and continue the suit; *Puppooth v. Manakkal*, 74 I. C. 309: 44 M. L. J. 515: A. I. R. 1923 Mad. 553.

The Courts, as a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court, and evading the payment of costs in case the plaintiff fails in the claim. When the fact of minority is a *bona fide* question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings, and to allow sufficient time to enable the minor to have himself properly represented by a next friend.—*Rattonbas v. Chabildas*, 13 B. 7; *Mt. Durga Devi v. Gur Narain*, 69 I. C. 401.

Where a minor plaintiff sued without a next friend and the defendant had not appeared but the irregularity was apparent on the examination of the plaintiff; *held*, that it was the duty of the Judge to take notice of the disregard of the provisions of Or. XXXII, r. 1 and to refuse to proceed further with the case so illegally commenced; *Maung San v. Maung Nyi*, 3 R. 239: 89 I. C. 870: A. I. R. 1925 Rang. 325; *Raja Lohar v. Nur Mohammad*, 115 I. C. 456. If the defendant appears and does not object, the Court should not reject the plaint but should allow the plaintiff time to get himself properly represented; *Ali Ahmad v. Said Mian*, 4 L. 390: 75 I. C. 1028: A. I. R. 1924 Lah. 188.

**Costs to be paid by the pleader, etc.**—Where the plaint in a suit was not framed in accordance with the provisions of S. 440, C. P. Code, 1882 (Or. XXXII, r. 1), the High Court, on special appeal, directed that the pleaders of the original and of the lower appellate Court, should be called upon to show cause why they should not be ordered to pay the costs of the suit and the appeal.—*Shonai Bawa v. Monoram*, 11 C. L. R. 15.

When a suit is instituted by a minor without a next friend, the pleader or any other person presenting the plaint is liable for costs but the Court should not make a minor's estate liable for costs.—*Amichand v. Collector of Sholapur*, 13 B. 234.

**Decree in suit instituted by minor without next friend.**—Where, in a suit instituted by a minor without a next friend, no objection as to the plaintiff's minority is taken by the defendant and a decree is passed, the defendant will be deemed to have waived his objection. The institution of a suit by a minor without a next friend is not a nullity but is merely an irregularity which can be waived by the conduct of the defendant; *Kamalakshi v. Ramasami*, 19 M. 127; *Fuli Bibi v. Khokai*, 55 C. 712: 111 I. C. 349: A. I. R. 1928 Cal. 537.

Guardian for the  
suit to be appoint-  
ed by Court for  
minor defendant.

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. [S. 443.]

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

[S. 456, PARA 1.]

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[NEW.]

### COMMENTARY.

**Alterations.**—Sub-rule (1) corresponds to para 1 of S. 443, C. P. Code, 1882, with some alterations and omissions. The last sentence of para. 1, and the whole of para. 2 of the old section have been omitted.

Sub-rules (2) and (3) correspond to para. 1 of S. 456, C. P. Code, 1882, with some verbal changes.

Sub-rule (4) is new. This rule has been inserted to protect the interests of the minor. No order under this rule shall be made unless some one interested in the welfare of the minor is served with notice. It seems to have been framed adopting the principles of *Suresh Chunder v. Jugut*, 14 C. 204 (F. B.) noted below.

"This is based on S. 443. The Committee think it necessary to ensure that notice should reach one, interested in the minor's welfare, and this rule

aims at securing this result. The form of application and notice in conformity with this sub-rule will be inserted in the Schedule of Forms."—*See the Report of the Special Committee.*

**Duty of Court to appoint guardian ad litem.**—It is the duty of the Court to appoint a guardian *ad litem* for a minor defendant under Or. XXXII, r. 3, C. P. Code. A person who is merely appointed to conduct a case on behalf of a minor is not a lawfully appointed guardian within the meaning of Or. XXXII, r. 3.—*Musst. Barkat Bibi v. Mohamed Amin*, 33 P. L. R. 551

A decree passed against a minor without a proper guardian *ad litem* appointed for him is a nullity.—*Jamilennessa v. Ijjatannessa*, A. I. R. 1929 Cal. 586 (ref. to 31 A. 573 (P. C.) and explg. 25 B. 337 (P. C.)). No person can be appointed guardian without his consent. At the same time where the Court has given sanction and approval for the appearance of

same time where no notice or summons is served on the guardian of the minor, and no order was made appointing a guardian for the minor, and there was no appearance by the so-called guardian at any stage of the proceedings, a decree passed against the minor is not binding on him.—*Rani Ohhattra Kumari v. Panda Radha Mohan*, 66 I. O. 137 : 3 P. L. T. 451 (26 C. L. J. 258, 37 A. 179, 20 C. L. J. 469, 2 P. L. T. 617 *relied on*). It is the duty of the Judge himself to decide who is the proper person to be appointed as guardian *ad litem*; *Ram Chandra v. Joti Prasad*, 29 A. 675.

Where certain persons were sued as partners of a firm, the decree passed in the suit was not had simply because one minor member of the firm was impleaded as a major when really he was a minor.—*Gauri Shankar v. Keshab Deo*, 114 I. C. 881 : 27 A. L. J. 204 : A. I. R. 1929 All. 148. But the principle that the manager of a joint family represents the whole family does not apply to a case where a minor member is impleaded as such; in such a case it is the duty of the plaintiff to get a proper guardian appointed for the minor, and if this procedure is not followed the decree passed in the suit cannot bind the minor.—*Chandi Prasad v. Balaji*, 53 A. 427 : 129 I. C. 560 : 29 A. L. J. 152 : A. I. R. 1931 All. 136.

It has been held that Or. XXXII, r. 3, C. P. C. applies to proceedings taken against a minor in the Revenue Courts under S. 81 of the Agra Tenancy Act.—*Madho Singh v. Keshab Deo*, A. I. R. 1931 All. 656.

**Guardian ad litem.**—Appointment of a guardian *ad litem* other than the certificated guardian is a mere irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such a decree.—*Jogeshwar Narain v. Lala Mooraliidhar*, 7 C. L. J. 270; *Dammar Singh v. Pirbhu Singh*, 29 A. 290; *Midnapur Zemindary Co., Ltd. v. Gobinda*, 8 C. L. J. 31 and 31 A. 7.

There is nothing either in the Code or in any of the authorities to lay down that merely because a person has executed a document or entered into a transaction on behalf of a minor, that same person cannot be validly



appointed the minor's guardian *ad litem* in a suit brought against the minor on the document or the transaction; the question is a question of fact not governed by any hard and fast rule, though in a vast majority of cases the appointment of such a person would be wholly undesirable.—*Venkatasomeswara Rao v. Lakshmanaswami*, 52 M. 275 (F. B.); 115 I. C. 801; A. I. R. 1929 Mad. 213; 29 L. W. 135; 56 M. L. J. 175. The mere appointment of the executant of a document (in this case of the father of the minor who had executed a mortgage bond) is, by itself, not void; the question of prejudice has to be gone into.—*Sri Maruthiswamiar v. Subramana*, 118 I. C. 831; 29 L. W. 393; A. I. R. 1929 Mad. 393.

When the Court is satisfied of the fact of the defendant's minority, it should follow the procedure laid down in this rule instead of dismissing the suit.—*Rohilkhand and Kumaon Bank Ltd. v. Row*, 7 A. 490.

Where no order of appointment of the guardian of the property of the minor is made under Act XX of 1864, there is no appointment of a guardian *ad litem* for the purpose of the rule.—*Raichand*, 5 B. 306.

Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, including proceedings in execution and appeal.—*Jwala Dei v. Pirbhu*, 14 A. 35. See also *Venkata v. Alakarajamba*, 22 M. 187, where it has been held that the appointment of a guardian *ad litem* in a Court of first instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal; *Krishna Pershad v. Gosta Behari*, 5 C. L. J. 434; *Shambu v. Kanhaya*, 44 A. 519; 20 A. L. J. 599; *Bhagelu v. Dharma*, 45 A. 623; 21 A. L. J. 591; *Zarina Bibi v. Wasuddi*, 59 C. 1103.

A guardian *ad litem* is not a party to a suit or appeal. He is merely named in the record as the person appointed by the Court to look after the interest of the minor. So, where a guardian *ad litem* of a defendant-respondent is not made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal has expired, the appeal is not for this reason time-barred; *Rup Chand v. Dasodha*, 30 A. 55; *Khem Karan v. Har Dayal*, 4 A. 37.

In a suit by a husband for divorce under the Parsi Marriage Act (XV of 1865), a guardian *ad litem* must be appointed, if the defendant be under 21 years.—*Sorabji Cawasji v. Buchooabai*, 18 B. 366.

Where an *ex parte* decree was passed against a minor on the footing that he was a major and objection having been raised in execution a guardian *ad litem* was appointed and a fresh decree was passed. Held that the suit should be taken to have been instituted against the minor on the date it was originally filed. Held also that the restoration of the case and the appointment of a guardian did not amount to the addition of a new party.—*Talib Ali Shah v. Piarey Lal*, 123 I. C. 438; 23 A. L. J. 938; A. I. R. 1930 All. 514.

In a suit brought against four brothers two of whom were majors and two minors, the minors were represented by their brother and certificated guardian without his formal appointment as guardian *ad litem* by the Court on formal application by the plaintiff and a decree was passed against the

four brothers, the minors being represented as above by a certificated guardian. *Held*, that in substance the minors were duly represented in the suit and the decree passed against them was binding upon them, the absence of the formal application being a mere irregularity not affecting the merits of the case.—*Satyendra v. Panchanon*, 128 I. C. 81 51 C. L. J. 362; A. I. R. 1930 Cal. 455.

Where a decree is obtained against a minor without having a guardian appointed for him or with a disqualified person appointed as guardian for him, the result is as if the minor was not represented and the decree must be regarded as a nullity. But where a qualified person was appointed guardian but there was some irregularity in the proceedings or where, on account of the fraud of the opposite party the appointment of one person as guardian was obtained instead of another who would have conducted the case better on behalf of the minor, the decree is not *ipso facto* a nullity. In such a case the irregularity or fraud must be shown to have prejudiced the minor before he is entitled to appropriate relief.—*Gangaraju v. Armilli Satyanarayana*, 134 I. C. 188; 34 L. W. 317 A. I. R. 1931 Mad. 674.

The real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person and not the mere existence of a formal order appointing a guardian for him. Even if there is the order but the guardian does not properly represent him, the decree should not be binding.—*Musst. Siraj Fatima v. Mahmood Ali*, A. I. R. 1932 All. 293 (F. B.); 30 A. L. J. 437.

The mere fact that the guardian did not enter appearance and take steps in connection with the appeal does not of itself show that he was either unable or unwilling to act or that he was guilty of neglect towards the minor.—*Zarina Bibi v. Wazuddi*, 59 C. 1108.

When defendant pleads minority.—When minority is pleaded as a defence to an action, a guardian should be appointed for the defendant, and a preliminary issue should be framed and tried as to whether defendant is or is not a minor. If the defendant is found to be a minor, a guardian *ad litem* should be appointed for him; but if he is found to be a major, the guardian appointed for the enquiry should cease to act and then he may conduct his own case.—*Kasi Dass v. Kassim Sait*, 16 M. 344. See also *Purna v. Bejoy Chand*, 18 C. L. J. 18; 17 C. W. N. 549; *Narsey Tokersey v. Sachindranath*, 31 Bom. L. R. 1007. Similarly if a dispute arises as to whether a minor is the legal representative of a deceased party, the Court should appoint a guardian *ad litem* and decide the matter; *Rukmani v. Veerasami*, 80 I. C. 942; 47 M. L. J. 370; A. I. R. 1924 Mad. 813.

If there is any doubt as to the minority of the defendant, that question ought to be made an issue in the case and the Court ought to decide whether it is a case in which a guardian ought to be appointed. It is not sufficient for the Court by just looking at the defendant to come to a conclusion that he is not a minor; *Ram Gobind v. Sital*, 96 I. C. 273; A. I. R. 1926 Pat. 489.

Estoppel.—When a person was sued as a minor by his guardian *ad litem*, and it appeared that he was in fact a major at the date of the suit, and that he knowingly allowed the guardian *ad litem* to conduct the defence on his behalf: *held* that he was bound by the decree passed in the suit, and

cannot afterwards sue to set aside the decree and *Ramachari v. Duraisami*, 21 M. 167.

Where no guardian *ad litem* appointed.—W. appointment of a guardian *ad litem* of a minor defendant prescribed by this rule and a decree is passed against him, nullity and it cannot be enforced against him.—*Bhura Mal v.* 24 A. 383 (F. B.) (14 C. 204 referred to); *Dakeshur Pershad v.* 25; *Hanuman v. Muhammad*, 28 A. 137; *Daji Himat v. Dhirajrao Rasidunnissa v. Muhammad*, 36 I. A. 168; 31 A. 572; 18 C. W. 6 A. L. J. 822; 11 Bom. L. R. 1225; 19 M. L. J. 631; 3 I. Balkesen v. Tapesur, 17 C. W. N. 219, *Lala Rampirit v. Thakur* (1921) P. 335; 2 P. L. T. 617; *Pande Satdeo v. Ramayan*, 4 P. L. T. 2 P. 335; 71 I. C. 705, *Purna v. Bejoy Chand*, 18 C. L. J. 18; 17 C. W. 543; *Narendra v. Jogendra*, 19 C. W. N. 537, *Surendra Nath v. Aghore Nath*. 25 C. W. N. 525; 62 I. C. 464; *Umapati v. Sheikh Masietulla*, 37 C. L. J. 496; 72 I. C. 475; A. I. R. 1923 Cal. 692.

Where one of the defendants in a suit for a declaration of a right of way is a minor, and he is not represented by a guardian, the suit ought to be dismissed. No effective decree can be made in the absence of one of the persons jointly interested in the servient tenement; *Sadhu Charan v. Indira Mohan*, 64 I. C. 90 (25 C. W. N. 249 at p. 252 *fold.*).

Formal order for appointment not absolutely necessary.—Under this rule the Court is bound, after satisfying itself to the fact of minority, to appoint a proper person to act on behalf of a minor in the conduct of a suit; and this rule should be strictly followed. But where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings.—*Walian v. Banke Behari*, 30 C. 1021; 7 C. W. N. 774 (P. C.) (14 C. 204 and 16 C. 40 (P. C.) referred to); *Pande Satdeo v. Ramayan*, 4 P. L. T. 147; 2 P. 335; 71 I. C. 705. See also *Vithaldas v. Dattaram*, 26 B. 298; *Kedar v. Protap*, 20 C. 11; *Keshavesarindra v. Debendrabala*, 4 P. L. J. 213; *Hanuman Prasad v. Muhammad Ishaq*, 28 A. 137; 2 A. L. J. 615; *Midnapore Zemindary Co. Ltd. v. Gobinda*, 8 C. L. J. 31; *Sures Chunder v. Jugut Chunder*, 14 C. 204 (F. B.); *Hari v. Bhubaneswari*, 16 C. 40 (P. C.); *Udhan Singh v. Gurdit Singh*, 39 P. W. R. 1919; *Kairajmal v. Daim*, 32 C. 296 (P. C.); 9 C. W. N. 201; 1 C. L. J. 584; 7 Bom. L. R. 1; 2 A. L. J. 71; 32 I. A. 23; *Narain Das v. Ralli Brothers*, 61 P. R. 1915; 136 P. W. R. 1915; *Sat Deo v. Jai Nath*, 9 O. L. J. 141; 67 I. C. 808; *Rani Chhattra Kumari v. Panda Radhamohan*, 3 P. L. T. 451; 66 I. C. 137; *Darshan Singh v. Ratan Lal*, 9 O. and A. L. R. 463; 74 I. C. 821; *Mata Ghulam Singh v. Sital Prasad*, 26 O. C. 113; 74 I. C. 409; *Phulli v. Debi Parshad*, 5 L. 38; 75 I. C. 449; A. I. R. 1923 Lah. 575; *Sadasheo v. Karim*, 92 I. C. 241; A. I. R. 1926 Nag. 267. In *Ramchandra v. Joti Prasad*, 29 A. 675; (1907) A. W. N. 225, it has been held that the duty of the Court is not a mere matter of form. It must not only appoint a guardian but satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor.

The failure to issue notice to all parties concerned in the matter of the appointment of a guardian and the misdescription of the nature of the



v. *Chinniah*, 4 L. W. 362; 36 I. C. 794. An order appointing a guardian ad litem of a minor defendant without giving notice to the minor as required by Or. XXXII, r. 3 (4) is without jurisdiction and is liable to be set aside; *Rajendra Prasad v. Prabodh*, 2 P. L. T. 116; 6 P. L. J. 82; *Rani Chhattra Kumari v. Panda Radha Mohan*, 66 I. C. 137; 3 P. L. T. 451; *Musst. Barkat Bibi v. Mahomed Amin*, 33 P. L. R. 551. But no irregularity by way of an omission to send a notice as required by Or. XXXII, r. 3 (4) will operate to render void the presumed representation of the minor in a suit by a guardian ad litem appointed for him, unless such an omission has in fact prejudiced his defence; *Tirumala Charyulu v. Ammisetti*, 46 M. L. J. 363; *Sukha v. Lachmi*, 26 A. L. J. 834; 113 I. C. 829; A. I. R. 1929 All. 621; *Shaik Abdul Karim v. Thakur Das*, 55 C. 1241; 32 C. W. N. 665; A. I. R. 1923 Cal. 844; 113 I. C. 843; *Sarfaraz v. Dy. Commr., Gonda*, 117 I. C. 475; A. I. R. 1929 Oudh 481.

Order XXXII, r. 3 (4) applies only to cases where an application is made for the appointment of a guardian in the name of or on behalf of the minor or the plaintiff; but when on the death, retirement or removal of a guardian, another guardian is appointed in his place, no such notice is necessary; *Sri Thakur Radha Krishna v. Lakshmi Narayan*, 1 P. L. R. 86; 2 P. 273; 4 P. L. T. 329; 71 I. C. 341; *Phulli v. Debi Pershad*, A. R. 1929 Lah. 575; 75 I. C. 449.

**Costs**—There is no authority in the C. P. O. to award costs personally against guardian ad litem.—*Narasimha v. Lakshmi pati*, 3 M. 263; *Sibt Ahmad v. Na Khatoon*, A. I. R. 1929 All. 18.

**Sindh rule**—Since the amended rule (of 1927) no notice is essential.—When all the next of kin of the minors are parties to the suit and their interests are likely to be affected by those of the minors, no notice need be issued on such relations.—*Musst. Ghulam Rasul Khan*, 114 I. C. 101; A. I. R. 1929 Sind 37.

**4.** Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit: [Ss. 445 & 457.]

Provided that the interest of the person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit, unless the Court considers, for reasons to be recorded, that it is for the minor's interest that another person be permitted to act or be appointed in the case may be. [Ss. 440 & 443.]

(3) No person shall without his consent act as next friend or guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require. [S. 456, PARA. 2.]

### COMMENTARY.

**Alterations in the rule.**—Sub-rule (1) correspond to Ss. 445 and 457 of the C. P. Code, 1882. The provisions of those two sections have been amalgamated in this sub-rule with some alterations and omissions. The words "*nor a married woman can be so appointed*," which occurred in the concluding part of S. 457 of the old Code, have been omitted; the omission seems to have been made adopting the views in *Asrun v. Sharip*, 17 C. 483 (F. B.) and *Kuttiati Haji v. Kunhi Putha*, 29 M. 53, and to set at rest the conflicting rulings on the point. The case (6 C. L. J. 36; 11 C. W. N. 176-n.) in which a contrary view was taken has been overridden by the above omission. Under the present Code, a married woman may be next friend and may also be appointed as guardian ad litem.

Sub-rule (2) corresponds to para. 2 of Ss. 440 and 443, C. P. Code, 1882, with some alterations and omissions. The provisions of those two paras have been amalgamated in this sub-rule with some modifications.

Sub-rule (3) is new. It is based on the principles laid down in *Uma Sundari v. Ramji*, 7 C. 242; 9 C. L. R. 13 and in *Mulji v. Chhagan*, 5 B. 306.

Sub-rule (4) corresponds to para. 2 of S. 456, with some modifications.

**Construction and scope of rule.**—Or. XXXII, r. 4 and other rules as with the provisions of r. 3 of guardians.—*Nachiappa v.*

It has been doubted whether Or. XXXII, r. 4 can be applied to the case of a Hindu idol.—*Shri Gopal v. Krishna Sunder*, 27 A. L. J. 1251.

**Who may be next friend or guardian ad litem.**—If in a suit the personal interest of the next friend of a minor conflicts with his duty towards the minor, he is not competent to act as his next friend unless he shows *uberrima fides*. In such a case the minor is not properly represented and so the decree in the suit is not binding on him.—*Bejoy Singh v. Sm. Mathuriya Debya*, 56 I. C. 97.

A person who is to succeed to the property of a minor on his death has an interest adverse to the minors; and, if he is not a blood relation of the minor, he is not qualified to act as next friend or guardian ad litem.—*Property.*—

On the re-marriage of a Hindu widow, if neither she nor any other person has been specially constituted by the will of the deceased husband the guardian of the child, a proper male relative of the deceased husband, should ordinarily be appointed guardian of such child in preference to his re-married mother.—*Khushali v. Rani*, 4 A. 195.

The rule of Mahomedan law, that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle from representing his infant nephew under the C. P. Code as next friend in a suit.—*Abdul Bari v. Rash Behari*, 6 C. L. R. 413.

A married woman may act as the next friend of an infant plaintiff.—*Asirun Bibi v. Sharif Mondul*, 17 C. 488 (F. B.) (11 C. 733 overruled).

**Guardian ad litem with adverse interest—Decree if binding on minor.**—A minor defendant represented in a suit by a guardian ad litem whose interest is adverse to that of the minor, is not represented at all, and any decree passed in the suit is a nullity so far as the minor is concerned (following *Rashid-un-nissa v. Muhammad Ismail*, 31 A. 572 (F. C.); 3 I. C. 864; *Sellappa Goundan v. Masa Nairan*, 47 M. 79; 76 I. C. 1018; A. I. R. 1924 Mad. 297; *Kasim v. Habibur*, 26 A. L. J. 777 (case of a minor belonging to a joint Hindu family, represented by an undivided brother who was shown to have an adverse interest and it was held that there was no adequate representative and that the decree was liable to be set aside), *Chiranj Lal v. Syed Ilias Ali*, 46 A. 620; 79 I. C. 556; A. I. R. 1924 All. 751. The appointment of a guardian ad litem whose interest is adverse may not render the decree a nullity in every case—*Per Rankin, C. J.* in *Shah Abdul Karim v. Thakurdas*, 55 C. 1241; A. I. R. 1928 Cal. 844. A mere defect in following the rule as to representation of minors is not necessarily fatal to the proceedings so as to render void a decree against the minor, *Kurpusuami v. Kamalammal*, 43 M. 842; 39 M. L. J. 375; *Ramasuami v. Doraisuami*, 44 M. L. J. 299; 73 I. C. 409; A. I. R. 1923 Mad. 465; *Venkatachalam v. Paramaswami*, 52 M. L. J. 709; A. I. R. 1927 Mad. 668.

Where in a suit to enforce a mortgage executed by the manager of a joint Hindu family he is himself appointed guardian ad litem of the minor members impleaded in the suit, and a decree is passed on confession of judgment, the decree is a nullity as against the minors for the manager was not a proper person to be appointed as a guardian; *Murliidhar v. Pitambar Lal*, 44 A. 525; 20 A. L. J. 329; 66 I. C. 372.

When a person has executed a document or entered into a transaction on behalf of a minor as his guardian, the appointment of such person as guardian ad litem of the minor in a suit brought against him on the document or transaction in question is not necessarily void without any enquiry into the particular circumstances of the case. It is a question of fact governed by no hard and fast rule of law and there is nothing either in the Code or in any of the authorities to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed; *Mudduri Venkatasomeswara Rao v. Lakshmanaswami*, 52 M. 375 (F. B.); 115 I. C. 801; A. I. R. 1923 Mad. 213; 29 L. W. 125; 56 M. L. J. 175. See also *Sri Maruthi v. Subramania*, 118 I. C. 831; 29 M. L. W. 893; A. I. R. 1929 Mad. 393.

r. 4.

"Guardian appointed or declared by competent authority."—Section 47 of the Indian Succession Act not being applicable to Hindus, a Hindu father has no statutory power to appoint a guardian to his son after his death. The words "competent authority" in this rule do not include the case of a Hindu father purporting to appoint a guardian under his will. Order XXXII, rr. 1 and 4 do not apply to all guardians, as they cannot apply to natural guardians.—*Budhlal v. Morarji*, 31 B. 413 : 9 Bom. L. R. 553. See, however, *Shahu v. Hapija*, 17 B. 560, and *In the matter of Srish Chunder Singh*, 31 C. 206. In *Midnapore Zemindari Co., Ltd. v. Gobinda*, 8 C. L. J. 31; and in *Dammar Singh v. Purbhu Singh*, 21 A. 290 : 4 A. L. J. 155, it has been held that where the Court acts in contravention of the provisions of rule 4 and overlooking the claims of the certificated guardian appoints some body else guardian of the minor, it is a mere irregularity and the decree and sale thereunder is not void. But it was held in *Bhimaji v. Rajabhai Hussain*, 39 M. L. J. 239 : 43 M. 808 : 59 I. C. 842 (following 31 A. 572 (P. C.) and 32 C. 296 (P. C.)), that a decree passed against a minor defendant is illegal and liable to be set aside where in spite of the fact, that he had already a Court guardian validly appointed for him the Court appointed another person as his guardian ad litem and passed the decree. See also *Sridhar Rao v. Ram Lal*, 31 A. 7, and *Jogeshwar Narain v. Lala Moorallidhar*, 7 C. L. J. 270; *Bhimaji v. Rajabhai Hussain*, noted ante.

The omission to record reasons under Or. XXXII, r. 4 (2) for the appointment of a Court guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. Where, however, the appointment of a guardian is secured by fraud and by false statements and concealment of material particulars, the minor is not bound by the decree passed in the suit or by the sale held in execution of the decree (37 A. 179 followed): *Puppooth v. Manakkal*, 74 I. C. 309 : 44 M. L. J. 515 : A. I. R. 1923 Mad. 553.

"Another person be permitted to act."—It is not necessary that the permission should be express.—*Sridhar Rao v. Ram Lal*, 31 A. 7.

No person can be appointed next friend or guardian without his consent.—No person can be appointed a guardian ad litem without his express consent. The question whether the person so appointed consented to act will always be one of importance on the merits.—*Radhashyam v. Ranga Sundari*, 24 C. W. N. 541. Where the mother of an infant is appointed guardian ad litem without her consent the decree obtained in the suit is liable to be set aside on appeal.—*Narendra v. Jogendra*, 19 C. W. N. 537 : 20 C. L. J. 469; *Umapati v. Shiekh Moseetulla*, 72 I. C. 475 : 37 C. L. J. 496; *Shroof Sahib v. Ragunatha Sivaji*, 18 M. L. T. 401 (17 C. W. N. 219, 35 A. 487 followed). A guardian who has not consented to act as such, is no guardian at all, and the decree is invalid irrespective of any question of prejudice, because the minor has not been represented in the suit; *Narendra v. Jogendra*, 19 C. W. N. 537; *Burendra v. Aghore*, 25 C. W. N. 525 : 63 I. C. 464; *Shaikh Sajjad v. Sakal Rai*, 2 P. 7 : A. I. R. 1922 Pat. 448; *Jagadis v. Harihar*, 40 C. L. J. 39 : 78 I. C. 219 : A. I. R. 1924 Cal. 1042; *Sriramulu v. Lakshminarayana*, 47 M. 783 : A. I. R. 1925 Mad. 30; *Satishechandra v. Hashemali*, 54 C. 450 : 103 I. C. 124 : A. I. R. 1927 Cal. 489. See also *Sheikh Sajjad v. Sakal Rai*, 2 P. 7 : 72 I. C. 637 (dissenting from 43 A. 104 : 59 I. C. 671).



Where the proposed guardian of a minor does not signify his consent, the Court should not, in contravention of the express direction of Or. XXXII, r. 4 (3), C. P. Code, appoint him as guardian for the suit. Who a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect (32 O. 296). The provision as to the consent of the person proposed to be appointed guardian of the suit is mandatory and imperative. Order XXXII, r. 4 (3) controls both sub-rules (1) and (2) and places a material restriction upon the power which the Court may exercise thereunder. Order XXXII, r. 4 (3) is applicable as well, to cases under sub-rule (1) as to cases under sub-rule (2). No person who is competent to act as a guardian of an infant either under sub-rule (1) or under sub-rule (2) shall be appointed guardian of the suit without his consent; *Annada Prasad v. Upendra Nath*, 34 C. L. J. 293 : 26 C. W. N. 781.

The consent referred to in this rule may be either express or implied.—*Baij Nath v. Radharaman Prasad*, 43 I. C. 563; *Chatter Singh v. Tej Singh*, 43 A. 104 : 18 A. L. J. 956 : 59 I. C. 671; *Jawahar Singh v. Sewa Singh*, 5 L. L. J. 487 (followed in *Mallayya v. Punnamma*, 47 M. 476 : 77 I. O. 628). The consent of the guardian ad litem may be presumed from the fact that he accepted the summons in the suit; *Venkatachalam v. Paramasivam*, 52 M. L. J. 709 : A. I. R. 1927 Mad. 668. Consent being a question of fact, evidence as to consent may be indirect and circumstantial, or it may be proved by conduct; *Sriramulu v. Lakshminarayana*, 47 M. 783 (F. B.) : 83 I. C. 312 : A. I. R. 1925 Mad. 30; *Jawahar Singh v. Sewa Singh*, 5 L. L. J. 487 : 79 I. C. 572 : A. I. R. 1924 Lah. 97.

In the absence of a provision in the old C. P. Code of 1882, corresponding to Or. XXXII, r. 4 (3) of the present Code, where a certificated guardian was proposed for appointment as guardian ad litem, the Court might unless he declined the appointment, presume his consent.—*Sarat Chandra v. Bibhabati*, 34 C. L. J. 302; *Thakur Tajeswar v. Lakhan Prasad*, 2 P. 296 : A. I. R. 1923 Pat. 231; *Chattar v. Tej Singh*, 43 A 104 : 59 I. C. 671; *Sriramulu v. Lakshminarayana*, 47 M. 783 (F. B.) : 83 I. C. 312 : A. I. R. 1925 Mad. 30, *Sarju Singh v. Dhaniram*, 2 Luck. 707 : A. I. R. 1927 Oudh 560.

The contravention of the provisions of Or. XXXII, r. 4 (3), does not deprive the Court of its jurisdiction to decide the case.—*Pande Saldeo Narain v. Ramayan Tewari*, 4 P. L. T. 147 : 2 P. 335.

Neither Act XX of 1864 nor the C. P. Code, empowers any Court to appoint a person against his will to be a next friend, guardian ad litem, or guardian of the person of a minor.—*Jadow Mulji v. Chahagan Rai Chand*, 5 B. 306.

**Wishes of minor—Whether, should be considered.**—In appointing a guardian ad litem for a minor defendant, it is desirable if possible, that the Court should consider the wishes of the minor as to the person who should be appointed; *Rajendra Prasad v. Prabodh*, 2 P. L. T. 116 : 6 P. L. J. 82; *Sri Thakur Radha Krishna v. Lakshmi Narayan*, 2 P. 273 : 1 P. L. R. 86 : 4 P. L. T. 329; *Sadaqat Ali v. Muhammad Sajjad Ali*, 113 I. C. 901 : 30 P. L. R. 17 : 11 L. L. J. 130 : A. I. R. 1929 Lah. 257.

"Where there is no other person fit and willing to act."—Where the Court appointed a Court guardian without funds, to represent a minor defendant when there was a natural guardian available, and ordered the minor to deposit all the costs of the plaintiff before his application to set aside the *ex parte* decree passed against him could be considered, held, that the order was bad and must be set aside; *Rajamanika v. Venkataramana*, (1926) M. W. N. 8: 93 I. C. 84: A. I. R. 1926 Mad. 950.

Court can appoint any of its officers guardian ad litem.—An officer of the Court who has been appointed guardian ad litem should not be paid for his trouble.—*Kerakoose v. Serle*, 3 M. I. A. 329. But where the Court appoints an officer of the Court as guardian ad litem of the minor defendant, it must require the party who gets him appointed, to make a deposit for the purpose of defending the case; *Rajamanika v. Venkataramana*, (1926) M. W. N. 8: 93 I. C. 84: A. I. R. 1926 Mad. 950; *Mohan Lal v. Ganga Prasad*, 45 A. 395: 71 I. C. 975: A. I. R. 1923 All. 293.

A Court can appoint an officer of Court as guardian, only when there is no other person willing to act as guardian.—*Nachiappa Chetty v. Chinniah Ambalam*, 36 I. C. 794 (37 A. 179 followed); *Dinabandhu v. Mashuda*, 16 C. L. J. 318: 17 I. C. 263. It has however been said that the appointment of a Court nazir as the guardian of a minor is objectionable because Court officials have neither the time nor the opportunity to do justice to the cause of minors.—*Mahomed Ismail Khan v. Abdul Ghaffar Beg*, 6 O. W. N. 1060.

It is necessary for the Court to be satisfied before appointing a Court guardian that there is no other person fit and willing as such guardian; but it cannot be said that because there was no such enquiry by the Court the appointment itself was null and void and the minor was not properly represented.—*Hitendra Narain v. Sukhdeb*, 8 P. 558: 115 I. C. 896: 10 P. L. T. 79: A. I. R. 1929 Pat. 360. The Deputy Registrar who was appointed guardian ad litem of the minor respondents might be appointed to represent them in proceedings for obtaining leave to appeal to the Privy Council, but upon the admission of the appeal he ceased to represent them, the High Court cannot provide for their representation in an appeal to the Privy Council.—*B.* 55 C. 753: 106 I. C. 867: A. I. R. 1929 Cal. 236.

The Court has power to relieve the nazir of his position as a guardian when the nazir has no funds for the purpose of conducting adequately the defence of the minor.—*Gopilal v. Agarsingji*, 23 B. 626.

A Vakil is an officer of the Court for purposes of Or. XXXII, r. 4 (4); *Mohan Lal v. Ganga Prasad*, 45 A. 395: 71 I. C. 975: A. I. R. 1923 All. 293.

Where a clerk of the Court is appointed as a Court guardian of a minor defendant after his father's expressing of unwillingness to act as guardian on an affidavit to the effect that there was no other principal guardian for the minor defendant, a decree obtained against the minor is not bad on the ground of his non-representation if it is not shown that the plaintiff procured the appointment of the Court guardian by collusion

and false affidavit; *Venkata Lakshmikantaraju Garu v. Peda Venkata*, 46 M. L. J. 12.

In a suit against several defendants one of whom was an infant, his mother on being proposed as guardian appeared through a pleader and stated that she could not act unless the name was corrected which not being done, she did not defend the suit on behalf of the infant. *Held*, the mother could not be forced to accept the guardianship (15 C. L. J. 3 followed). If she declined to accept the guardianship for reasons, technical or otherwise, the proper course to follow was to appoint an officer of the Court to conduct the defence on behalf of the infant; *Surendra Nath v. Aghore Nath*, 25 C. W. N. 525: 62 I. C. 464.

A Sub-Judge who, under this rule appoints the *nazir* or any other officer of his Court to act as a guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it, and pass a decree against that officer as guardian ad litem of the minor.—*Mohan Iswar v. Haku Rupa*, 4 B. 638 (4 Bom. 642-note, followed). But see *Issur Chunder v. Nobo Eristo*, 7 C. L. R. 407; *Babaji v. Maruti*, 11 B. H. C. R. 182.

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the *nazir* who has been appointed guardian ad litem, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit, if it should be of opinion that the *nazir* has been unavoidably prevented from making himself acquainted with the case against the minor.—*Narayan Das v. Saheb Hussain*, 12 B. 553. But the Court guardian should be afforded facilities to communicate with the minor and his relatives in order to file a written statement and produce evidence and should be provided with funds to defray the costs to be incurred by him in the performance of his duties.—*Brij Raj Saran v. Alliance Bank of Simla*, 110 I. C. 346.

Whether Or. XXXII, r. 4 applies to non-contentious probate proceedings—Order XXXII, r. 4, does not apply to a non-contentious proceeding in Probate. But where minors are concerned and citations are issued to them, it is necessary for the protection of their interest for the Court to be satisfied not only that a guardian has been appointed but also that he has consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the minors; *Sachindra Narain v. Hironmoyee*, 59 I. C. 435; *Radhashyam v. Ranga Sundari*, 24 C. W. N. 541: 59 I. C. 664.

Leave to sue or defend on behalf of a minor.—The effect of S. 3 of Act XL of 1858, read with Or. XXXII, rr. 1 and 4, is that a minor plaintiff must not only always sue by his next friend, but the person representing the minor must either be a certificated guardian, or must obtain the sanction of the Court for the suit to proceed. The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded.—*Durga Churn v. Nilmoney*, 10 C. 134: 13 C. L. R. 369. Permission granted to sue or defend on behalf of a minor should be formally placed on the record. The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded.—*Mrinamoyi v. Jogodishuri*, 5 C. 450: 5 C. L. R. 361; *Ganga Prasad v. Umbica Churn*, 14 C. 754; *Russick Das v. Prem Nath*, 10 C. 102: 12 C. L. R. 405. But see *Bhaba Pershad v. Secretary of State*, 14 C.

159 (F.B.) ; *Parmeshar Das v. Bela*, 2 A. 503 ; *Pirthi Singh v. Lobban Singh*, 4 A. 1 ; *Luchmiput v. Amir Alum*, 9 C. 176 : 12 C. L. R. 22 ; *Suresh Chunder v. Jugut Chunder*, 14 C. 204 (F.B.) ; *Jogi Singh v. Kunj Behari*, 11 C. 509 ; *Newaj v. Muksud Ali*, 12 C. 131 ; *Kedar Nath v. Debidin*, 4 A. 165 ; *Janki v. Dharam Chand*, 4 A. 177 ; *Aukhil Chunder v. Tripoora Soonduree*, 22 W. R. 525. In all these cases it has been held that a written permission to sue is not absolutely necessary ; but the admission of the plaint by the Court sufficiently indicates that sanction has been given.

**Procedure where decree passed against a minor is declared not binding on the ground of want of proper representation.**—In a decree giving such a declaration, there was a direction to the minor's guardian ad litem to apply for a review of the judgment in the previous suit in which the invalid decree was passed ; *held*, that the direction as to review was inappropriate, but that it was open to the Court in which the invalid decree was passed to reopen and proceed with the suit and that it was not a case in which the minor was being for the first time sought to be added as a party.—*Raghunatha v. Ghonnu*, (1928) M. W. N. 275.

**Oudh rule.**—In the Province of Oudh the consent of the guardian need not be express ; the Court, however, cannot presume consent where the her refusal  
—*Naunihal*  
Oudh 50.

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, Representation of minor by next friend or guardian for the suit sub-rule (2), shall be made by his next friend or by his guardian for the suit. [S. 441.]

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader. [S. 444.]

### COMMENTARY.

**History.**—Sub-rule (1) corresponds to S. 441, C. P. Code, 1882, with some verbal changes only.

Sub-rule (2) exactly corresponds to S. 444, C. P. Code, 1882.

**"Every application."**—The words mean every application in connection with the *lis* ; where a person the appointment is to be treated a proceedings.—*Shantabai v. Larm*.

A. I. R. 1930 Nag. 185 (dissenting from A. I. R. 1921 Cal. 476 and A. I. R. 1925 Cal. 23).

**Effect of an application without next friend or guardian.**—Under Or. XXXII, r. 5, no order affecting a minor can legally be made without such minor being represented by a next friend. Neither r. 2 nor r. 5 gives any authority to a Court to make a minor's estate liable for costs.—*Amichand v. Collector of Sholapur*, 13 B. 234.

The words "may be discharged" imply that the Court's power is discretionary—*Doorga Mohun v. Tahir Ally*, 22 C. 274. Rule 5 (2) by its wording gives a discretionary power to the Court and if, therefore, there is already some adult on the record, for example, the manager of the joint family who does adequately represent the estate and its interests, the mere omission to appoint a guardian for the minor will not invalidate the proceedings; *Ramanathan v. Ramanathan*, A. I. R. 1929 Mad. 275.

In order that the Court's order may be binding on the minor it is necessary that he should be properly represented at the time the order is made.—*Mrinamoy v. Jogodishuri*, 5 C. 450; *Vishnu v. Ramchandra*, 11 B. 130; *Daji Himat v. Dhirajram*, 12 B. 18; *Ganga Prosad v. Umbica Churn*, 14 C. 754; *Jungee Lall v. Sham Lall*, 20 W. R. 120; *Durga Persad v. Kesho Persad*, 8 C. 656, 662 (P. C.); *Radha Kristo v. Ram Chunder*, 11 W. R. 300; *Russick Das v. Preonath*, 10 C. 102; *Sham Lal v. Ghasita*, 23 A. 469.

Under S. 3 of Act (XL of 1859), the Civil Court has no power to refuse to admit a person who has obtained a certificate under the Act to defend a suit on behalf of the minor as his guardian.—*Baldeo Das v. Gobind Shankar*, 7 A. 914.

A suit was instituted in a mofussil Court against two defendants, one of them being a minor. Before a guardian ad litem had been appointed for the defendant, an application was made to the High Court through a next friend to transfer the case from the mofussil to the High Court. *Held*, that the application was not informal, and could be made through the next friend.—*Jotendronauth v. Raj Kristo*, 16 C. 771.

A person who is not a guardian for the suit but who is interested in the minor must be allowed to appear on behalf of the minor to prosecute an application for setting aside a sale held in execution of a decree against the minor if he can show that the guardian ad litem had been neglecting his duties.—*Shantabar v. Laxmichand*, 26 N. L. R. 173; 124 I. C. 247; A. I. R. 1930 Nag. 185.

Where the general attorney of a minor's guardian taking advantage of his position as attorney instituted a suit on his own behalf and on behalf of the minor's guardian without the latter's knowledge or permission; *held* that the minor was not properly represented and the judgment was not binding on him.—*Ram Das v. Dwarka Dds*, 128 I. C. 763; A. I. R. 1930 All. 875.

A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant *sui juris*. So long as he continues to be the next friend, he is entitled to appoint and change his own solicitor.—*Dinendra Nath v. T. H. Wilson & Co.*, 5 C. W. N. 434.

**Pleader's liability for costs.**—Where the plaint in a suit by minors was not framed in accordance with the provisions of rr. 1 and 4, the High Court directed that the pleader who filed the original suit, and the pleaders who filed the appeal in the lower Court, should be called upon to show cause, why they should not be ordered to pay the costs of the suit and of the appeal.—*Shonai Bewa v. Monoram Mundul*, 11 C. L. R. 15.

- 6. (1)** A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

Receipt by next friend or guardian for the suit of property under decree for minor.

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

### COMMENTARY.

**History.**—This section exactly corresponds to S. 461, C. P. Code, 1883.

**Joint Hindu family.**—The managing member of a joint Hindu family governed by the Mitakshara School, who is also appointed guardian ad litem of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by this rule.—*Harihar Pershad v. Mathura Lal*, 35 C. 561; 12 C. W. N. 593; 8 C. L. J. 256. But on the other hand, a later decision of the Privy Council has decided that a managing member of a joint Hindu family, if he is also a next friend or guardian, is subject to the control of the Court, and that he cannot do any act in his capacity of manager for which the leave of the Court would have been necessary if he had acted as next friend or guardian; *Ganesha v. Tuljaram*, 36 M. 295 (P. C.); 40 I. A. 132; 19 I. C. 515. See also *Narayanan v. Srinivasan*, (1930) M. W. N. 1240 (ref. to 29 I. C. 475 and 47 M. 920; and following 36 M. 295 (P. C.)). So where payment under a decree passed jointly in favour of a minor and of the manager of a joint Hindu family was certified by the manager alone as the next friend of the minor, the Court refused to record the payment on the ground that the leave of the Court had not been obtained; *Pitchakkuttiya v. Doraiswami*, A. I. R. 1925 Mad. 230; 47 M. L. J. 493; 82 I. C. 583.

Whatever may be the case as regards a compromise without the leave of the Court under Or. XXXII, r. 7, as regards a valid discharge the question must always be a construction of the decree in each case as to whether

the manager has or has not the power to receive payment; where a redemption decree provided that the manager might receive certain amounts on behalf of the minors on giving security, it was held that he was competent to receive the payments with the sanction of the Court and give a valid discharge.—*Murtidhar v. Shiuram*, 31 Bom. L. R. 963; A I. R. 1929 Bom. 382.

A Court cannot, under this rule, order payment of money to a person not appointed guardian ad litem by any competent authority without demanding security from him.—*Krishna Aiyar v. Chakrapani*, 29 I. C. 475 (31 B. 418; 9 Bom. L. R. 553 followed).

"The Court shall give such directions."—The order for attachment of a surety's property under Or. XXXII, r. 6 cannot fall within the words "such directions as will, etc." The legislature could not have intended to include such a large power as that of attaching the property of a person not a party to any suit or decree within the cognizance of the Court under the category of mere directions.—*Nadanaligi v. Angad*, (1917) M. W. N. 490: 39 I. C. 928.

**7. (1)** No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor. [S. 462.]

### COMMENTARY.

**History.**—This rule corresponds to S. 462, C. P. Code, 1892, with this modification, that the words "*expressly recorded in the proceedings*" have been added after the words "without the leave of the Court." The above addition has been made in accordance with several rulings of the Privy Council and of the High Courts noted below. By the addition of the above words the cases in which it was held that when the Court permits a compromise, it must be presumed in the absence of evidence to the contrary that it gave due consideration to the matter, have been superseded.

**Object and scope.**—The provisions of this rule have been adopted from the rule previously laid down by the Privy Council and are intended to protect the interests of minors.—*Rajagopal v. Subramanya*, 3 M. 103, 104; *Sharat Chunder v. Kartik Chunder*, 9 C. 810; *Moulvie Abdool v. Mozuffer Hossein*, 16 W. R. P. C. 22. A suit relating to the estate or person of a minor and for his benefit has the effect of making him a ward of Court and no act can be done affecting the minor's property unless under implied.—*Doraswami v. Thungaswami*, Or. XXXII, r. 7 do not apply and no which is made on behalf of a minor by the Court of Wards.—*Mahomed Shah v. Ghulam Mustafa Shah*, 123 I. C.

693 : A. I. R. 1930 Sind 217. Before a compromise decree can be passed in a suit to which a minor is a party it is necessary to take the following steps, viz., (1) an application by the next friend or guardian ad litem to compromise the suit, (2) the granting of permission by the Court to so compromise and (3) the consent of the next friend or guardian to the proposed compromise after the Court's leave is obtained; *Aman Singh v. Narain*, 20 A. 98. The Court cannot force compromise upon a minor against the wishes of the guardian ad litem or next friend, *Hemangini v. Bhagwati*, 27 C. W. N. 792; 75 I. C. 682; A. I. R. 1923 Cal. 685; but if the guardian or next friend appears to be refusing to consent to an arrangement which is likely to prove beneficial to the interests of the minor, the Court may take steps for his removal and appoint some other person; *Hemangini v. Bhagwati*, 27 C. W. N. 792. Where a compromise has been entered into on behalf of a minor and sanction for that compromise has been duly granted under Or. XXXII, r. 7, C. P. C. the permission contemplated by S. 29 of the Guardian and Wards Act is not necessary.—*Chet Ram v. Bhim Sain*, 122 I. C. 103 31 Punj. L. R. 131; A. I. R. 1930 Lab. 250.

The provisions of the C. P. Code do not apply *en bloc* to Courts constituted under the Land Revenue Act. Where an elder brother of a minor entered into a compromise on behalf of the latter in mutation proceedings without leave under Or. XXXII, r. 7; held that this compromise was not bad.—*Sitla Prasad v. Sarju*, 136 I. C. 254; A. I. R. 1932 Oudh 44.

Want of sanction makes the compromise a nullity, so far as the minor is concerned.—*Mundakath v. Vishnu*, 136 I. C. 350; A. I. R. 1932 Mad 303.

If a guardian has wrongly settled a suit out of Court, that may be a ground for further steps being taken, but that must be at the instance of the minor after he attains majority or a next friend or a guardian during minority; the attorneys who received instructions from the guardian who compromised cannot go behind their instructions.—*Abu Baker v. Amiabai*, 34 Bom. L. R. 614.

"Without the leave of the Court expressly recorded in the proceedings."—To give permission to compromise a suit on behalf of a minor, it is usual and desirable that the Court should record an order stating that it considers the compromise to be for the benefit of the minor, but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in Or. XXXII, r. 7 has not changed the pre-existing practice under S. 462 of the old Code.—*Bejoy Singh v. Mathuriya Debya*, 56 I. C. 97; *Ishan Chandra v. Nitratan*, 2 P. 538; 4 P. L. T. 311; 1 P. L. R. 217. But see *Hanuman Rai v. Jagdis Rai*, 35 I. C. 675. The leave must be express, not implied; *Rajagopal v. Muttupalem*, 3 M. 103; *Shorat v. Kartick*, 12 C. L. R. 453; 9 C. 810; *Rameswar v. Ram Bahadur*, 5 C. L. J. 175; 11 C. W. N. 178 (P. C.). The sanction of the Court to a compromise cannot be inferred merely from the fact that the Court passed a decree in accordance with the compromise; *Manohar Lal v. Jadunath*, 28 A. 285; *Partab v. Bhabuti Singh*, 35 A. 487 (P. C.); 40 I. A. 182; 21 I. C. 288; *Sharat v. Kartick*, 9 C. 810; *Ramgulam v. Durga Pershad*, 6 P. L. J. 190; 60 I. C. 930; *Har Sarup v. Tohfa Singh*, 111 I. C. 156; A. I. R. 1928 All. 534. In order to show that the provisions of the rule have been complied with there ought to be evidence that the attention of the Court was directly called to



the fact that a minor was a party to the compromise, and it ought to be shown clearly that the leave of the Court was obtained; the fact that the minor was so described and appearing by a guardian, that the compromise was before the Court and that the Court acted upon the agreement are not sufficient for the assumption that the Court granted leave.—*Banwari v. Jamna*, 125 I. C. 587; 29 A. L. J. 7fi. But an order of the Court sanctioning a compromise need not, on the face of it, state in so many words that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor; *Janki v. Naunihal*, 3fi P. R. 1917: 39 I. C. 53; *Rajagopalan v. Subbarama*, (1919) M. W. N. 356: 53 I. C. 354.

**Compromise under misapprehension of material facts.**—Where it appears that the compromise has been entered into by the parties and sanctioned by the Court, under a misapprehension of material facts, the minor is entitled to have the compromise set aside, and the parties are entitled to be restored to their rights in the former suit as at the time it was effected.—*Bibee Solomon v. Abdool Azeez*, 6 C. 637: 8 C. L. R. 169; *Jhanda Singh v. Lachmi*, 5fi I. C. 878: 1 L. 344; *Badar Din v. Mt. Natho*, 11 L. L. J. 14: 30 P. L. R. 116: A. I. R. 1929 Lah. 279.

**Materials to be considered by Court in sanctioning a compromise on behalf of a minor.**—The Court must exercise its discretion in a judicial manner when sanctioning a compromise on behalf of a minor. If it does, it cannot be set aside in a subsequent suit. What materials the Judge must consider before sanctioning the compromise will depend upon the facts of each case. There is no general rule.—*Dhairyasingh v. Kissandas*, 23 Bom. L. R. 363: 94 I. C. 104: A. I. R. 1926 Bom. 291. Minor's benefit is the test.—*Suresh v. Jogendra*, 32 C. W. N. 459. There should be an affidavit by the guardian to the effect that the compromise is for the minor's benefit; and in heavy cases there should be an opinion of counsel or else a statement by counsel at the bar that in his opinion the compromise is beneficial to the minor.—*Chandulal v. Nagindas*, 119 I. C. 6fi3: 31 Bom. L. R. 631: A. I. R. 1929 Bom. 350. Whether sanction should or should not be granted is a matter mainly for the Judge and where granted the compromise should not be set aside unless it is proved that there has been some fraud or misrepresentation inducing it or that the Judge acted under a misapprehension of a material fact; in the absence of any proof to the contrary it should be assumed that the Judge duly appreciated and weighed the facts before him.—*Chet Ram v. Bhim Sain*, 122 I. C. 103: 31 Punj. L. R. 131: A. I. R. 1930 Lah. 250; *Sudhiredra v. Ranendra*, 51 C. L. J. 364: 127 I. C. 785: A. I. R. 1930 Cal. 539. Where the Judge failed to consider whether the compromise was for the benefit of the minor, held that the compromise was not binding on the minor.—*Musst. Barkat Bibi v. Mohamed Amin*, 33 P. L. R. 551.

In the case of *Vaishno Dibi v. Rameshri*, 113 I. C. 1 (P. C.): A. I. R. 1928 P. C. 294, their Lordships of the Judicial Committee expressed no opinion on the question whether a compromise entered into on behalf of a minor defendant by his guardian ad litem and duly approved and sanctioned by the Court as being in the best interests of the minor could be impeached by the minor and invalidated on the ground that he had been represented by a person with an adverse interest and so contrary to Or. XXXII, r. 4.

**Compromise of execution proceedings.**—This rule applies to a compromise of execution proceedings. Hence an adjustment of a decree to

which a minor is a party requires under this rule the sanction of the Court.—*Virupakshappa v. Shidappa*, 26 B. 109; the provisions of this section apply to compromises after decree and no adjustment by compromise of a decree by the guardian of a minor can be certified under S. 258, C. P. Code, 1882 (Or. XXI, r. 2), without the leave of the Court under this rule.—*Arunachellam v. Ramanadhan*, 29 M. 309; *David Rowther v. Paramaswami*, 35 I. C. 70; 31 M. L. J. 207. See also *Ramgulam v. Shamsahai Dass*, 5 P. L. J. 379; *Gurumallappa v. Mallappa*, 22 Bom. L. R. 725; and *Sadashiv v. Trimbak*, 44 B. 202; 22 Bom. L. R. 266; 56 I. C. 399.

**Sanction of Court if necessary to transfer of decree in favour of minor by guardian or next friend.**—The next friend of a minor cannot transfer a decree which he had obtained on behalf of the minor, to a third party without obtaining the leave of the Court; *Kancherla Kanakayya v. Mulpuree Kottayya*, 41 M. L. J. 75; 13 L. W. 637. But see *Govindarajulu v. Ranga Rao*, 40 M. L. J. 124; 13 L. W. 97, where a contrary view was taken.

**Conditions necessary to make binding compromise by minor's guardian.**—When a compromise of the suit is made, it ought to be carried out by proper deeds and filed in Court, particularly when infants are concerned, so as to have the assent of the Court at the time, instead of its being totally concealed from them.—*Abdool Ali v. Mozuffer Hussein*, 16 W. R. 22 (P. C.).

In order that a compromise may be binding upon a minor the leave must be express and the Court in sanctioning a compromise under this rule should record the fact that the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered. From the mere fact that the Court passed the decree in accordance with the compromise it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court.—*Biku Halwai v. Mohesh Halwai*, 8 C. L. J. 266 (16 W. R. 232; 26 B. 109, followed). See also *Virupakshappa v. Shidappa*, 26 B. 109; *Govindasami v. Alagirisami*, 29 M. 104; *Krishna Parshad v. Romes Chunder*, 8 C. L. J. 274; 13 C. W. N. 163; *Manohar Lal v. Jadu Nath*, 28 A. 585 (P. C.); 4 C. L. J. 8; 10 C. W. N. 898; *Rajagopalan v. Subrahmanya*, (1919) M. W. N. 356; *Lala Majlis Sahai v. Narain Bibi*, 7 C. W. N. 90; *Kalavati v. Ohedi Lal*, 17 A. 531; *Sharat Chunder v. Karitik Chunder*, 9 C. 810; 12 C. L. R. 453; *Raja Gopal v. Muttupalem*, 3 M. 103; *Arunachalam v. Meyyappa*, 21 M. 91; *Ram Gulam v. Durga Pershad*, 6 P. L. J. 190; 2 P. L. T. 325; *Dhairyasinh v. Kissanadas*, 28 Bom. L. R. 363; 94 I. C. 104; A. I. R. 1926 Bom. 291. But see *Aman Singh v. Narain Singh*, 20 A. 98 and *Nirvanaya v. Nirvanaya*, 9 B. 365; *Midnapore Zemin-dari Co. Ltd. v. Gobinda*, 8 C. L. J. 31.

No compromise, even though with the Court's leave, will be binding on the minor if at the time when the guardian entered into it the minor had in fact attained majority.—*Lanka Sanyasi v. Lanka Lakshman Naidu*, 51 M. 763; A. I. R. 1928 Mad. 294; 55 M. L. J. 374.

**Effect of compromise without leave of Court.**—In cases to which this rule applies it should be clearly shown that the leave of the Court was obtained

and that the attention of the Court was drawn to the fact that there was a minor.—*Partab Singh v. Bhabuti Singh*, 35 A. 487 (P. C.): 18 C. L. J. 384: 17 C. W. N. 1165; *Ishan Chandra v. Nilratan*, 2 P. 538: 4 P. L. T. 311. Otherwise the compromise is not enforceable against the minor.—*Subramanian v. Rajeswara*, 39 M. 115 (P. C.): 20 C. W. N. 201; *Jamna Bai v. Vasanta Rao*, 39 M. 409 (P. C.) (on appeal from 34 M. 314).

Where the guardian of a minor litigant fails to obtain the leave of the Court to enter into a compromise on behalf of a minor, it is open to the minor under Or. XXXII, r. 7 to avoid the compromise. In the absence of an order granting permission to the guardian to enter into a compromise, the presumption is that no such permission was granted.—*Badra Prasad v. Gopal Behari Lal*, 41 A. 553: 17 A. L. J. 789: 50 I. C. 752.

A compromise in a suit made without the leave of the Court though not binding on the minor will be binding on the other parties.—*Charu Chandra v. Sambhu Nath*, (1918) P. 193: 3 P. L. J. 255: 4 P. L. W. 393.

If a compromise is entered into by a guardian on behalf of a minor without the leave of the Court and a decree is passed in accordance with the terms of the compromise, such a decree is not a nullity but is voidable at the instance of the minor; *Jeta Singh v. Man Singh*, 2 L. 164: 62 I. C. 794 (26 B. 109; 95 P. R. 1912 (F. B.) *folld*); 28 A. 137, 35 A. 487 (P. C.) *distd.*), *Chellaram v. Kimatram*, 14 S. L. R. 245: 61 I. C. 118.

Compromise of suit by guardian ad litem—Leave of Court not obtained—Withdrawal from compromise by the guardian—Suit to have the compromise enforced *Held* that in as much as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce a compromise, even though the terms of it might appear to be beneficial to the minor.—*Ranga Rao v. Rajagopala Raya*, 22 M. 378 *See also* *Gurdevi v. Khairati Mal*, 10 L. L. J. 23. If on account of absence of leave a compromise is bad, hardship of the other party or impossibility to restore him to the original position cannot make it enforceable—*Suresh v. Jagendra*, 32 C. W. N. 459.

Compromise when can be set aside.—A compromise sanctioned by a Court under this rule cannot be set aside merely on the allegation that the compromise was not in the interests of the minor and was unconscionable. The Court has to consider the question whether the compromise is for the benefit of the minor before it sanctions it, and so there must be something amounting to fraud before the Court can set it aside.—*Maharaj Bhanudas v. Krishnabai*, 50 B. 716: 23 Bom. L. R. 1225: A. I. R. 1927 Bom. 11. A man cannot complain of fraud simply because he regrets a bargain into which he entered with his eyes open; nor can a minor attack a compromise sanctioned by the Court on his behalf by merely proving that the compromise was not profitable to him or that his opponent put forward a false plea, but he must prove that the Court was deceived into believing a false plea or as regards the facts of the case or into believing that the compromise had been accepted by the minor's next friend or guardian when in fact, it had not been so accepted.—*Ramaswami v. Alagathai*, (1928) M. W. N. 654: 116 I. C. 116: A. I. R. 1929 Mad. 96. Where leave is granted under a misapprehension and the compromise is not to his advantage, it can be set aside.—*Badar Din v. Natho*, 116

A. I. R. 1929 Lah. 279. If fairly and honestly made and sanction fairly and honestly obtained for it, the compromise cannot be set aside merely because subsequent events show that from the infant's point of view it has worked out ill.—*Sudhirendra v. Ravendra*, 127 I. C. 785; 51 C. L. J. 364; A. I. R. 1930 Cal. 539.

Agreement to refer to arbitration, whether under this rule.—An agreement entered into by a next friend or guardian ad litem to refer any matter in dispute in the suit to arbitration is an "agreement" falling within this rule and the Court's sanction is therefore necessary; *Lakshmana v. Chinnathambi*, 24 M. 326; *Vijaya v. Venkatasubba*, 39 M. 853; *Atmaram v. Bhula*, 15 Bom. L. R. 223; *Sadashivappa v. Gangappa*, 134 I. C. 1231; 33 Bom. L. R. 1033; A. I. R. 1931 Bom. 500; *Ganesha v. Mul Chand*, 95 P. R. 1912; *Muhammad Ibrahim v. Allah Baksh*, 145 P. R. 1919; *Chhajju Mal v. Tarioki Nath*, 8 L. L. J. 414; 96 I. C. 748; A. I. R. 1926 Lah. 666. It has been held by the Allahabad High Court that such an agreement is not within this rule, and the sanction of the Court is not necessary.—*Hardeo v. Gauri Shanker*, 28 A. 35, *Lutawan v. Lachaya*, 36 A. 69 (F. B.); 21 I. C. 989.

The agreement contemplated in Sch. II, C. P. Code, para. 1, *et seq.*, is an "agreement with reference to the suit" under Or. XXXII, r. 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule—*Davuluru Vijaya v. Davuluru Venkatasubba*, 39 M. 853. 30 M. L. J. 465. The Lahore High Court has held to the same effect; *Bakhtawar v. Kesar Singh*, 59 I. C. 31; *Sadagat Ali v. Muhammad Sajjad Ali*, 113 I. C. 901; 11 L. L. J. 130. 30 Punj L. R. 17. A. I. R. 1929 Lah. 257. But the Allahabad High Court, in *Hardeo v. Gauri Shankar*, 28 A. 35, has held that such an agreement is not within this rule, and the Court's sanction is therefore not necessary. This has been approved by the Calcutta High Court in *Annada Krishna v. Jogendra Nath*, 8 C. L. J. 294. It has been held by the Calcutta High Court that as in the case of a compromise, so in the case of an agreement to refer to arbitration, the objection that the guardian acted without the leave of the Court under Or. XXXII, r. 7 (2) can be taken by the minor himself and by no other party and that not by an appeal from the decree but by way of an application for review in the trial Court or by a separate suit; the minor may seek such relief either on attaining majority or before then by a next friend.—*Golnur Bibi v. Abdus Samad*, 35 C. W. N. 238.

Where a partition suit was referred to arbitration and the minors were fully represented by their father whose interest was not adverse to that of the minors and they got as much as their major brothers, *held*, that the minors were bound by the award, and that the position would be the same if they were represented not by their father but by the manager of the family.—*Vasudeva v. Sundararaja*, 124 I. C. 209; 30 L. W. 868; A. I. R. 1930 Mad. 38.

A manager of a joint Hindu family has the power to bind the family by reference of a dispute with any outsider regarding any family property to arbitration. Minors in the family are bound by the reference and

consequently the award made upon it.—*Balaji v. Nana*, 27 B. 287. See also *Vithaldas v. Dattaram*, 26 B. 298.

A joint application signed by pleaders of both the parties by which they agreed to abide by the decision of the Court after local inspection is not a reference to arbitration but a compromise; if no leave of the Court is obtained for it, the minor can have it set aside.—*Banwari v. Jamna*, 125 I. C. 587; 29 A. L. J. 76; A. I. R. 1930 All. 731.

**Withdrawal of suit by next friend.**—When a person acting for a minor has fraudulently withdrawn the minor's suit, without obtaining leave to bring a fresh suit, it is open to the minor to relieve himself from the consequences of fraud in one of three ways, viz.: (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.—*Eshan Chundra v. Nundamoni*, 10 C. 357 (approved in *Virupakshappa v. Shidappa*, 23 B. 620). See also *Ram Sarup v. Shah Latifat Hossein*, 29 C. 735; *Rajada v. Ghulia*, 59 P. R. 1919. In *Doraswami v. Thungasami*, 27 M. 377, the order of withdrawal was set aside by the High Court on revision.

**Power of a guardian to bind the minor by the oath of the opposite party.**—The offer of the guardian of a minor defendant to be bound by the oath of the opposite party, stands on a very different ground from an agreement or compromise contemplated by this rule. In such a case, the minor is bound by the consent of his guardian, although given without the leave of the Court, provided that there is no fraud or gross negligence on the part of the guardian.—*Sheo Nath v. Sukh Lal*, 27 C. 229; 4 C. W. N. 327 (followed in *Hardeo Sahai v. Gauri Shankar*, 28 A. 35; *Mahammad Mahmud Choudhury v. Behary Lal*, 34 C. W. N. 310; 129 I. C. 408; A. I. R. 1930 Cal. 463). See also *Ohengal Reddi v. Venkata Reddi*, 12 M. 483, and *Annanda Krishna v. Jogendra Nath*, 8 C. L. J. 294. So also an agreement to be bound by the statement on oath of a witness.—*Deoraj v. Abhai Raj*, 49 A. 842; 102 I. C. 38; A. I. R. 1927 All. 584.

**Whether the Court can force compromise against the wishes of the guardian ad litem or next friend.**—Although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of the next friend or guardian ad litem in the action. No doubt if the Court found that a guardian or next friend, was acting improperly and against the infants' interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person.—*Hemangini Dasi v. Bhagwati Sundari*, 27 C. W. N. 792; 75 I. C. 682. Where a guardian had entered into a compromise but before the Court granted sanction resiled from it, it was held that the Court had the power to pass a decree in accordance with it.—*Sambhunath v. Abdul Kader*, 107 I. C. 477; A. I. R. 1928 Cal. 247.

**Gross negligence or fraudulent conduct of next friend or guardian ad litem vitiates proceedings.**—An infant has a remedy either by application for review of judgment or by separate suit when either gross laches or fraud or collusion is found in the next friend. The result appears

to be that the negligence or laches of the guardian which entitles the minor to avoid the decree must be of a gross character.—*Ram Sarup v. Shah Lafat Hossein*, 29 C. 735. It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be re-opened. It must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully averted. It is not sufficient to show that the guardian ad litem absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian ad litem to appear at the trial. The test in such a case is whether or not there has been culpable neglect of the interests of the minor, whether there has been, in the conduct of the suit, any act or omission on the part of the guardian ad litem which, in the result, has brought prejudice to the minor's interests.—*Brijraj v. Ram Sarup*, 48 A. 44: A. I. R. 1926 All. 36; *Parmeswari v. Sheo Dutt*, 6 C. L. J. 448; *Lekhray Roy v. Mahtab Chand*, 14 M. I. A. 393: 17 W. R. 117; *Aramita v. Audithrao*, 105 I. C. 537: 29 Bom. L. R. 1357: A. I. R. 1927 Bom. 613.

A suit by a minor to set aside a compromise decree on a ground other than fraud is maintainable. When and under what circumstances such a suit is maintainable explained and pointed out.—*Surendra Nath v. Hemangini*, 34 C. 83 (10 C. 612 and 2 C. L. J. 508, referred to). See also *Barhamdeo v. Banarsi*, 3 C. L. J. 119, and *Banarsi v. Ram Narain*, 30 A. 105: 5 A. L. J. 35.

The proper course for a minor to set aside a compromise entered into by his guardian without the leave of the Court and the decree based upon it, is by way of an application for review in the first Court or by a separate suit; but not by an appeal from the compromise decree.—*Rakhal Moni v. Adwita Prosad*, 30 C. 613: 7 C. W. N. 419. See also *Biraj Mohini v. Chinta Moni*, 5 C. W. N. 877.

**Form of the compromise decree.**—The Court is not obliged to pass a formal decree in the exact form which the parties propose. Very often it may be more convenient to set out in a schedule the precise compromise agreed upon by the parties and then in the order itself merely the operative portion which the parties want.—*Chandulal v. Nagindas*, 119 I. C. 663: 31 Bom. L. R. 621: A. I. R. 1939 Bom. 350.

*In addition to the cases noted above, see the cases noted under Or. XXIII, r. 3 on this point, under the heading "Compromise by the minor's next friend and guardian and its effects."*

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

[S. 447.]

## COMMENTARY.

**History.**—This rule exactly corresponds to S. 447, C. P. Code, 1882.

**Retirement of next friend.**—This rule directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place and without giving security for the costs already incurred. Where the same person is both a certificated guardian and guardian ad litem to a minor plaintiff, the fact that one of such plaintiffs has come of age and has been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of his duties as guardian ad litem: to do this requires a special order under this rule.—*Banarsi Prasad v. Ram Narain*, 30 A. 105; 5 A. L. J. 35.

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit. [S. 446.]

## COMMENTARY.

**Alterations.**—Sub-rule (1) corresponds to para. 1 of S. 446, C. P. Code, 1882, with some modifications. The word "*where*" has been substituted for the word "*if*" wherever it occurred in the old section; and the words "*and make such order as to costs as it thinks fit*," have been added.

Sub-rule (2) corresponds to para. 2 of S. 446 of the C. P. Code, 1882, with the addition of the following words: "*and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.*"

"The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be

power to require him to become liable or give security for costs in the suit previously incurred."—See the Report of the Special Committee.

"Where the next friend does not do his duty."—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on his behalf for removal of the next friend and for friend, or in order that the minor plaintiff etc., proceed with the suit or withdraw from 27 M. 377.

Where charges of immorality were brought against the holder of a certificate under Act XL of 1859, it was held to be the duty of the Judge to enquire into the truth of the charges and fitness of the certificate holder.—*Mohumuddy Begum v. Oomdutoonissa*, 13 W. R. 454.

Adverse interest.—When the next friend or guardian of the minor has, for his own advantage or by negligence, allowed time for appeal to run out, the Court may enlarge time for appeal in the minor's favour.—*Cursandas v. Ladkavahoo*, 20 B 104. If a Court considers that the interest of a next friend of a minor plaintiff is adverse to that of the minor, it should remove the next friend under this rule and then stay further proceedings under the next rule until the appointment of a fresh next friend; *Krit Narayan v. Chanchal*, 63 I. O. 736; 6 P. L. J. 317.

In a case where the guardian, without any sufficient cause or justification, and without legal advice, withdrew an appeal made to set aside a sale of the estate of the minors, the certificate of guardianship was cancelled.—*Pitambar Day v. Ishan Chunder*, 19 W. R. 169.

An application for the removal of guardians must be supported by proof of malversation or misconduct such as would afford sufficient ground for removal.—*Rajessures Debia v. Jogendro Nath*, 23 W. R. 278.

Stay of proceedings on removal, etc., of next friend

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place. [S. 448.]

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor, or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit. [S. 449.]

### COMMENTARY.

Alterations.—Sub-rule (1) corresponds to S. 448, C. P. Code, 1882, with the addition of the word "retirement" before the word "removal"

Sub-rule (2) corresponds to S. 449, C. P. Code, 1882, with the substitution of the word "where" for the word "if" which occurred in the old section.



**Death of next friend.**—On the death of a minor plaintiff's next friend, the suit does not abate, and, therefore, should not be dismissed. If, however, an order of dismissal is passed, it is a nullity and can have no effect upon the rights of the plaintiff. The duty of the Court is either to appoint a new next friend or to allow the suit to be pending till the minor attains majority.—*Venkateswara v. Cherasser*, 27 M. L. J. 405: 25 I. C. 597.

**11. (1)** Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit. [S. 458.]

**(2)** Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place. [S. 459.]

### COMMENTARY.

**Alterations**—Sub-rule (1) corresponds to S. 458, C. P. Code, 1882, with some additions and alterations. The old section is reproduced below to observe the changes introduced in this rule "If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty."

Sub-rule (2) corresponds to S. 459, C. P. Code, 1882, with some modifications. The word "retires" has been added before the word "dies."

The other changes are merely verbal.

**Retirement of guardian.**—It is not open to a guardian appointed by the Court to retire at his own sweet will without the permission of the Court. It is a matter of discretion for the Court to permit the guardian to retire.—*Narender Singh v. Chaitrapal*, 94 I. C. 340: A. I. R. 1926 All. 437; *Kuppusamy v. Bavaaswami*, 50 M. 357: 101 I. C. 399: A. I. R. 1927 Mad. 538; *Thiagaraja v. Kothandapani*, 113 I. C. 238: A. I. R. 1926 Mad. 980.

If the Court finds that a guardian is not acting properly or in the interest of the minor it would be the duty of the Court to remove him and to see that the interest of the minor is protected. When a guardian properly appointed takes proper steps in the interest of the minor and then wants to force the hands of the Court by preferring a resignation, it would be the duty of the Court to see whether in the interest of the minor the resignation should be accepted or not. "Claiming an interest adverse to the minor" only means that the interest of the minor would not be safe in the hands of his guardian.—*Ram Kishan v. Radhey Lal*, 136 I. C. 562: 29 A. L. J. 1102: A. I. R. 1932 All. 130.

"May remove him."—The power of the Court to remove the guardian ad litem and appoint a new guardian instead may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* had previously been passed.—*Ayya Nadan v. Thanammal*, 27 M. L. T. 171: (1920) M. W. N. 241: 55 I. C. 945: 11 L. W. 289.

r. 11.

**Appeal**—Even for the purposes of the appeal it is only the guardian ad litem appointed by the trial Court who can act, and so long as he has not died, retired or been removed no one else can be allowed to represent the minor in the appeal. After the decree is passed by the trial Court that Court becomes *functus officio* for the purpose of removing the guardian or . . . . . allegation is that the guardian was other person interested in the minor's application to the appellate Court for removal of the guardian and appointment of a fresh one. But if there is inordinate delay the Court will not interfere.—*Datapat v. Mahomed Yar Khan*, 52 A. 494; 124 I. C. 474; 23 A. L. J. 771; A. I. R. 1930 All. 456; *Punjabi v. Ramanand*, 122 I. C. 445; A. I. R. 1930 Nag. 177.

"Court may make such order as to costs as it thinks fit."—The C. P. Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in this rule.—*Narasimha Rau v. Lakshmipati Rau*, 3 M. 263; *Sibt Ahmed v. Amina*, 50 A. 733; 113 I. C. 434; A. I. R. 1929 All. 18.

Where a guardian ad litem of an infant had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purpose, and which, the evidence showed, was to his knowledge duly executed by the testatrix in a sound state of mind, *held*, that he was liable for the costs of the suit.—*Goolam Hossein v. Fatmabai*, 8 B. 391.

After the dismissal of an administration suit brought by the next friend of a minor plaintiff, the Court ordered the next friend to pay the costs, being of opinion that he was the real actor in the suit, and that the suit was unnecessary.—*Devkabai v. Jefferson*, 10 B. 248.

This rule is not, so far as regards payment of costs, applicable to any person appointed to act as guardian ad litem with his previous assent.—*Jadow Mulji v. Chhagan Raichand*, 5 B. 306.

**Death of guardian ad litem.**—Where the death of a guardian ad litem takes place pending appeal, and judgment is passed without a new guardian, it is a mere irregularity.—*Randayal v. Ajudhia*, (1906) A. W. N. 40; *Gobardhan v. Mahabir*, 34 A. 321.

Where a guardian ad litem died during the pendency of the appeal and the appeal was disposed of without a fresh guardian being appointed but a new guardian was appointed in execution proceedings. *Held*, that no guardian for the minors having been appointed they were to all intents and purposes not parties to the appeal at all and therefore the decree and sale in execution were as against them a nullity.—*Chundury Krishnayya v. Koripalli Raju*, 31 M. L. J. 39; 35 I. C. 154; *Jager Nath v. E. I. Ry Co.*, 106 I. C. 540; 9 P. L. T. 547; A. I. R. 1929 Pat. 163. But where on the death of a guardian ad litem pending an appeal, though no fresh guardian was appointed, the mother of the minors engaged a counsel and fought out the proceedings on behalf of the minors, *held*, that the decree against the minors was voidable and not void.—*Musst. Phul Kuer v. Najmunissa*, 125 I. C. 779; 11 P. L. T. 361; A. I. R. 1930 Pat. 473.

Where a minor filed an objection in execution proceedings with a particular person as next friend and in the appeal against the order in those proceedings, the minor was represented by another person and no

objection was raised as regards the guardianship, *held*, it was not a material irregularity and S. 99 of the C. P. Code precluded the Court from reversing the decree on that ground; *Abdul Gani v. Barkia*, 61 I. C. 605.

Course to be followed by minor plaintiff or applicant on attaining majority.

**12.** (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application. [S. 450.]

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name. [S. 451, PARA. 1.]

(3) The title of the suit or application shall, in such case be corrected so as to read thenceforth thus:—

“A. B., late a minor, by C. D., his next friend, but now having attained majority.” [S. 451, PARA. 2.]

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend. [S. 452.]

(5) Any application under this rule may be made *ex parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend. [S. 453.]

### COMMENTARY.

**Alterations.**—The provisions contained in Ss. 450, 451, 452 and 453 of the C. P. Code, 1882, have been amalgamated in this rule with some additions and alterations.

Sub-rule (1) corresponds to S. 450, C. P. Code, 1882, with some verbal alterations. The words “*shall*” has been substituted for the word “*must*” and the words “*on attaining majority*” have been substituted for the words “*on coming of age,*” which occurred in the old section.

Sub-rule (2) corresponds to para. 1 of S. 451 of the C. P. Code, 1882, with some modifications. The word “*where*” has been substituted for the word “*if*”; and the words “*with the suit or application*” have been substituted for the words “*with it,*” which occurred in the old section.

Sub-rule (3) corresponds to para. 2 of S. 451 of the C. P. Code, with this modification, that the words “*having attained*” have been substituted for the words “*but now of full age,*” which occurred in the last part of para. 2 of the old section.

Sub-rule (4) corresponds to S. 452, C. P. Code, 1882, with slight modification. The words “*or opposite party*” have been added after the word “*defendant.*”

Sub-rule (5) corresponds to S. 453, C. P. Code, with some additions and alterations. The words "and it must be found by affidavit that the late minor has attained his full age," which occurred in the old section have been omitted; and the words "*but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend*" have been added.

When a suit is instituted on behalf of a person alleged to be, but not, in fact, a minor, and the suit is brought through a next friend, the Court should not dismiss the suit. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended, the next friend's name may be treated as a mere surplusage, and the suit should be allowed to proceed.—*Taqi Jan v. Obaidulla*, 21 C. 866. *Contra* in *Shoorania v. Bharat Singh*, 20 A. 90.

Scope.—Rules 12 and 13 of Or. XXXII, lay down the course that a plaintiff may follow on attaining majority, but there is no corresponding rule relating to a defendant who becomes major during the pendency of a suit. The reason of this omission is that while a plaintiff on attaining majority may put an end to the suit, the defendant cannot do so and the suit must proceed. He has notice of the suit already and so no further notice need be given to him; if he chooses to conduct his own defence he may do so or if he so desires he may allow himself to be represented by his *quondam* guardian—*Umra v. Barkat Ali*, 110 I. C. 725; A. I. R. 1928 Lah. 371. The mere circumstance that he has not chosen to come forward will not enable him to have it declared that a judgment pronounced against him as represented by his guardian is not binding on him; but it is otherwise if the case is compromised by his guardian after he has attained majority in which case the compromise though sanctioned by the Court would not be binding on him.—*Lanka Sanyasi v. Lanka Lakshman Naidu*, 51 M. 763; A. I. R. 1928 Mad. 294; 55 M. L. J. 374; 29 L. W. 455; 118 I. C. 294 (39 M. 1031 referred to).

Notice.—Where during the pendency of an appeal the minor attained majority and the counsel who appeared for the next friend did not appear because he had not received a fresh engagement from the *quondam* minor and the Court dismissed the appeal for want of prosecution; held that the proper course for the Court was to issue notice to the minor to appear and prosecute the appeal or to drop it.—*Ishar Singh v. Bakhshish Singh*, 115 I. C. 72; 30 Punj. L. R. 273; A. I. R. 1929 Lah. 555.

Title to be corrected.—The provision in this rule requiring the title to be corrected, would apply to a pending suit, and not to a suit in which a final decree has been passed, and in which it only remains to proceed in execution.—*Doorga Mohun v. Tahir Ally*, 22 C. 270.

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff attaining majority desires to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant. [S. 454.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 454, C. P. Code, 1882, with some alterations and omissions.

Sub-rule (1) corresponds to para. 1 of S. 454. The words "*where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply*" have been substituted for the words "*a minor co-plaintiff, on coming of age, and desiring to repudiate the suit, must apply,*" which occurred in the beginning of the old section.

Sub-rule (2) corresponds with the first part of para. 2 of the old section with the addition of the words "*on any co-plaintiff.*" The words "*and it must be proved by affidavit that the late minor has attained his full age,*" which occurred in the middle of para. 2 of the old section, has been omitted.

Sub-rule (3) corresponds to the last part of para. 2 of the old section with some verbal changes.

Sub-rule (4) corresponds to part 3 of the old section with change of some words, without any change in the meaning.

14. (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

Unreasonable or  
improper suit.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit. [S. 455.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 455, C. P. Code, 1882, with some alterations and omissions.

Sub-rule (1) corresponds to para. 1 of the old section, which is reproduced here to mark the distinction: "*If any minor, on attaining majority, can prove, to the satisfaction of the Court, that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed.*"

Sub-rule (2) corresponds to para. 2 of S 455, C. P. Code, 1882, with the addition of the words "*or make such other order as it thinks fit*" in the last part.

After the dismissal of an administration suit brought by the next friend of a minor plaintiff, the Court ordered the next friend of the minor to pay the costs of the suit, being of opinion that he was the real actor in the suit, and that the suit was unnecessary.—*Devkabal v. Jefferson*, 10 B. 248.

When a person acting for a minor has fraudulently withdrawn the minor's suit, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor, from bringing a fresh suit it is open to the minor to relieve himself from the consequences of the fraud in one of the three ways, viz., (1) by an application to the Court in the suit in which the withdrawal took place; (2) by an application to the Court for leave to bring a fresh suit; (3) by an application to the Court for leave to set aside the order of withdrawal; fraud—857.

**15.** The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. [S. 463.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 463, C. P. Code, 1882, with some additions and alterations. The old section is reproduced below to observe the changes introduced by the present rule: "*The provisions contained in Ss. 440 to 462 (both inclusive) shall mutatis mutandis, apply in the case of persons of unsound mind adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.*"

It would appear on a comparison that the words "*and to persons who though not so adjudged are found by the Court on inquiry by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued*" have been added. The additions seem to have followed the principles laid down in 16 B. 132, 24 M. 504, and in 33 C. 1094; 10 C. W. N. 719; 4 C. L. J. 306, and to set at rest the conflicting rulings, all of which have been considered and discussed in the above Calcutta case. The above amendment has overridden 6 M. 380 and 13 B. 656 and the other cases in which a contrary view was expressed.

**Scope of the rule.**—The matter for determination in lunacy proceedings under Act IV of 1912 is whether the person in respect of whom the question arises is a person "of unsound mind and incapable of managing his property." The question under Or. XXXII, r. 15, is whether a person, not being a person already adjudged to be of unsound mind is "by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests in the suit." The

language of the two provisions is not the same. A finding in the negative in lunacy proceedings does not preclude an affirmative finding under this rule.—*Chaturbhuj v. Harnand Lal*, 50 A. 335: 108 I. C. 141: 25 A. L. J. 1082: A. I. R. 1928 All. 103. Where the pleader informed the Court that lunacy proceedings were pending in the Court of the District Judge and applied for stay of the suit pending the decision in the lunacy proceedings but was refused, it was held that though no revision lay, the case was a fit one for the exercise of the inherent powers of the Court and stay should be granted.—*Harnand Lal v. Chaturbhuj*, 48 A. 356: 93 I. C. 285: A. I. R. 1926 Bom. 212.

"Mental infirmity."—By the addition of the words "or mental infirmity," the scope of the present rule has been enlarged. The old section was applicable to persons of "unsound mind" only; but the present rule applies to persons of unsound mind as well as to persons who are suffering from any mental infirmity in consequence of which he is incapable of protecting his own interests. In this connection 4 C. L. J. 115 should be consulted in which the words "lunacy, weakness of intellect, and unsoundness of mind" have been clearly explained and distinguished.

"The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf-mute."—*See the Report of the Special Committee*. Order XXXII, r. 15 is intended to cover the case of persons who are absolutely deaf and dumb and on that account are incapable of receiving any communications or communicating their wish or thoughts to others; the case of persons who are partially deaf and dumb and are able to communicate with others with some difficulty stands on a different footing.—*Nanak Chand v. Banarsidas*, 126 I. C. 579: 12 L. L. J. 254: A. I. R. 1930 Lab. 425.

Meaning of the term "unsound mind."—The term "unsound mind" comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease.—*In re Cawasji Beramji*, 7 B. 15.

Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness arising from accidental and temporary causes, considered.—*In re Nagappa Chetti*, 18 M. 472 (6 C. 539 and 543 referred to).

Mere weakness of intellect is not unsoundness of mind. The distinction between lunacy, weakness of intellect, and unsoundness of mind explained.—*Mazharuddin Khan v. Serajuddin Khan*, 4 C. L. J. 115 (24 W. R. 124 approved).

"Persons adjudged to be of unsound mind."—Under the Lunacy Act IV of 1912 a person may be adjudged to be of unsound mind. The old Act was Act XXXV of 1858.

Appointment of next friend or guardian ad litem of persons of unsound mind.—A person alleged to be a lunatic, though not adjudged to be so under Act XXXV of 1858, may sue through a next friend, or defend through a guardian ad litem.—*Nabhu Khan v. Sita*, 20 A. 3. In

*Uma Sundari v. Ramji Haldar*, 7 C. 242: 9 C. L. R. 13, and in *Brindaban Chunder v. Kali Dass*, W. R. (1864) 268, it has been held that a person alleged to be a lunatic though not found so under Act XXXV of 1858, may appear either by vakel or in person. See also *Pransukhram v. Bai Ladhori*, 23 B. 653. Although S. 443 (Or. XXXII, r. 3), read with S. 463, C. P. Code, 1882 (this rule), does not oblige a Court to appoint a guardian ad litem for a defendant of unsound mind, except when he has been adjudged to be of unsound mind under Act XXXV of 1858, still upon general principles, and in conformity with the practice of the Court of Chancery, the Court should assign a guardian ad litem for the defendant if it finds, on enquiry, that he is of unsound mind so as to be unfit to defend the suit.—*Venkataramana v. Timappa*, 16 B. 132. This case has been followed in *Kadala Reddi v. Narisi*, 24 M. 504. See also *Lakshya Dasya v. Uma Kanta*, 14 C. W. N. 256; *Kamini Kumar v. Shib Sundari*, 62 I. C. 770; *Rasik Lal v. Bidhumukhi*, 33 C. 1094: 10 C. W. N. 719: 4 C. L. J. 306, where all the cases on this point have been referred to. But in *Subbaya v. Buthaya*, 6 M. 380 and in *Tukaram Anant v. Fital Joshi*, 13 B. 656, a contrary view was taken by holding that provisions of S. 463 of the C. P. Code (this rule) applied only to those who were previously adjudicated lunatics under Act XXXV of 1858. These latter cases have been superseded by the amendment.

A guardian of the person only of a lunatic is not competent to sue in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit. The word "guardian" in S. 440, C. P. Code, 1882 (Or. XXXII, rr. 1, 4), when applied to a lunatic, means the manager of his estate. Under this rule a person other than the guardian of the estate can also sue with the leave of the Court.—*Bai Divali v. Hira Lal*, 23 B. 403.

The mere absence of a formal adjudication of lunacy under Act XXXV of 1858, cannot invalidate the charge assumed by the Court of Wards, and a lunatic is properly represented in a suit brought by the Collector as guardian of the lunatic.—*Sanku v. Puttamma*, 14 M. 289 (13 M. 197 referred to).

**Power of guardian of persons of unsound mind.**—The Lunacy Act (XXXV of 1858) does not affect the general provisions of Hindu law, as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act.—*Kanti Chunder v. Bisheswar*, 25 C. 585 (F. B.): 2 C. W. N. 241 (4 C. 929 followed in principle: 10 B. L. R. 364, 19 W. R. 163 disapproved).

When a person is appointed manager of a lunatic's estate under Act XXXV of 1858, he can only make a valid alienation in accordance with the provisions of that Act, although he may be a *de facto* manager of the family property.—*Anpurna Bai v. Dargapa*, 20 B. 150.

A guardian of a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him.—*In the matter of Basharat Ali*, 24 C. 133.

A District Judge has power to make an order requiring the guardian to obtain his permission before marrying the lunatic.—*Chellathammal v. Ammayappa*, 32 M. 253 (24 C. 133, 32 B. 50, 12 B. 480, referred to).



## 16. Not.

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or other persons c

This Order shall apply to a Sovereign  
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mors or by or against lunatics  
[S. 464.]

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History —This rule  
verbal changes.

"Shall not affect the  
this rule is merely to prevent  
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friend of a minor whose estate  
Court The Collector is *ex officio*  
*subba*, 13 M 197

In a suit by an undjudged lun.  
as guardian Held, that the Court of  
of the plaintiff's case under Reg V  
Wards should ordinarily obtain a declar.  
cases where the lunacy of a ward is open  
was not fatal to the suit, and that this rule  
case.—*Sanku v. Puttamma*, 14 M. 239.

The sanction of the Civil Court under C  
to the validity of a compromise entered in  
the direction of the Court of Wards on behalf n.  
as otherwise such a condition would seriously a  
provisions contained in Ss. 18 and 51 of the B  
1879 —*Nakmo Dewani v. Pamba Ditcher*, 41 C. 829:

A decree made against a Deputy Commissioner a  
of Wards for a debt due from a proprietor whose esta.  
charge of that officer under Act XXXV of 1853, the debt.  
to be of unsound mind and incapable of managing his affa  
the Privy Council overruling the objection that the sui. should have been  
brought against the manager appointed under the said Act.—*Asharfi Lal v.*  
*Deputy Commissioner of Bara Banki*, 22 C. 729 (P. C.).

The provisions contained in r. 7 of this Order must be read with the  
provisions of S. 147, which controls it.

C. P. Code, 1882, with some

local law."—The effect of  
than some agent acting  
being admitted as a next  
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t.—*Beresford v. Rama-*

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# ORDER XXXIII.

## SUITS BY PAUPERS

1. Subject to the following provisions, any suit may be instituted by a pauper.

Suits may be in-  
stituted in forma  
pauperis

*Explanation.*—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

[S. 401.]

## COMMENTARY.

*Alterations.*—The rule corresponds to S. 401, C. P. Code, 1882, with slight modifications. The word "provisions" has been substituted for the word "rules" after the word "following", and the word "institute" has been substituted for the word "brought" which occurred in the old section.

*Object and scope of the order.*—A person instituting a suit in a Civil Court is bound, according to the ordinary rules, to pay the Court-fee prescribed by law for the plaint and subsequent proceedings in the suit. The object of this order is to enable a person, who is too poor to pay the Court-fee, to institute and prosecute his suit without payment of Court-fees.—*Jotindro v. Dwarka*, 20 C. 111. The exemption does not extend to fees for service of process and such fees must under r. 8 be paid by him.

Where the plaintiff was allowed to sue as a pauper but an order was made making payment of costs of adjournment a condition precedent for allowing time to amend the plaint, *held* that the order was not illegal.—*Lim Pin Sin v. Eng Wan Hock*, 6 R. 561: A. I. R. 1928 Rang. 306: 114 I. C. 677. In spite of the mandatory provisions of Or. XXXIII, r. 6 the provisions of Or. VI relating to amendment of pleadings apply to petitions under Or. XXXIII.—*Amarnath v. Rattan Chand*, 138 I. C. 652: A. I. R. 1932 Lah. 548. But it has been held that an order for payment of costs in cash for allowing an amendment as a condition precedent is bad.—*Ambaji Balwantrao v. Hanmantrao*, 47 B. 104. Where a plaintiff is allowed to sue as pauper but an order is made on him to furnish security, on the application of the defendant, for costs, such order cannot be justified except for exceptional circumstances; and in the absence of exceptional circumstances the order is a material irregularity as it is almost impossible for a pauper to furnish security.—*Harkaur v. Chamba*, A. I. R. 1928 Lah. 960.

*Person.*—A firm can be considered to be a person under this rule.—*D. K. Cassim & Sons v. Abdul Rahman*, 127 I. C. 175: A. I. R. 1930 Rang. 272. The word means a natural person and not a juridical person such as a

Receiver.—*S. M. Mitra v. Corporation*, 126 I. C. 650: A. I. R. 1930 Rang. 259.

"Pauper."—Pending the investigation into pauperism under rr. 6 and 7, the defendant appearing deposited in Court some of the articles claimed by the petitioners to which he admitted they were entitled. The value of the articles deposited was Rs. 100. The petitioners admitting that the articles were their property declined to take possession of them. *Held*, that the petitioners were not "paupers" as defined in this rule, being possessed of property worth Rs. 100, other than the subject-matter of the suit.—*Dwarka Nath v. Madhavray*, 10 B. 207; *Mahalakshmi Ammal, In re*, 50 M. L. J. 114: 94 I. C. 337: A. I. R. 1926 Mad. 567. But see *Fatmabai v. Dossabhoy*, 34 B. 638, in which it was held (*per* Macleod, J.) that in such a case the petitioner could not be said to be entitled to property worth Rs. 100 inasmuch as every application to sue as a pauper may be defeated by the respondent paying into Court Rs. 100 out of the amount claimed.

A Hindu widow applied for leave to sue *in forma pauperis* for the recovery of maintenance and her *stridhanam* jewels and cash withheld by the defendant. The defendant admitted liability for the jewels and cash and produced them in Court. It was found that the jewels and cash were more than sufficient to pay the Court-fee and the Court depaupered her. *Held*, on revision, that the order of the Court was improper and it could not be said that owing to the defendant's offer the plaintiff was possessed of sufficient means to pay the prescribed Court-fee.—*Bai Balagauri v. Motilal*, 47 B. 523: 25 Bom. L. R. 199: A. I. R. 1923 Bom. 247.

In an application to file a suit *in forma pauperis* on a claim which required the Court-fee of Rs. 1,775 on the plaint, it was found that the applicant had property worth Rs. 1,600. *Held*, that the possession of Rs. 1,600 would not enable the applicant to pay Rs. 1,775 which was the fee prescribed by the law for the plaint.—*Ganga Bai v. Shridhar Annaji*, 8 Bom. L. R. 642.

The mere fact that the applicant's husband has property is not a sufficient reason for refusing leave to sue as a pauper.—*Sharfunnessa v. I* 3 P. L. J. 178.

A person who applies for permission to sue as a pauper is not bound to try and raise funds by mortgaging his claims. Notwithstanding that he might do so, he may be a pauper under this rule.—*Vedanta v. Perindeamma*, 3 M. 249.

"On an application to sue *in forma pauperis*, the Court is required to deal with the question of the applicant's pauperism, with reference to the definition as given in this rule, and in deciding it, to ascertain the exact property, its market-value and the title thereto, and then to deal with the case under Or. XXXIII, r. 5, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.—*Mahammad Hussain v. Ajudhya Prasad*, 10 A. 467.

On proof of pauperism, a company represented by its liquidator can be granted leave to sue *in forma pauperis* for the recovery of a debt due to the company. The word "person" in the *Explanation* to Or. XXXIII, r. 1,

r. 1.

includes a company or association or body of individuals whether incorporated or not.—*Perumal Goundan v. Thirumalarayapuram*, 41 M. 624 : 34 M. L. J. 421 : 45 I. C. 164.

"Is not possessed of sufficient means."—A debt which is due to the applicant from a third person cannot be said to be "means of which the applicant is possessed." The words "is not possessed of" must mean that the applicant has no actual control over it.—*Mabia Khatun v. Sheikh Sathari*, 45 C. L. J. 68 : A. I. R. 1927 Cal. 309 : 100 I. C. 264. It cannot be assumed that the framers of Or. XXXIII, r. 1 thought that every one who is entitled to property is possessed of means to the value of that property.—*Dwarkabai v. Sakham*, 119 I. C. 697 : A. I. R. 1929 Nag. 319.

An applicant to be disqualified to sue as pauper must be possessed of means sufficient to pay court-fees and not merely entitled to property of that value.—*Kishan v. Manjai*, A. I. R. 1928 Nag. 24. The word 'means' in Or. XXXIII, r. 1 is intended to cover and include all forms of realisable assets which can be converted into cash and as such can be used for financing the litigation; where the applicant had an interest in a decree which *prima facie* was more than sufficient for the court-fees, held that the application should be rejected.—*Lal Chand v. Musst. Pisto*, 110 I. C. 122 : 10 L. L. J. 159. 29 Punj. L. R. 229. A. I. R. 1928. Lah. 271. Following this last mentioned case and dissenting from 45 C. L. J. 68 it has been held that a mortgage in petitioner's favor is 'means' within the meaning of this rule.—*Nand Kishore v. Prabhu Doyal*, A. I. R. 1929 Lah. 821. In considering the question of pauperism the Court must look at the matter as it stood at the date of the suit. If his circumstances at the date of the application bring him within the terms of the Explanation, the immunity in respect of payment of Court-fees will be enjoyed by him till the termination of the suit or until such time when sufficient materials would be forthcoming to justify an order cancelling the permission; the word 'possession' indicates that any amount which forms the subject-matter of the suit and is not in the actual possession of the petitioner cannot be taken into account in determining his 'means'; jojunction may be issued restraining him from receiving an amount until orders regarding court-fees are passed.—*Pravash Chandra v. Municipal Commissioner, Haurah*, 125 I. C. 102 : 57 C. 980 : 34 C. W. N. 188 : A. I. R. 1930 Cal. 147.

"Other than his necessary wearing apparel."—Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel and cannot be taken into consideration in determining whether she has sufficient means to pay the court-fees.—*Mabin Khatun v. Sheikh Sathari*, 45 C. L. J. 68 : A. I. R. 1927 Cal. 309 : 100 I. C. 264.

Subject-matter of the suit.—The words "other than his necessary wearing apparel and the subject-matter of the suit" in the Explanation do not qualify that part of the Explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.—*Krishnabai Janardan v. Manohar Sundarrao*, 30 B. 593 : 8 Bom. L. R. 671. See also *Dwarkabai v. Sakham*, 119 I. C. 697 : A. I. R. 1929 Nag. 319.

Where a mortgagor sues the mortgagee for redemption of the mortgage, his equity of redemption is no part of the subject-matter of the suit and its

value therefore should be taken into consideration in determining whether he is a pauper.—*Kapil Deo v. Ram Rikha*, 33 A. 237; *Achal Singh v. Seth Jibandas*, 19 N. L. R. 165.

**Suit instituted in the ordinary form may be continued in forma pauperis.**—A Court has power under this Chapter (rule) to allow a suit, instituted in the ordinary form, to be continued in *forma pauperis*.—*Thompson v. Calcutta Tramway Co. Ltd.*, 20 C. 319. The power to allow a suit ordinarily instituted to be continued as a pauper is included in the power given to the Court to allow a suit to be instituted in *forma pauperis*.—*Surendra v. Showdamini*, 36 C. W. N. 1035: 56 C. L. J. 148. See also *Nirmul Chandra v. Doyal Nath*, 2 C. 130; *Revji Patil v. Sakharam*, 8 B. 615; *Subbarao v. Venkataratnam*, A. I. R. 1929 Mad. 828: 30 L. W. 637: 57 M. L. J. 677. But a contrary view has been taken in *Selima Sheehan v. Hafez Mohammed*, 36 C. W. N. 567 (doubting 20 C. 319).

**Pauper defendant.**—Although this Chapter (rule) of the C. P. Code only provides for suits to be brought by a pauper, the Court has power to allow a defendant to defend in *forma pauperis*.—*Doorga Churn v. Nittokally*, 5 C. 819: 6 C. L. R. 120. But see *Coates v. Secretary of State*, 54 P. R. 190: 121 P. L. R. 1905, where it has been held that the defendant cannot be allowed to defend a suit in *forma pauperis*, in as much as there is no provision in the Code authorizing such a course.

**Suit by next friend, administrator, executor, trustee, or legal representative.**—The next friend of a minor who is not himself a pauper may sue in *forma pauperis* on behalf of a pauper minor.—*Venkatanarasayya v. Achemma*, 3 M. 3; *Nanibala v. Jamini Sundari*, 37 C. L. J. 394; *Nemi Chand Bhick Chand v. Keval Chand*, 26 Bom. L. R. 380. A suit can be brought in *forma pauperis* by a next friend who is also a pauper.—*Galaupmones v. Prosonnomoye*, 11 B. L. R. 373.

There is no necessity for an enquiry whether an alleged legal representative of an admitted pauper plaintiff is a pauper or not. The Court, if satisfied that he is the legal representative, ought to admit him to carry on the suit.—*Bhagbut Doss v. Buloram Doss*, 3 W. R. Mis. 20. The question whether the legal representative of a deceased plaintiff who had filed his suit in *forma pauperis* can continue the suit in *forma pauperis* depends not on the property possessed by the legal representative personally in his own right.—*Ammakannu Ammal v. Damodara*, 109 I. C. 258: A. I. R. 1928 Mad. 66 (relying on 7 M. 390, 41 M. 624 and A. I. R. 1925 Mad. 765; and disseatting from 18 B. 237); nor is the capacity of his next friend or relations to be considered.—*Sharan Singh v. Musst. Man Kaur*, A. I. R. 1929 Lab. 746. But see *Manaji v. Khandoo*, 36 B. 279, in which it has been held that in such a case the legal representative may be permitted to continue the suit in *forma pauperis* if he himself is a pauper. See also *Lalit Mohan v. Satis Chandra*, 33 C. 1163: 4 C. L. J. 234 (followed in *Farzand Ali Khan v. Mir Amir Haider*, 26 I. C. 714: 1 O. L. J. 709), where it has been held that the right to apply for leave to sue in *forma pauperis* being a personal right, if the applicant dies before the leave is granted, his legal representative is not entitled to continue the application. See also *Rao Sahib Manaji Rajuji v. Khandoo*, 13 Bom. L. R. 577; *Kavuri v. Yabursu*, 54 M. L. J. 582: 51 M. 697: 110 I. C. 318: A. I. R. 1928 Mad. 278.

## r. 1.

Where a guardian obtains permission to sue *in forma pauperis* on behalf of a minor, the diemissal of the suit is nnground for throwing the costs of the suit on the guardian.—*Brijessuree v. Kishore Doss*, 25 W. R. 316.

A *shebait* who is not possessed of sufficient means to pay court-fees hnth personally and as a *shebait* may apply for leave to sue *in forma pauperis* for recovery of certain endowed properties from his *co-shebaitis*.—*Nanda v. Dwarka*, 16 C. W. N. 93. A trustee nr *shebait* not possessed of efficient property of the trust may be allowed to sue as a pauper although he has sufficient personal property of his own.—*Mabia v. Sheikh Sathari*, 45 C. L. J. 69; 100 I. C. 264; A. I. R. 1927 Cal. 309.

The administratr of the estate of a deceased person may apply to sue *in forma pauperis* under the provisions of this Chapter (rule).—*In re Bill*, 7 M. 390.

Where an executor is not in possession of the property of his testator, and cannot get possession of it, and he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate *in forma pauperis*—*In the matter of the Will of Dawubai*, 18 B. 237.

The provisions of this Chapter (rule) do not preclude a person, who has obtained leave to sue under S. 18 of the Religious Endowment Act (XX of 1863), for the removal of the trustees of a temple, from being permitted to sue *in forma pauperis*.—*Gurusami v. Krishnasami*, 24 M. 419.

The plaintiff in a suit brought *in forma pauperis* died, but in ignorance of her death the Court passed a decree in her favour. The defendant appealed, making respondent a lady who he alleged was the legal representative of the deceased plaintiff and an order was passed by consent of the parties sending back the suit for re-trial on the merits. On re-trial the suit was again decreed. *Held*, that the defendant was estopped from disputing the right of the representative of the original plaintiff to sue as a pauper.—*Akbar Husain v. Alia Bibi*, 25 A. 137.

Plaintiff suing in representative capacity—His personal property should not be taken into account.—When a plaintiff sues in a representative character, such as a *mutwalli*, trustee nr a *shebait*, unless it is shown that the plaintiff has in his possession property helnging to the *wakf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity.—*Mabia Khatun v. Sheikh Sathari*, 45 C. L. J. 68; A. I. R. 1927 Cal. 309; 100 I. C. 264. See also *Nanak Chand v. Harnam*, 125 I. C. 611; A. I. R. 1930 Lah. 735.

Formerly excepted suits—Section 402, C. P. Code, 1882, which ran as follows: "No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language, or assault," has been nmitted.

"The Committee have not preserved S. 402. In the light of the case-law it is misleading so far it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from

a pauper a right to sue as such in respect of defamation or assault."—See the Report of the Special Committee.

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to contents of application. to complaints in suits: a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. [S. 403.]

### COMMENTARY.

**History.**—This rule corresponds to S. 403, C. P. Code, 1882, with some verbal changes only. Some of the words of the old section have been changed and replaced by more appropriate words. The procedure laid down in r. 2 is to be followed when a suit is proposed to be instituted *in forma pauperis*.

**Contents of application.**—Where a pauper applicant omits to mention his immoveable property and also fails to submit a list of such property when required, the application is not in proper form.—*Sheo Narayan Lal v. Mt. Munagga*, 9 O. L. J. 610: 74 I. C. 344: A. I. R. 1923 Oudh 118. But mere omission to mention some item of property does not amount to non-compliance with this rule.—*Birj Ballab Lallji v. Beney Krishna*, A. I. R. 1923 Pat. 28. There must, however, be utmost good faith in the disclosure of assets, and if it is revealed that the applicant has not stated with the utmost good faith the whole of his assets, the application must be rejected at the very earliest stage.—*Durga Prasad v. Srinivas Sureka*, 123 I. C. 398: 11 P. L. T. 567: A. I. R. 1930 Pat. 368.

The object of the rule that a pauper should set out the list of his properties is to help the Government in ascertaining whether the applicant is in a position to pay the court-fee payable on the plaint. Omission of a few articles of trifling value, unless due to bad faith, is of little importance.—*Musst. Chamela Kuar v. Pursottam Das*, 13 P. L. T. 538.

**Verification.**—Where the petitioner did not verify the contents of the petition at the foot of the petition, but he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were said to be true and no part of them was false and nothing had been concealed, held, this affidavit being annexed to the petition must be treated as a part of it; *Pirji Ashraf Ali v. Rameshwar Nath*, A. I. R. 1933 Lah. 684.

There is no provision which requires the schedule to the application to sue *in forma pauperis* to be verified; in any case if the signature and verification of the applicant is necessary, the proper procedure is to return the plaint in order to remedy the defect.—*Amar Nath v. Rattan Chand*, 133 I. C. 652: A. I. R. 1932 Lah. 548.

**Death of applicant.**—The right to obtain permission to sue as a pauper is only a personal right, and on the death of the applicant his legal representative cannot come in as such and be substituted in his place but if he is a pauper himself he can file a fresh application for leave to sue *in forma pauperis*.—*Lalit Mohan v. Satish Chandra*, 33 C. 1163 : 4 C. L. J. 234 ; *Subbiah v. Bala*, 51 M. 697 : 110 I. C. 318 : A. I. R. 1928 Mad. 278.

**3.** Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person. [S. 404.]

### COMMENTARY.

**History.**—This rule corresponds to S. 404, C. P. Code, with some alterations of a verbal character.

The words "*in these rules*" have been substituted for the words "*in S. 36,*" the words "*under Ss. 640 or 641,*" which stood after the words "*from appearing in Court,*" and the word "*duly*" which stood before the words "*authorized agent*" in the old section have been omitted.

"**Shall be presented in person.**"—The provisions of this rule requiring the petition for permission to sue *in forma pauperis* to be presented by the petitioner in person is imperative and must be held to control the provisions of Or. III, r. 1.—*Ex parte Divgir*, 4 B. H. C. R. 91.

Presentation need not be to the Court itself. Presentation to the proper officer of the Court is sufficient.—*Chidambaram v. Kadar Mohideen*, 48 M. 785 : A. I. R. 1924 Mad. 901.

This rule which requires an application for permission to sue *in forma pauperis* to be presented (except in certain circumstances) by the applicant in person, does not apply to an application under S. 592, C. P. Code, 1882 (Or. XLIV, r. 1), to be allowed to appeal as a pauper.—*Maitli v. Somappa Banta*, 26 M. 369. But see *In re Narise*, 8 M. 504 (21 W. R. 303 referred to). Where a plaint is validly presented in person and is subsequently returned for presentation to a proper Court and a memorandum is filed by both the parties that the suit should be proceeded with, the objection that the plaint should have been presented in person to the latter Court cannot be upheld but the question of pauperism may be gone into afresh.—*Papathi Ammal v. Karuppiiah*, (1930) M. W. N. 582.

**Authorized agent**—"Authorized Agent" in r. 3 clearly does not include a recognised agent or pleader. In order to bring him within the rule he must be specially authorized for the purpose.—*Sakina Bibi v. Charnjit Singh*, 80 P. L. R. 1915 : 23 I. C. 448 (21 W. B. 303 referred to). There is nothing to show that the authority of the agent must be in writing.—*Musst. Bibi Sogra v. Radha Kishun*, 7 P. 825.



The Court rejected a petition of appeal presented on behalf of a pauper by a pleader who was retained under an ordinary *Vakalatnama*, but was not specially authorized to sign as attorney for the applicant.—*Bhugobutty v. Gunesh*, 21 W. R. 308.

The mere fact that several persons jointly present an application for permission to sue as pauper, does not authorize the Court to entertain it on behalf of the applicants who do not appear in person.—*Burgess v. Sidden*, 10 M. 193.

**Pardanashin woman.**—Where an appeal *in forma pauperis* by a *pardanashin* woman, who had sued as a pauper in the first Court, was presented by a person, other than an advocate, *yakil* or attorney, or the suitor in person, but by her duly authorized agent, *held*, that was a good presentation.—*Wazirunnissa v. Nahi Bakhsh*, 24 A. 172.

**Limitation.**—If the application for leave to sue *in forma pauperis* has been presented at the office within the period of limitation, the fact that the application was signed or verified a little later does not matter.—*Vora v. Japan Cotton Trading Co. Ltd.*, 32 Bom L. R. 1343; 128 I. C. 625; A. I. R. 1931 Bom. 47.

See Or. XLIV as to Appeal in *forma pauperis*.

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

[S. 406.]

## COMMENTARY.

**History.**—This rule corresponds to S. 406, C. P. Code, 1892, with some verbal alterations. Some of the words of the old section have been changed and replaced by more appropriate words.

**Scope of the enquiry.**—In an enquiry under Or. XXXIII, C. P. Code, the Court cannot take evidence (except the evidence of the applicant himself) on the merits of the claim. Rule 4 expressly gives power to the Court to examine the applicant regarding the merits of the claim and the property of the applicant, so that there is no doubt that the applicant himself can be examined not only with reference to the question of pauperism but also with reference to the merits of the claim.—*Jogendra Narayan v. Durga Charan*, 46 C. 651; 52 I. C. 610.

The Court when making an enquiry under Or. XXXIII, rr. 4 and 7, cannot take any evidence except that of the applicant himself on the merits.

of the claim. The Court has to determine whether the allegation in the petition and the examination of the petitioner himself disclose a cause of action.—*Sita Nath v. Radha Raman*, 50 I. C. 676.

**Examination of applicant.**—The C. P. Code does not authorize the rejection of an application for leave to sue *in forma pauperis* for want of merits when the applicant is found to be a pauper, and his allegations disclose a right to sue *in forma pauperis* to the merits of the claim.—*Re* . . . . . M. 323; *Naraini Kuar v. Makhan Lal*, 17 A. 526, and *Abbasi Begam v. Nanhi Begam*, 18 A. 206. See also *Debo Das v. Mehunt Ram*, 2 C. W. N. 474 and *Gopal v. Bigoo*, 8 C. W. N. 70, noted under r. 5 (b) and (d).

When a plaintiff applies for permission to sue *in forma pauperis* and is examined under Or. XXXIII, r. 4, the opposite party is entitled to cross-examine the applicant on the merits of his claim to test the statements he makes in his examination; *Radha Raman v. Sitanath*, 60 I. C. 738.

Rejection of application. **5.** The Court shall reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

[Ss. 405 & 407.]

## COMMENTARY.

**Alterations.**—This rule has embodied the provisions of Ss. 405 and 407 of the C. P. Code, 1882, with some additions and alterations.

Clause (a) corresponds to S. 405 of the old Code with some verbal changes only.

Clause (b) is similar to Cl. (a) of the old S. 407.

Clause (c) is similar to Cl. (b) of the old S. 407 with change of some words and phrases.

Clause (d) has been substituted for Cl. (c) of the old S. 407, which ran as follows: "*That his allegations do not show a right to sue in such Court.*" These words gave rise to several conflicting rulings: and in order to set at rest the several conflicting rulings, the words "*cause of action*" have been substituted for the words "*right to sue in such Court*" which occurred in the old section. The conflicting rulings have been noted under Cl. (d). For the meaning of the words "*cause of action*," see notes under S. 20 and Or. XI, r. 2.

**Scope of rule.**—By the above amendment the scope of the present rule has been enlarged, as the words "*cause of action*" are wide enough to include the cases mentioned in 7 A. 661 (F. B.), 20 A. 299, 19 M. 197, 13 B. 126 and 27 M. 37. The object of the amendment will be clearly understood on reference to the above cases.

Clause (e) corresponds to Cl. (d) of the old S. 407.

It is true that under Or. XXXIII, r. 5 the Court is bound to reject an application which is not framed and presented in the manner prescribed by rr. 2 and 3, but from this it does not follow that rr. 2 and 3 should be meticulously interpreted against the petitioner and used as a trap.—*Praphull v. Sham Lal*, A. I. R. 1932 Lah. 328.

That the applicant is not able to name all the persons in possession of the property left by the deceased in an administration suit, is no ground for dismissing the application.—*Praphull v. Sham Lal*, A. I. R. 1932 Lah. 328.

**Clause (a)—Where application not properly framed.**—If an application is improperly framed through misjoinder of causes of action and reliefs, the Court has got the power to amend the application under S. 141 of the C. P. Code.—*Kanagammal v. Panchapakasa*, 26 M. L. J. 343; (1914) M. W. N. 327; 23 I. C. 82. But see *Kalikumar v. N. N. Burjorjer*, 20 I. C. 640; 7 L. B. R. 60; 6 Bur. L. T. 141, where it was held that an application ought to be rejected as being improperly framed, where it was not accompanied by a schedule of the applicant's moveable and immoveable properties.

Where an applicant has not calculated the court-fees in accordance with S. 7 (v) (b) of the Court-fees Act, his application to sue as a pauper must be rejected.—*Maung Pe Kye v. Ma Shwe Zin*, 7 R. 359; 118 I. C. 415; A. I. R. 1929 Rang. 128 (case in which it was observed that the rejection of the application would not bar a fresh application being presented).

The fact that a joint pauper application by two persons was dismissed is no ground for dismissing a subsequent pauper application by one of them.—*Praphull v. Sham Lal*, A. I. R. 1932 Lah. 328 (referring to A. I. R. 1929 Rang. 128).

**Clause (b)—Where applicant not a pauper.**—On an application to sue *in forma pauperis*, the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to Or. XXXIII, r. 1 and, in deciding it, to ascertain the exact property, its market-value, and the title thereto, and then to deal with the case under r. 5, irrespective of any surmises as to the reason why

r. 5.

the applicant has valued his claim at a high figure.—*Muhammad Husain v. Ajudhia Prasad*, 10 A. 467.

The Code of Civil Procedure does not authorize the rejection of an application for leave to sue *in forma pauperis* for want of merits when the applicant is found to be a pauper, and his allegations disclose a right to sue. When an application for leave to sue *in forma pauperis* is made, the Court should not go into the evidence as to the merits of the claim.—*Ranganayaka Ammal v Venkatachellapati*, 4 M. 323. See also *Debo Das v. Mohunt Ram*, 2 C. W. N. 474 (followed in *Gopal v. Bigoo*, 8 C. W. N. 70).

Where an application is made for leave to sue *in forma pauperis*, the Court is bound to proceed on the valuation put upon the suit by the plaintiff and to investigate whether he has sufficient means to enable him to pay the court-fee on the plaint as presented by him. It is not open to the Court to investigate his claim in order to enable him to sue as a pauper; *Tulshi Mahatani v. Gajadhar*, 61 I. C. 891.

At an enquiry under this rule, if it be found that the petitioner is possessed of property which is within his reach and can be made use of by him to carry on his litigation, such property cannot be excluded from consideration.—*Dwarka Nath v. Madhavray*, 10 B. 207.

The father as next friend of a minor applied for leave to sue *in forma pauperis* for damages for serious bodily injuries received by her. The Court rejected the application under Or. XXXIII, r. 5, on the ground that the next friend, the father of the plaintiff, was not a pauper. Held, that the order should be set aside and the matter inquired into under Or. XXXIII, r. 6 of the C. P. Code.—*Musst Amirmon v. Secretary of State*, 23 C. W. N. 955.

The capacity of the relations cannot be considered.—*Sharan Singh v. Musst. Man Kaur*, A. I. R. 1929 Lah. 746. Where the applicant was a Burmese Buddhist wife having no property except a house belonging jointly to her and her husband it was held that she had no definite share in the house nor any separate property and so should be permitted to sue as a pauper.—*Ma Bok v. Maung Sein*, 128 I. C. 848; A. I. R. 1930 Rang. 324. Husband's means may be considered for inferring therefrom the wife's financial condition but the inference must not be a conjecture.—*Ma Ma Gale v. Ma Mi*, A. I. R. 1931 Rang. 318.

Clause (d)—Where allegations do not show cause of action.—It is open to the Court to consider not only the statement made in the plaint but also the statements made in his examination by the applicant before the Court, in determining whether his allegations disclose a cause of action as laid down in Or. XXXIII, r. 5, Cl. (d). But the Court cannot examine the witnesses for deciding the question of limitation or any other question other than the pauperism of the applicant.—*Jogendra Narayan v. Durga Charan*, 46 C. 651; 52 I. C. 610. See also *Sita Nath v. Radha Raman*, 50 I. C. 676; *Nawab Bahadur of Moorsheedabad v. Harish Chandra*, 13 C. L. J. 593. There is a clear distinction between a plaint not disclosing a cause of action and a suit being barred by limitation.—*Allah Wasai v. Ramzan*, 117 I. C. 95; A. I. R. 1929 Lah. 498. The merits of a cause of action cannot be gone into.—*Ma E. Htai v. U Hmai*, 131 I. C. 64; A. I. R. 1931 Rang. 79.

The non-existence of a cause of action should appear clearly on the face of the application itself, which alone would justify the Court in rejecting the application: *Govindasami v. The Municipal Council*, 41 M. 620; *U Ba Dwe v. Maung Lu Pan*, A. I. R. 1932 Rang. 107 (F. B.). The Court would be acting without jurisdiction if it should travel beyond the four corners of the application and take into consideration matters not stated therein or consider any document or other evidence in order to determine whether there is a cause of action or not; *Ramachandra v. Venkiah*, 101 I. C. 18; 52 M. L. J. 380; A. I. R. 1927 Mad. 441. Where the allegations made in the application for leave to sue as a pauper show a cause of action, the Court cannot dismiss the application by going beyond the allegations and taking into consideration the evidence of the defendant in the suit.—*U Maung Gyi v. Naungbo Co-operative Credit Society*, A. I. R. 1929 Rang. 209. It is open to the Court to consider not only the statements made in the plaint but also the statements made by the petitioner in his examination before determining whether a cause of action is disclosed.—*Ma Shopjambi v. Mubarak Ali*, 7 R. 361; A. I. R. 1929 Rang. 273 (relying on 46 C. 651 noted ante). But the Court cannot ask the applicant to produce evidence to show that he has a good case or reject the application because the evidence adduced does not prove that he has a good case.—*Ram Lal Sah v. Allahabad Bank, Ltd.*, 118 I. C. 669; 27 A. L. J. 1059.

Clause (d) does not refer solely to a question of jurisdiction, but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer, and not barred by *res judicata*, limitation, or any other law.—*Chattarpal Singh v. Raja Ram*, 7 A. 661 (F. B.) (followed in 134 P. R. 1919; 53 I. C. 441). See also *Kamarak Nath v. Sundar Nath*, 20 A. 299 (4 M. 323 dissented from); *Vijendra Tirtha v. Sudhindra Tirtha*, 19 M. 197; *Dulari v. Vallab Das*, 13 B. 126; and *Amirtham v. Alwar Manikkam*, 27 M. 37 (20 A. 299 followed).

Where the lower Court dismissed an application to sue *in forma pauperis* on the ground that the case was founded on Government Pleader intended to dispute the pauperism and the Court did not enquire as to a pauper or not, held that the order must be set aside.—*Sumatra Devi v. Hazari Lal*, 126 I. C. 1; 28 A. L. J. 901; A. I. R. 1930 All. 758.

A Court shall reject an application for permission to sue *in forma pauperis*, if  
 "cause of action is not disclosed"  
*sami v.* . . . . .

585. But it has been held in *Kamaya v. Vadamalai*, A. I. R. 1926 Mad. 135, that it is undesirable, on an application for leave to sue *in forma pauperis*, to go into a complicated question of limitation. See also *Bhajja v. Mohammad*, 138 I. C. 396; 30 A. L. J. 489; A. I. R. 1932 All. 543.

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*Sankararama Ayyar v. Subramania Ayyar*, 27 M. 120.

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 of action.—

In an enquiry under Or. XXXIII, r. 5 (d), if there is nothing to show from the allegations in the plaint as they stand, that the petitioner has no

right to sue, then the Court is justified in rejecting the application. But where a Judge in making an enquiry finds that the applicant is a pauper and then addresses himself to the merits of the case, to the rights of parties, and to matters which are entirely foreign to the enquiry that he has to make, he exceeds his jurisdiction, and the High Court has power to interfere under S. 622, C. P. Code, 1882 (S. 115).—*Debo Das v. Mohunt Ram Charn*, 2 C. W. N. 474 (followed in *Gopal Chundra v. Bigoo Mistry*, 8 C. W. N. 70); *Natesa Ayyar v. Manogya Ayyar*, 10 L. W. 589 (2 C. W. N. 474 relied on). It is not permissible in a pauper petition to go into an elaborate enquiry on the merits of the plaintiff's case; *Charukonda v. Lakshmananna*, 97 I. C. 349; A. I. R. 1926 Mad. 1160.

Where an application is made for leave to sue *in forma pauperis*, it is open to the Court to dismiss the application on the ground that though the plaint discloses a cause of action, the plaintiffs' case would fail on the merits.—*Bolimati Muriqadu v. Nalla Bapadu*, 18 L. W. 53; 73 I. C. 946; (1923) M. W. N. 412; or that the claim is doubtful; *Mt. Rupibai v. Sadashiv*, 75 I. C. 744.

Where the applicant sued in ejectment alleging that he was the sole surviving *sanyasi*, but was not the successor nominated by the last *mohant*, nor appointed to the *guddi* by the electoral body; held that the applicant has no cause of action and his application should be dismissed.—*Parmath Gir v. Ram Sarup*, 30 A. L. J. 303.

For the purpose of determining whether the applicant has complied with the provisions of r. 5 (d) it is not competent to the Court to allow the applicant to be examined under rr. 6 and 7 upon the merits of the case, nor the Government pleader or the opposite party to adduce evidence under these rules, though the parties can present arguments in that behalf.—*U Ba Dwe v. Maung Lu Pan*, A. I. R. 1932 Rang. 107 (F. B.).

Where a petition in a suit *in forma pauperis* had been admitted and the case came on for hearing under Or. XXXIII, r. 7, it was proposed for the defendant to show by examination of the plaintiff that on the facts stated in the petition, she had no cause of action. The Court allowed the plaintiff to be examined to show that, on her own evidence, she had no cause of action, but refused to allow other witnesses to be called upon.—*Tarramoney v. Hurro Mohun*, 11 B. L. R. App. 23. But *In re Gunga Dass*, 11 B. L. R. App. 23 note: 14 W. R. 281, it was held that where on the day fixed for hearing evidence on the question of pauperism the defendant brought to the notice of the Court any ground on which it would have been bound to refuse to allow the petitioner to sue as a pauper, it would be the duty of the Court, at any rate it would be in the discretion of the Court upon being so informed to refuse leave. Cited in *Vijendra Tirtha v. Sudhindra Tirtha*, 19 M. 197.

... leave to sue her husband for  
... to express her intention of  
... leave to do so as a pauper.  
... application does not amount  
to a demand by way of action. A counter-petition by the husband objecting  
to the pauper suit being allowed, and denying his liability to pay the dower,  
does not alter the character of the proceedings, since no opposition on his  
part can constitute a cause of action, unless there has been a previous demand

by the wife.—*Khajooroonnissa v. Saifoolla*, 15 B. L. R. 306 (P. C.): 24 W. R. 163 (P. C.) (reversing 5 B. L. R. 84: 13 W. R. 371).

The subsequent insolvency of the petitioner is no ground for rejecting the application.—*Chidambaram v. Kother*, 48 M. L. J. 491: 87 I. C. 720: A. I. R. 1925 Mad. 791.

Rules 5 and 7 of Or. XXXIII do not directly apply to pauper appeals. The appellate Court cannot address itself to the question whether the plaint shows a cause of action.—*Somasundaram v. Arunachalam*, (1932) M. W. N. 537: A. I. R. 1932 Mad. 523: 63 M. L. J. 28.

Clause (e)—Transfer of interest in subject-matter—Whether benamdar plaintiffs can be allowed to sue as paupers.—The provisions of Or. XXXIII of the C. P. Code have been designed to aid *bona fide* litigants and must be strictly confined to such litigants. It cannot have been the intention of the Legislature that a litigant, fully able to comply with the terms of the fiscal law, should, by setting up a pauper as a nominee, be entitled to evade the claim of the State. The effect of permitting a benamdar to sue as a pauper would be to give a person who is not a pauper the right to evade the fiscal law and to infringe the provision of Or. XXXIII, r. 5 (e) of the C. P. Code.—*Srimuty Charu Sila v. Haran Chandra*, (1919) P. 232: 50 I. C. 520.

On an application by two persons for permission to sue *in forma pauperis*, it appeared that they had entered into an agreement with the pleader to pay his remuneration out of the proceeds of the property in dispute after its recovery. *Held*, that such an agreement was within the scope of Cl. (e), and their application to sue as paupers was to be rejected.—*Menohar Ram chandra v. Lakshman*, 3 B. 371. No leave to appeal *in forma pauperis* can be given when at the date of suit there was subsisting an agreement falling within this clause.—*Hanufa Bai v. Haji Siddick*, 30 M. 547: 17 M. L. J. 447.

Where the applicant in his examination said:—"I have not yet paid any fees to him (his pleader) but I have undertaken to pay him fees when I obtain a decree for my share." *Held* that the statement does not amount to giving any definite interest in the subject-matter to the pleader within the meaning of r. 5 (e).—*Skeena Bai v. Abdul Aziz*, A. I. R. 1932 Rang. 69.

Revision.—There is some conflict of authority on the point whether an order not. The not a pauper is revisable or whether a party is or is not a pauper. The meaning of S. 115 and so no revision lies from an order rejecting an application for leave to sue as a pauper.—*Mahadeo v. Secretary of State*, 44 A. 248: 65 I. C. 255: A. I. R. 1922 All. 1: 20 A. L. J. 55; *Shankar v. Ram Dei*, 48 A. 493: 94 I. C. 484: A. I. R. 1926 All. 446 (following *Budhu Lal v. Mewa Ram*, 43 A. 564 (F. B.): 63 I. C. 15). But the same High Court in *Secretary of State v. Jillo*, 21 A. 133 (F. B.) while holding that no appeal lay from an order rejecting an application for leave to sue *in forma pauperis*, entertained the matter of their own motion in revision saying "the order passed by the Subordinate Judge is so extraordinary that we direct this case to be treated as a case in revision".—In *Shauran Bibi v. Abdus Samad*, 45 A. 549: 73 I. C. 538: A. I. R. 1923 All. 577: *Lachmi v. Ram Bahadur*, 86 I. C. 781: A. I. R. 1925 All. 275; *Musi. Sumatra Devi*

rr. 5, 6.

v. *Hazari Lal*, A. I. R. 1930 All. 758; *Faiz Mohammad v. Azizunnissa*, (1893) A. W. N. 218; *Mt. Chhangia v. Joti Pershad*, G. I. C. 703, the same High Court exercised revisional powers where leave to sue as a pauper was refused. See also *Ghulam v. Dwarka Prasad*, 18 A. 163 and *Debi Das v. Ejaz Husain*, 28 A. 72; 2 A. L. J. 749; (1905) A. W. N. 19. In *Malik Mohammad Ayub v. Malik Mohammad Mahrood*, G. I. C. 831; 32 A. 623, the same High Court held that a distinction is to be drawn between the cases in which an application *in forma pauperis* is rejected and cases in which it is granted. When it is rejected, the "case" of the application comes to an end and an application for revision lies in such cases; but when the application is granted the "case" of a pauper is not decided within the meaning of S. 115 and in such a case the High Court cannot interfere in revision. The other High Courts have held that a revision petition lies against an order of the Court rejecting an application for leave to sue *in forma pauperis*.—*Debo Das v. Mohunt Ram Charn*, 2 C. W. N. 474 (folld. in *Gopal v. Bigoo*, 8 C. W. N. 70); *Ramachandra v. Venkiah*, 101 I. C. 18; 52 M. L. J. 380; A. I. R. 1927 Mad. 441; *Ma Ma Gale v. Ma Ma*, A. I. R. 1931 Rang. 318; *Ma Mya Thin v. Ma Chu*, 9 R. 86; 132 I. C. 705; A. I. R. 1931 Rang. 129.

Judg . . . . . but an order passed by a single  
 paup . . . . . cation for leave to sue *in forma*  
 . . . . . tent.—*Sadashiv v. Soondardas*,  
 130 I. C. 24; 32 Bom. L. R. 1647; A. I. R. 1931 Bom. 166; *Baba v. Purushothama*, 48 M. 700. 85 I. C. 201; A. I. R. 1925 Mad. 167; 47 M. L. J. 932.

Doctrine of *lis pendens*.—Doctrine of . . . . .  
 cation for permission to sue *in forma pauperis*,  
 not numbered and registered as a suit.—*Ambi*  
 30 A 95

6. Where the Court sees no reason to reject the appli-  
 cation on any of the grounds stated in rule 5, it  
 shall fix a day (of which at least ten days' clear  
 notice shall be given to the opposite party and  
 the Government pleader) for receiving such evi-  
 dence as the applicant may adduce in proof of  
 his pauperism, and for hearing any evidence which may be  
 adduced in disproof thereof. [S. 403.]

### COMMENTARY.

History.—This rule corresponds to S. 408, C. P. Code, 1882, with some verbal changes only.

"Notice shall be given to the opposite party."—Where a Munsif disposed of an application for leave to sue as a pauper, without taking such evidence as the opposite party had offered before the Court, and without notice to the opposite party and the Government: *Held*, the Court acted without jurisdiction in dealing with the pauper application, and a revision lay. *Noni Krishna v. Nabamonyuri*, A. I. R. 1937 Cal. 464; 100 I. C. 726.



**Evidence in disproof of applicant's pauperism.**—A defendant is entitled at the hearing to adduce evidence in disproof of the alleged pauperism of the plaintiff. Therefore a Court should not allow a plaintiff to sue *in forma pauperis*, without opportunity afforded to the defendant to prove that the plaintiff is not a pauper.—*Zillar Rahman v. Guzunfur Hossain*, 23 I. C. 974 (10 B. 207; 30 B. 593; 8 Bom L. R. 671 *relied on*).

The only matter in regard to which evidence may be taken is the question of the pauperism or otherwise of the applicant. Rule 6 does not empower the Court to try the question of the plaintiff's title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted (46 C. 651 *applied*; 20 A. 299 *distd.*); *Shauran Bibi v. Abdus Samad*, 45 A. 548; 21 A. L. J. 441. But it has been held that though in an application for permission to sue as a pauper the opponent has no right to examine the applicant on the merits of the claims, it is open to the Court to do so both before and after the issue of the notice referred to in r. 6 and for that purpose the Court may avail of such help as the opponent may render.—*Vasanbai v. Radhibai*, 103 I. C. 657; A. I. R. 1928 Sind 118.

**7. (1)** On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper. [S. 409.]

### COMMENTARY.

**History.**—This rule exactly corresponds to S. 409 of the C. P. Code, 1892.

**Scope of enquiry.**—In an enquiry on an application to sue *in forma pauperis* under Or. XXXIII, rr 4, 5 and 7, C. P. Code, the primary question which the Court should consider is the fact of the petitioner's pauperism and the Court should not go into the merits of the petitioner's claim and determine a complicated question of law such as limitation.—*Kalliani Amma v. Matathil Veetil*, 37 M. L. J. 309; (1919) M. W. N. 573; 53 I. C. 239. See also *Sitanath v. Radha Raman*, 50 I. C. 676; *Jogendra v. Durga Charan*, 46 C. 651; 52 I. C. 610; *Mt. Bhagwanti v. Bua Ditta*, 76 I. C. 40; *Ma Shopjambi v. Mubarak*, 7 R. 361; A. I. R. 1929 Rang. 273.

The burden of proving that the value of the petitioner's property does not exceed the amount required for court-fees lies on the petitioner.—*Nand Kishore v. Prabhu Dayal*, A. I. R. 1929 Lah. 821.

**Mode and subject of examination.**—The examination of the applicant to be conducted by the Judge in person and not by any officer of the Court.—*In re Eknath*, 1 B. H. C. R. 102. See also *In re Gunga Dass*, 11 B. L. R. App. 23 note; 14 W. R. 281.

Where a Judge in making an enquiry finds that an applicant is a pauper and then addresses himself to the merits of the case, to the rights of the parties and to matters which are entirely foreign to the enquiry that he has to make, he exceeds his jurisdiction.—*Debo Das v. Mohunt Ram Charn*, 2 C. W. N. 474; *Gopal Chandra v. Bigoo Mistry*, 8 C. W. N. 70.

**"The Court shall hear argument."**—Order XXXIII, r. 7 which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in r. 5," enables the parties to argue the question if they so desire but does not preclude the Court if no argument is offered, from considering that question of its own motion.—*Amirtham v. Alwar Manikkam*, 27 M. 37.

On hearing a petition under S. 409 of the Code of 1882 (Or. XXXIII, r. 7) for leave to sue *in forma pauperis*, the Court must decide whether the petitioner has at the date of the petition a subsisting cause of action capable of enforcement, and where the cause of action is barred by *res judicata* or limitation, the petition must fail.—*Vijendra Tirtha v. Sudhindra Tirtha*, 19 M. 197.

**Evidence.**—The evidence to be taken under r. 7 is confined to the evidence which may be adduced by the applicant in proof of pauperism and any evidence which may be adduced in disproof thereof as laid down in r. 6.—*Jogendra v. Durga Charan*, 46 C. 651: 52 I. C. 610 (20 A. 299, 13 B. 126; 13 C. L. J. 593 followed). See also *Srimaty Charu Sila v. Haran Chandra*, (1919 P. 232: 50 I. O. 520. The Court should pass orders only after hearing the evidence; where an order was passed without taking evidence on the question whether certain sums of money belonging to the minor (applicant) were at the time of the family partition handed over to his guardian as alleged by the defendant, held that the order could not stand.—*Subba Reddy v. Kadaswamy*, (1928) M. W. N. 235.

**"The applicant is or is not subject to any of the prohibitions specified in r. 5."**—On this point see notes under Cls. (b), (d) and (e) of r. 5.

Where an application for leave to sue *in forma pauperis* is rejected for want of prosecution, the order rejecting the application is an order under this rule, and operates as a bar under S. 413, C. P. Code, 1882 (Or. XXXIII, r. 15), to the entertainment of the second application in the same right.—*Ranchod Morar v. Bezany*, 20 B. 86. But in *Kedar Nath v. Tula Bibi*, 10 C. W. N. civ (104-n), it was held (dissenting from 20 B. 86) that there having been no adjudication on the former occasion on the question of pauperism, this rule was no bar.

**Limitation where application refused.**—Where an application to sue as a pauper is refused, and a suit in the ordinary way in respect of the same subject-matter is subsequently instituted by the applicant, the suit, for the purposes of limitation, will be deemed to have been instituted on the date

on which the plaint is presented, and not the date on which the rejected application was filed.—*Naraini v. Makhan Lal*, 17 A. 526; *Abhoya v. Bissesswari*, 24 C. 889; *Keshav v. Krishna Rao*, 20 B. 508.

**Limitation where application is converted into a plaint on payment of Court-fees.**—Where a person applies for converting his application for leave to sue as a pauper into a plaint on payment of the necessary court-fees, the suit will be deemed to have been instituted, for the purposes of limitation, on the day on which the application for leave to sue as a pauper was filed, and not the day on which the court-fees were paid.—*Sook Lal v. Dal Chand*, 1 R. 196; 74 I. C. 835; A. I. R. 1923 Rang. 256; *Janakdhary v. Janki*, 28 C. 427; *Naraini v. Makhan Lal*, 17 A. 526. That is also the case when the application is granted.—*Kaman v. Mallai*, 91 I. C. 302; 49 M. L. J. 538; A. I. R. 1926 Mad. 159.

**Appeal from orders under this rule.**—An order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, is appealable as a decree.—*Baldeo v. Gula Kuar*, 9 A. 129 (referred to in *Ranchod Morar v. Bezanti*, 20 B. 86). But see *The Secretary of State v. Jillo*, 21 A. 133, where it has been held that no appeal lies from an order rejecting an application for leave to appeal *in forma pauperis*.

Where after consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as pauper.—*Mumtazan v. Rasulan*, 23 A. 364.

**Order under this rule subject to review.**—An order under this rule refusing leave to sue as a pauper is subject to review under S. 623, C. P. Code, 1882 (S. 114 and Or. XLVII, r. 1).—*Adarji v. Manikji*, 4 B. 414. See also *In the matter of the petition of Rani Umasundari*, 5 B. L. R. App. 29; and *Mahomed Gazi v. Dullab Bibi*, 5 B. L. R. 318-note; 11 W. R. 22.

**8.** Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit. [S. 410.]

### COMMENTARY.

**History.**—This rule corresponds to S. 410, C. P. Code, 1882, with some alterations of a verbal character.

**Procedure.**—An application to sue *in forma pauperis*, which was filed in the Subordinate Judge's Court, was transferred to the Court of the District Judge, who granted the application. *Held*, that the District Judge had no power subsequently to transfer the pauper suit thus initiated to the file of the Sub-Judge.—*Nandan Prasad v. W. G. Kenney*, 24 A. 356.

No security for costs ought to be demanded from a person who has been allowed to sue as a pauper under this rule.—*Hafizan v. Abdul Karim*, 1 C. L. J. 312 : 12 C. W. N. 163 (17 W. R. 68 *relied on*).

**Mode of computing period of limitation in pauper suits.**—Where an application for leave to sue as a pauper is *granted*, limitation will run from the date of filing the application, and not from the date on which the application is numbered and registered as a suit (S. 4, Limitation Act).—*Thangathammal v. Iravatheswara*, 28 I. C. 504 : (1915) M. W. N. 228. But when the application is *refused*, and the applicant then institutes a suit on the same subject-matter in the ordinary way, the suit will, for the purposes of limitation, be deemed to have been instituted on the date on which the plaint is presented, and not the date on which the rejected application was filed.—*Naraini v. Makhan Lal*, 17 A. 526 ; *Keshav v. Krishnarao*, 20 B. 508 ; *Aubhoya v. Bissesswari*, 24 C. 889.

Where an application for leave to sue *in forma pauperis* is made in good faith, but the applicant, before an order is passed under this rule, converts his application into a plaint by paying the necessary court-fees, the suit would be deemed to have been instituted on the day on which the application was filed and not on the day on which the court-fees were paid ; but if the application is found to have been made in bad faith, the day on which the court-fees were paid would be taken to be the date on which the suit was instituted.—*Stuart Skinner v. Orde*, 2 A. 241 (P. C.) (reversing 1 A. 230) Followed in *Janakdhary v. Janki Koer*, 28 C. 427 (18 A. 206 *dissented from*) and in *Alayakammal v. Subbaraya*, 28 M. 493 : 15 M. L. J. 219. See also *Jumnabai v. Vissondas*, 21 B. 576 ; *Bai Ful v. Desai Manorbhai*, 22 B. 849 ; *Girwa Lal v. Lakshmi Narain*, 26 A. 329 ; and *Durga Charan v. Dookhiram*, 26 C. 925. For this purpose it is essential that a finding should be arrived at on the question of fact whether the original application to sue as a pauper was a fraudulent and *malafide* or a *bona fide* one.—*Model Mills Ltd. v. Kurban Hussain*, A. I. R. 1928 Nag. 296. But see *Chunder Mohun v. Bhubon Mohini*, 2 C. 389 ; *Bishnath v. Jagarnath*, 13 A. 305 ; *Ram Sahai v. Maniram*, 5 C. 807 ; 6 C. L. R. 223 ; *Keshav v. Krishnarao*, 20 B. 508 ; *Naraini v. Makhan Lal*, 17 A. 526 ; *Abbasi Begam v. Nanhi Begam*, 18 A. 206 ; *Aubhoya v. Bissesswari*, 24 C. 889 (20 B. 508, 17 A. 526, 18 A. 206, *followed* ; 2 A. 241 (P. C.) *distinguished*).

Where a petition to sue *in forma pauperis* was presented in a wrong Court, the time spent in that Court was to be deducted in computing the period of limitation.—*Skinner alias Mirza v. Orde*, 6 N. W. P. 225.

There is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of a deceased opponent's heir, in place of such opponent.—*Janardan v. Anant*, 7 B. 373.

**Exception from liability to pay further court-fee.**—Where an applicant is not liable to pay any court-fee in a suit *in forma pauperis*, that applicant is not liable to pay any court-fee.—*Umda*

The payment of court-fees as such is not merely suspended, but it has not got to be paid at all.—*Panalal v. Collector of Mandalay*, 8 B. 294 : 127 I. C. 606 : A. I. R. 1930 Rang. 342.

Under this rule, a pauper cannot claim exemption from liability to pay any further stamp duty or penalty in respect of a document on which he relies, and which, owing to a defect in the stamp, is inadmissible as evidence in the suit.—*Golam Guffoor v. Ekram Hossein*, 10 W. R. 357.

**Appeal from orders under this rule.**—See notes under rule 7.

*Doctrine of lis pendens applies to an application for permission to sue as a pauper, see 30 A. 95, noted under rule 5.*

**9.** The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

- (a) if he is guilty of vexatious or improper conduct in the course of the suit ;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper ; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter. [S. 414.]

### COMMENTARY.

**History.**—This rule corresponds to S. 414, C. P. Code, 1882, with change of some words and phrases. No change has been made in the meaning.

**Object and scope of rule.**—The object of this rule is, that if after the permission to sue *in forma pauperis* has been granted, it is found that, for the grounds mentioned in the rule, the applicant should not be allowed to continue the suit *in forma pauperis*, then on the application of the defendant or of the Government pleader, the Court may order the plaintiff to be dispaupered.

"If it appears that his means are such that he ought not to continue to sue as a pauper."—The word "means" in this clause is to be interpreted with the help of the definition of "pauper" in Or. XXXIII, r. 1. To apply Cl. (b) of r. 9, the Court could dispauper her when her means are such as to enable her to pay the court-fee of Rs. 3,000 upon the plaint in the case.—*Srimoti Savitri v. Secretary of State for India*, 2 P. 879: 4 P. L. T. 538.

The mere fact that the plaintiff was appearing through eminent counsel would not be sufficient to dispauper the plaintiff.—*Srimoti Savitri v. Secretary of State for India*, 2 P. 879: 4 P. L. T. 538.

Where a person found to be a pauper on the date of her application paid a large sum immediately after, which she alleged, she had paid away her property, she was not to be considered as having been in possession of funds after her application, and it was not relieved by her paying the

rr. 9, 10.

money away. The Court had no jurisdiction to grant her leave to sue *in forma pauperis*, once it had ascertained that she had ceased to be a pauper after the date of her application—*Gadigi Muddappa v. Rudramma*, 13 L. W. 76: 61 I. C. 958.

The heir of a pauper plaintiff who desired to continue the suit on the death of the latter was found to be possessed of sufficient means and as he desired to continue the suit in his personal capacity and not in his representative capacity: *held*, that he could be dispaupered.—*Arumuga v. Subramania*, 131 I. C. 828: (1931) M. W. N. 199: 33 L. W. 446: A. I. R. 1931 Mad. 324.

"Vexatious or Improper conduct."—Though concealment of property may amount to improper conduct which by itself would entitle the Court to dispauper a plaintiff under Or. XXXIII, r. 9, the facts which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plaintiff had means so that he ought not to be allowed to continue the suit as a pauper—*Shankarbhut v. Sakherambhat*, 46 B. 1017: A. I. R. 1922 Bom. 215 70 I. C. 964. If the pauper purposely delays in bringing the legal repr . . . record, the Court may punish him . . . XXXIII, r. 9 (a) read with S. . . proper or under S. 151 as an abuse of the process of the Court.—*Khatijan Bai v. Nur Mahomed*, 116 I. C. 111: A. I. R. 1929 Sind 136.

"Agreement with reference to subject-matter of suit."—This expression is not limited to an agreement by way of obamperty or maintenance, but is intended rather to prevent a party continuing his suit as a pauper, after a third party not necessarily a pauper had for any cause whatever obtained an interest in the subject-matter of the suit and consequently an interest in paying the court-fees due to Government.—*Edulji Cowasji v. Dadabhoy*, 7 S. L. R. 52 (18 B. 464 referred to).

**Appeal in forma pauperis.**—Compromise of suit pending appeal and withdrawal of appeal—Application by Government pleader for payment of all costs payable to Government on account of institution fees, etc.—Opposition by parties to such application—Second application by Government pleader to dispauper the appellants under this rule. *Held*, that the appeal having been withdrawn, no order could be made either under S. 412 (Or. XXXIII, r. 11) or under S. 414 (Or. XXXIII, r. 6), C. P. Code, 1882.—*Bai Chandaba v. Kuver Sahab*, 18 B. 464.

**10.** Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit. [S. 411.]

Costs where pauper succeeds.

## COMMENTARY.

**History.**—This rule exactly corresponds to S. 411, C. P. Code, 1882.

**Right of Government to realize court-fees.**—The Crown has the first claim to the proceeds of a pauper-suit to the extent of the amount of the court-fees that would have been payable at the institution of the suit had the plaintiff not been a pauper.—*Ganpat Putaya v. Collector of Kanara*, 1 B. 7 (referred to in *Gayanoda Bala v. Bullo Kristo*, 33 C. 1040; 10 C. W. N. 857; *Gulzari Lal v. Collector of Bareilly*, 1 A. 596). But in the Full Bench case of *Dost Muhammad v. Mani Ram*, 29 A. 537; 4 A. L. J. 720, it has been held that the sale subject to a mortgage of property belonging to the defendant in a suit brought in *forma pauperis* for the purpose of realizing the court-fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage (2 A. 196 overruled; 1 B. 7 distinguished).

Where a pauper plaintiff succeeded only partially in the suit he brought and the amount decreed to him was less than what he had to pay the defendant as costs under the decree, held, that the Government could recover nothing out of the amount decreed towards the court-fees due to it.—*T. V. Chakrapani v. The Government of India*, (1921) M. W. N. 805; 14 L. W. 529; 69 I. C. 743; A. I. R. 1922 Mad. 125.

**Costs where plaintiff succeeds.**—The defendant is liable to pay court-fees proportionately where plaintiff succeeded only in part and failed as regards the rest of the claim.—*Ganga Dahal v. Gaura*, 14 A. L. J. 657; 38 A. 469; *Srinivasa v. Lakshmi*, 108 I. C. 712; A. I. R. 1928 Mad. 216; 54 M. L. J. 530; *Chandrareka v. Secretary of State*, 14 M. 163; *Rami Reddi v. Polamma*, 53 M. 780; 129 I. C. 66; A. I. R. 1930 Mad. 1000. Where the suit is compromised, proper orders as to apportionment of court-fee may be passed.—*Badrinath v. Jagdip*, 122 I. C. 152; 11 P. L. T. 267; A. I. R. 1930 Pat. 353.

The discretion given to the Court under r. 10 is sufficient to enable the Court to mould its decree in view of the circumstances of the case according to what the justice of the case requires in reference to court-fees payable; and the words in the rule "that such amount shall be recoverable by the Government from any party ordered by the decree to pay the same" leave the discretion entirely with the Court to direct which of the parties should pay the court-fees due to the Government.—*Rohini Kumar v. Kusum Kamini*, 55 C. 488.

**Mode of recovery of court-fees by Government.**—The amount of stamp in a pauper case cannot be claimed as a lien or charge upon the decree in favour of Government, but is recoverable in the same manner as the costs of the suits, Government being, as regards its claim in such a case, in no higher position than an ordinary judgment-creditor.—*Pran Kristo v. Collector of Moorshedabad*, 15 W. R. 205. But in *Puthia Valappil v. Veloth Assenar*, 25 M. 733, a contrary view seems to have been taken.

The decree-holder is entitled to take out execution against the judgment-debtor if he is able to state either that he had already paid the amount to the Secretary of State or was prepared to assure the Court that the money

would be paid to the Secretary of State. If the decree-bolder does not give any such assurance to the Court, the Court should pay it over direct to the Secretary of State.—*Surjan v. Shantanand*, 118 I. C. 191: A. I. R. 1929 All. 905.

The proper method of recovering court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance, is by the Court appointing a receiver to collect the maintenance amount and pay to Government the fee due by plaintiff.—*Secretary of State v. Sarvepalli*, 49 M. 567: 50 M. L. J. 279; *Rajindra v. Sundar Bibi*, A. I. R. 1925 P. C. 176.

Where a decree in a pauper-suit directs that the court-fee should be recoverable from the defendant in the same manner as the costs of the suit, held, that the same might be realized in execution and not by a separate suit.—*Ram Das v. Secretary of State*, 18 A. 419 (followed in *Babui Girija Kuer v. Secretary of State*, 4 P. L. J. 166: 50 I. C. 315).

Cross-decrees in the same suit or in a cross-suit are not enforceable against the right of Government to recover court-fees in a pauper suit.—*Janki v. Collector of Allahabad*, 9 A. 64.

The provisions of this rule do not justify the Court in selling a decree upon the application of the Collector, in as much as it provides that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover the amount of the fees, which have been for a time, pending the decision of their suit, remitted to them.—*Jotindra Nath v. Dwarka Nath*, 20 C. 111 (2 A. 290 and 6 M. 418 followed).

Sale of property for the purpose of realizing court-fees erroneously supposed to be due to Government. Held, that an order for sale and resale under such order were *ultra vires* and nullities when in fact there was no jurisdiction in the Court to make the order.—*Bahwant Rao v. Muhammad Husain*, 15 A. 324 (12 C. 307 referred to).

After the decree in a pauper-suit and order for payment of costs by plaintiff and defendant in proportion to their success, the Court, on motion by the Government, altered its original order with respect to the payment of costs, and declared that the costs should be realized from both the parties jointly. Held, that the Court had no authority to make the second order in favour of Government.—*Shoslee Churn v. Collector of Chittagong*, 13 W. R. 155.

Appeal.—All questions arising between the Government and any party to the suit under this rule would come within the purview of S. 47 as relating to the "execution, discharge and satisfaction" of a decree. An appeal will therefore lie from an order passed under this rule deciding any such question.—See S. 2, Cl. (2), S. 96, and *Secretary of State v. Narayan*, 35 B. 448.

11. Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

Procedure where  
pauper fails.



- (a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or
- (b) because the plaintiff does not appear when the suit is called on for hearing.

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. [S. 412].

### COMMENTARY.

**Alteration.**—The word "withdrawn" has been newly added, and para. 2. of the old section, which contained the provision for the punishment of the pauper, has been omitted. The old section is reproduced here for observing the changes introduced by this rule.—"*If the plaintiff fails in the suit, or if he is dispaupered, or if the suit is dismissed under Ss. 97 or 98, the Court shall order the plaintiff or any person made, under S. 32, co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and if it finds that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees, or with imprisonment for a term which may extend to a month, or with both.*"

"Where the suit is withdrawn."—The above change has been introduced on account of several conflicting rulings regarding the meaning of the expression "*if the plaintiff fails in the suit*," as will appear from the cases noted below. In some of the Bombay cases, it was held that S. 412 of the old Code applied only to cases of adjudicated failure (15 B. 77 and 18 B. 464); and in some cases doubts were expressed as to whether "failure" includes withdrawal of suits. With a view to clear away this conflict, the word "*withdrawn*" has been added in the present rule, adopting the law as laid down in the Full Bench case in *Secretary of State v. Bhagirathibai*, 31 B. 10; by which 15 B. 77 and 18 B. 464 have been overruled.

Where a pauper plaintiff withdraws from a suit without permission under S. 373, C. P. Code, 1882 (Or. XXIII, r. 1) as the result of a compromise, by which he obtains a substantial part of the relief claimed, he fails in the suit within the meaning of this rule—*Secretary of State v. Bhagirathibai*, 31 B. 10 (F. B.): 8 Bam. L. R. 689 (15 B. 77 and 18 B. 464 overruled).

The words "*if the plaintiff fails in the suit*" in S. 412, C. P. Code, 1882: (Or. XXXIII, r. 11), apply to the withdrawal of a suit under S. 373, C. P. Code, 1882 (Or. XXIII, r. 1). Where a pauper plaintiff withdraws a suit with liberty to bring fresh suit, he is liable to pay to Government court-fees.—*Secretary of State v. Narayan Balkrishna*, 29 B. 102 (15 B. 77 and 18 B. 464 distinguished; 21 M. 113 referred to).

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If the plaintiff fails in his suit brought in *forma pauperis*, he is liable to pay to Government the amount of court-fees.—*Balwant Singh v. Roshan Singh*, 18 A. 253, p. 255.

"The Court shall order the plaintiff to pay the court-fees."—The terms of this rule are mandatory, and it is obligatory upon the Court, when passing the decree, to provide in the decree for the payment of court-fees.—*Secretary of State v. Bhagwanti Bibi*, 13 A. 326, 329. When the Court omits to pass such an order, it is now provided by r. 12 that the Government has the right to apply to the Court for an order as to costs at any time. Under the old Code it was held that the Government not being a party to the suit, it had no right of appeal in case of such omission but could proceed only by an application for review.—*Collector of Ratnagiri v. Janardan*, 6 B. 590; *Collector of Kanara v. Krishnappa*, 15 B. 77; *Chandaba v. Kuver*, 18 B. 464.

The Madras High Court has held that there is no inconsistency between the Madras H. C. Fees Rules (O. S.) Or. II, r. 2 and rr. 10 and 11 of Or. XXXIII of the Code, and that the said rules of the Code are not *ultra vires* of the Indian Legislature since there is nothing to prevent the Indian Legislature from making rules relating to court-fees applicable to the Original Side of the High Court.—*Yelumalai v. Kupparammal*, 109 I. C. 173; 27 L. W. 760; A. I. R. 1928 Mad. 385; 54 M. L. J. 263.

Where an application to sue in *forma pauperis* was rejected solely on the ground of the minority of the plaintiff, and that such minor was not properly represented by a next friend or guardian, without any enquiry as to his pauperism, and the Court ordered all costs to be paid out of the minor's estate, held, that, as no enquiry was made as to the pauperism of the minor, the order for costs against the minor's estate could not be passed under this section (rule), and that the order was illegal and *ultra vires*.—*Amichand Talakchand v. Collector of Sholapur*, 13 B. 234.

Costs.—This rule does not deal with the cost of a successful defendant in a pauper-suit. The costs of defendant in such a case are to be dealt with under S. 35, C. P. Code, and the Court of original or appellate jurisdiction has full power to give and apportion costs in any manner it thinks fit.—*Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577 (F. B.).

**12.** The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.  
Government may apply for payment of court-fees

[New.]

### COMMENTARY.

**History and Object.**—This rule is new. It has been framed to meet the following cases. In 4 M. 155, it was held that an application by Government for the payment of court-fees is governed by three years' rule of limitation. But under the present rule the Government shall have the right to apply at any time. No question of limitation will arise.—See *Shami Mohammed v. Mohammed Ali Khan*, 3 B. L. R. App. 22; 11 W. R. 67, where it has been held that the right of Government to recover the stamp-fees in

pauper suits is not affected by the rule of three years' limitation laid down in the Limitation Act.

"At any time."—See *Secretary of State v. Narayan*, 13 Bom. L. R. 686: 35 B. 448.

Appeal.—An order under this rule is appealable as an order under S. 47.—*Secretary of State v. Narayan*, 35 B. 448: 13 Bom. L. R. 686.

**13.** All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47. [New.]

### COMMENTARY.

Object and scope.—This rule is new. It has been framed to set at rest the following conflicting decisions under the old Code by providing that though the Government is not actually a party to the suit, it shall be deemed to be a party to the suit for the purposes of S. 47 of the C. P. Code.

Where a decree in a pauper suit did not contain any order as to the payment of stamp-fees, and the Government applied to have the decree amended in that respect, *held*, that the Government, not being a party to the suit, had no right to be heard in the matter.—*In the matter of the petition of Secretary of State*, 2 C. L. R. 461. But see *Collector of Kanara v. Krishnappa*, 15 B. 77, where it has been held that the Government, though not a party to the suit, was entitled to move the High Court under S. 622, C. P. Code, 1882, (S. 115), on the question of court-fees. See also *Collector of Kanara v. Rambhat*, 18 B. 454 (6 B. 590 followed).

In a suit *in forma pauperis* the Court decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion dismissed. The Government preferred an appeal in respect of the court-fee on the portion of the claim dismissed. *Held*, that such an appeal would lie.—*Secretary of State v. Bhagwanti Bibi*, 13 A. 326 (9 A. 64 referred to). But see *Collector of Kanara v. Rambhat*, 18 B. 454, where it has been held, on the authority of *The Collector of Ratnagiri v. Janardan*, 6 B. 590, that no appeal by Government would lie in such a case, and that in the exercise of its extraordinary jurisdiction, the High Court would rectify the decree by directing the plaintiff to pay the costs of Government. The Bombay cases have been followed in *Collector of Trichinopoly v. Sivaramakrishna*, 23 M. 73.

**14.** Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector. [New.]

Copy of decree to be sent to Collector.

### COMMENTARY.

History and object.—This rule is new.

Under the old Code the copy of the decree had to be given to the Government pleader. A copy of a decree passed in favour of a pauper should

All that the Code directs the Court to do is to send to the Collector a copy of the decree; what the Collector does on receipt of the same is no concern of the Court; a forwarding letter by the Court "for necessary action" is not justified.—*Panalal v. Collector of Mandalay*, 8 B. 294: 127 I. C. 606: A. I. R. 1930 Rang. 342.

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This rule does not bar a second application when the first application was rejected under r. 5 (a) as not having been accompanied by a schedule of moveable and immoveable property.—*Mussammal Bal Kaur v. Shib Das*, 1 L. 151 (42 I. C. 803 (F. B.) referred to; 33 I. C. 812 distinguished).

Where an application to sue *in forma pauperis* is summarily rejected under Or. XXXIII, r. 5 (a), a second application to sue as a pauper is not barred by the provisions of this rule.—*Chinnammal v. Papathi Ammal*, A. I. R. 1925 Mad. 986; *Krishnamoorthy v. Ramayya*, 50 M. 63; 51 M. L. J. 79; 96 I. C. 962; A. I. R. 1926 Mad. 875.

"Refusal" implies a consideration of the application on its merits; where the application is withdrawn and consequently dismissed a fresh application is not barred.—*Ma E Htai v. U Hmai*, 131 I. C. 64; A. I. R. 1931 Rang. 79.

Where an application for permission to sue *in forma pauperis* was dismissed on the ground that the application was not framed and presented in accordance with the rules, and a subsequent application for the same purpose was dismissed for default, neither side appearing at the hearing, held, that a third application to sue as a pauper was not barred by the two earlier applications because they had not reached the stage of refusal within the meaning of this rule, and that such an application is expressly provided for by Or. IX, r. 4.—*Ma Sein v. Ma Kya Hmyin*, 4 R. 245; A. I. R. 1926 Rang. 200; 98 I. C. 26; *Maung Pe v. Maung Shwe*, 118 I. C. 415; 7 R. 369; A. I. R. 1929 Rang. 128.

A dismissal of an application to sue *in forma pauperis* for default is not an order refusing permission to sue as a pauper and hence is no bar to an application.—*Maung Aung Tun v. Ma E. Kin*, 2 Bur. L. J. 217.

Where the petitioner claims maintenance from the opposite party, her husband, and applies for leave to sue *in forma pauperis* but her application is dismissed under r. 5 (d) as disclosing no cause of action and she applies more than two years after such dismissal for leave to sue *in forma pauperis* to recover maintenance for a period subsequent to the date when her first application was filed, held, that the subsequent application to sue *in forma pauperis* was not barred under this rule.—*Ratnamala v. Kamakshya*, 31 C. L. J. 351. Though in such a case it was open to the applicant to file a suit in the ordinary way on payment of costs.—*Srimatya Baroda Dasi v. Upendranath*, 52 I. C. 562.

Where there has been no refusal of the application to sue as a pauper, but it is dismissed for default by non-appearance, the applicant may revive his application for leave to sue.—*Bhoj Singh v. Mahakonwer*, 3 Agra. Mis. 1.

A Court has power to entertain an application under S. 114 to review an order refusing under r. 7 a petition for leave to sue *in forma pauperis*. The provisions of this rule do not affect the right of a person, against whom such order has been made, to obtain a review.—*Adarji Edulji v. Manikji Edulji*, 4 B. 414; *In the matter of the petition of Rani Umasundari*, 5 B. L. R. App. 29; and *Mahomed Gazi v. Dullab Bibi*, 5 B. L. R. 318-note.

There is a marked distinction between "a right to sue" and a right to make an application for permission to sue as pauper; and this distinction is clearly indicated in this rule. The right to make such an application is obviously a personal right, and cannot survive in the legal representative who may or may not be a pauper himself.—*Lalit Mohan v. Satish Chandra*, 33 C. 1163 : 4 C. L. J. 234.

The bar to a subsequent application being a bar to the jurisdiction of the Court, the Court is competent and bound to take notice of it at any stage of the suit.—*Ranchod Morar v. Bezanji Edulji*, 20 B. 86; *Khondkar Ali Afzal v. Purna*, 40 C. L. J. 188 : 84 I. C. 703 : A. I. R. 1924 Cal. 1039.

**Costs incurred.**—Under this rule, a person whose application to sue *in forma pauperis* has been rejected, must, in order to institute a suit in the ordinary way in respect of the same right, first pay the costs due to Government, but the suit ought not to be dismissed for default in payment of such costs unless demand for payment has been made either on behalf of the Government or by the Court.—*Mrinalini v. Tinkauri*, 16 C. W. N. 641.

**16.** The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit. [S. 415.]

Costs.

### COMMENTARY.

**History.**—This rule corresponds to S. 415, C. P. Code, 1882, with this modification that the words "*shall be costs*" have been substituted for the words "are costs" which occurred in the old section.

**Costs.**—The amount of stamps in a pauper case cannot be claimed as a lien or charge upon the decree in favour of Government, but is recoverable in the same manner as the costs of suit, Government being, as regards its claim in such a case, in no higher position than an ordinary judgment-creditor.—*Pran Kristo v. Collector of Moorshedabad*, 15 W. R. 205. But see 25 M. 733.

For the meaning of the word "costs" in the suit, see *Collector of Trichinopoly v. Sivaramakrishna*, 23 M. 73 (79).

## ORDER XXXIV.

### SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure, sale and redemption.

*Explanation.*—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. [S. 85.]

### COMMENTARY.

*History.*—This rule corresponds to S. 85 of the T. P. Act of 1882 with some additions and alterations as will appear on a comparison of this rule with the old section which is reproduced here: "*Subject to the provisions of the Code of Civil Procedure, S. 437 (now Or. XXXI, r. 1), all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.*"

The proviso to S. 85 of the T. P. Act (IV of 1882), has been omitted, and the reason for the omission will appear from the following Report of the Special Committee:—

"Another amendment of importance which we have introduced is in regard to mortgage suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code, and we have therefore introduced rules in Or. XXXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be repealed. We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes. The proviso to S. 85 of the Transfer of Property Act, 1882, has given rise to certain doubts which the Committee have sought to remove by substituting for it the words now added with a view to making it clear that a person not a party is not bound by a decree (*Ram Nath Rai v. Lachman Rai*, 21 A. 193).

"The explanation has been inserted in order to remove doubts which have arisen from the conflict of authorities on the point."—*See the Report of the Special Committee.*

Sections 85 to 90 inclusive, 92 to 94 inclusive, 96, 97 and 99 of the Transfer of Property Act, 1882, have been repealed, and the words in S. 100

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"and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property" have been omitted.

The *Explanation* attached to this rule is new. It has been inserted to meet the conflicting rulings on the point adopting the principles laid down in certain Calcutta decisions, e.g., the case of *Debendra Narain v. Ramtaran*, 30 C. 599 (F.B.): 7 C. W. N. 766, *Ram Narain v. Bandi Pershad*, 31 C. 737; *Surjiram v. Barhamdeo*, 1 C. L. J. 337 (351) and *Gurdeo v. Chandrikah*, 36 C. 193: 5 C. L. J. 611. In all these cases it was held that in a suit to enforce a second mortgage, the first mortgagee was not a necessary party, while there were decisions of the other High Courts to the contrary.

The effect of the omission in Or. XXXIV, r. 1 of the proviso to S. 85 of the Transfer of Property Act relating to the mortgagee's notice and of the omission in Or. XXXIV, r. 5 of the words in S. 89 of the Act to the effect that on the passing of an order absolute for sale the defendant's right to redeem and the security shall both be extinguished is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgagee's suit.—*Venkat Reddy v. Kunjappa*, 47 M. 551.

**Object.**—The object of Or. XXXIV, r. 1 is that all claims affecting the equity of redemption should be disposed of in one suit.—*Ramarayanimgar v. Maharaja of Venkatagiri*, 50 M. 180 (P. C.): 45 C. L. J. 395.

Under the Transfer of Property Act it was observed that there was nothing in the provisions of that Act, which required that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and that S. 96 of the Act did not militate against that view and it was doubted whether S. 85 of the Act required such persons whose rights were admitted should be made parties.—*Srinivasa v. Yamunabhai*, 29 M. 84. It was also held that the rule that all persons interested in the actual subject of the suit should be before the Court, in order that, as between them, complete justice might, as far as possible be done, cannot be taken as authorizing a Court to complicate a suit by a mortgagee, by introducing into it controversy, in which the mortgagee is not really interested.—*Krishna Ayyar v. Muthukumarasawmiya*, 29 M. 217.

**Subject to the provisions of the Code—'Shall.'**—Under the Transfer of Property Act, 1892, S. 85, it was held that the word 'must' in that section which is one of the strongest words of compulsion which the legislature can employ must be given its full significance and that therefore the non-joinder of persons interested in the mortgaged property was a fatal defect, unless cured by the Court, under S. 32 of the Code by the addition of parties by the Court.—*Mata Din v. Kazim*, 13 A. 432 (F. B.) (Mahmood, J. dissentiente); *Janki Prasad v. Kishen Dat*, 16 A. 478 (F. B.), *Bhawani v. Kallu*, 17 A. 537 (F. B.), *Ghulam v. Mustakim*, 18 A. 109. In *Jamuna v. Ganga*, 19 C. 401; *Sorabji v. Ruttonji*, 22 B. 701; *Tikam Singh v. Thakur Kishore*, 20 A. 189; and *Kundan v. Faqir*, 27 A. 75, it was held that the defect did not entail a dismissal of the suit but that the parties omitted should be added. See also *Ramasamayyan v. Virasami Ayyar*, 21 M. 222; and *Palani v. Rangayya*, 22 M. 207. The effect of the alteration of "must" into "shall" and the deletion of the words "Section 437" from S. 85 of the Transfer of Property Act, 1892 (now Or. XXXI, r. 1) has been to make all



the provisions of the Code applicable to mortgage-suits. See notes under heading "History," *ante*.

Order I, r. 9 says that no suit shall be defeated merely for non-joinder of parties; and under Or. I, r. 10 the Court has the power to add parties at any stage. Consequently unless the party omitted is a 'necessary' party as distinguished from a 'proper' party and the plaintiff has refused to join him as a party though called upon by the Court to do so, the Court will have, under Or. I, r. 9 to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Order I, r. 9 applies to mortgage suits as well as to other suits.—*Harchandra v. Mahomed*, 25 C. W. N. 594; *Kherodamoyi v. Habib*, 29 C. W. N. 51; 82 I. C. 638; *Haidarali v. Safiuddin*, 54 C. L. J. 113; 134 I. C. 1068; *Shahasahab v. Sadashiv*, 43 B. 575; 51 I. C. 223; *Shivubai v. Siddheshwar*, 45 B. 1009; *Sital v. Asho*, 2 P. 175; 69 I. C. 677; *Waleyatunnissa v. Chalakhi*, 10 P. 341; 132 I. C. 100; A. I. R. 1931 Pat. 164; *Girwarnarain v. Makliunnissa*, 1 P. L. J. 468. This view has also been adopted by the Allahabad High Court in its more recent decisions though, as observed above, it had previously held otherwise.—See *Sheo Tahal v. Sheodan*, 28 A. 174 (F. B.); *Sanwal v. Ganeshi*, 35 A. 441; *Parshadi Lal v. Laiq Singh*, 21 A. L. J. 701; 74 I. C. 943; *Ganeshi Lal v. Charan Singh*, 35 A. 247; 19 I. C. 614; *Alam Singh v. Gokal Singh*, 35 A. 484; 11 A. L. J. 749; 21 I. C. 271 (in which it was held that the non-joinder of a subsequent mortgagee by the plaintiff who deliberately refused to make him a party though called upon by the Court to do so, should not result in a dismissal of the suit but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage); *Baldeo v. Bhola Nath*, A. I. R. 1929 All. 941.

Persons having an interest either in the mortgage security or in the right of redemption.—The words in S. 85 of the Transfer of Property Act, 1882, were "persons having interest in the property comprised in a mortgage." These words gave rise to considerable conflict of judicial opinion. The Allahabad High Court in the Full Bench case of *Mata Din v. Kazim*, 13 A. 432 (F. B.) (Mahmood, J. dissentiente) held that the term property as used in Chapter IV of Act IV of 1882 meant an actual physical object and did not include mere rights relating to physical objects, and that the property to be sold within the meaning of S. 67 or S. 89 of the Act must mean the immovable property and that in neither section can the word 'property' mean merely the bare rights and interests of a mortgagor, namely, the equity of redemption. On that view the frame of the suit should be such as to enable a proper sale of the property itself, as a physical object, to take place, and therefore persons who may not have any interest in the mortgage security or in the right of redemption would be proper parties and even 'necessary' parties in view of the meaning of the word 'must' in S. 85 of the Act. This view obtained in that Court in later decisions also, some of which are noted under the heading "Subject to the provisions of the Code," *ante*. A contrary view prevailed in the Calcutta High Court (e.g., *Kanti Ram v. Kutubuddin*, 22 C. 33; *Beni Madhub v. Sourendra*, 23 C. 795; *Jaggewar v. Bhuban Mohan*, 33 C. 425; 3 C. L. J. 205). This contrary view has been given effect to by the legislature in enacting this rule.

See notes under heading "Sale of property subject to prior mortgage and application of proceeds" under rule 13, *post*.

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**Effect of addition of parties after period of limitation.**—A subsequent purchaser of the mortgaged property either at an execution or at a private sale is a necessary party to a mortgage suit. But when in the course of a mortgage suit, the purchaser of a portion of the mortgaged property is made a party defendant after the prescribed period of limitation, the suit as against him is barred by limitation. *Quere*—Whether the portion of the mortgaged property in the hands of the added defendant is thereby exempted from liability under the mortgage.—*Ram Kinkar v. Akkil Chandra*, 35 O. 519 (F. B.); 11 C. W. N. 350; 5 C. L. J. 242. This Full Bench decision approved of an earlier decision in which it had been held that when a Court adds a party at the instance of a plaintiff S. 22 of the Limitation Act applies and the suit against the added defendant shall be deemed to have been instituted when he was so made a party.—*Imam Ali v. Baij Nath*, 33 C. 613; 10 C. W. N. 551.

Where out of several persons who apparently had a right to bring a suit on a mortgage as co-plaintiffs some only appeared as plaintiffs and joined the others as co-defendants, held that the suit should not have been dismissed merely because the plaintiffs failed to show that the persons whom they joined as co-defendants refused to appear with them as co-plaintiffs.—*Biri Singh v. Nawal Singh*, 24 A. 226. See also *Mariyal v. K. M. Narayanan*, 26 M. 461, in which *Savitra v. Raman*, 24 M. 296 was distinguished and doubted.

Omission to join all the heirs of a purchaser of the mortgaged property within the period of limitation, is no ground for dismissal of a suit, unless it is found that the mortgagor was aware, at the date of the suit, of the interest of those persons in the mortgaged property. The proper procedure was to add those heirs as parties, and, if it appeared, that at the date of the suit, the plaintiff was not aware of their interest in the property, to ascertain what proportion of the debt was due by the heir who had been made a party in time, and to pass a decree against his share for that amount.—*Basiruddin v. Debendro Nath*, 12 C. W. N. 911 (18 A. 109, 30 C. 755; 7 C. W. N. 723, referred to); *Har Chandra v. Mahomed Husein*, 25 C. W. N. 594. See also *Shahasaheb v. Sadashiv*, 43 B. 575; 21 Bom. L. R. 369, in which it has been held that the test both under Or. XXXIV, r. 1 and S. 22 of the Limitation Act is the same: Was the suit properly constituted at date of the plaint so as to enable the Court to adjudicate as between the parties impleaded?

Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation. To meet an objection raised for non-joinder of parties, the plaintiffs subsequently applied to make the remaining heirs party defendants to the suit. The lower Courts declined to make them parties on the ground that the claim as regards them was barred by S. 22 of the Limitation Act. Held the plaintiffs' right to redeem which they had was not lost by their omission to make the remaining heirs party defendants to the suit, they were only necessary parties to save multiplicity of suits and to prevent the mortgagee from being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption.—*Shivubai v. Siddheshwar*, 45 B. 1003.

Where an application for adding certain mortgagees as parties is made, the limitation for them to sue as plaintiffs having elapsed, the Court should in compliance with Or. XXXIV, r. 1 and Or. 1, rr. 9 and 10 (2) add

necessary parties and then apply S. 22 of the Limitation Act to see the result on the relief asked for; the Court should not refuse to add a person as defendant merely on the ground that if he were added the plaintiff's suit would be barred, when the plaintiff does not ask for any relief against him, nor does he get any relief by being so added.—*Baldeo v. Bhola Nath*, A. I. R. 1929 All. 941.

**Parties in suits on mortgages—Prior mortgagee, in a suit for foreclosure or sale by the puisne mortgagee.**—The prior mortgagee is not a necessary party in a suit for foreclosure or sale by a puisne mortgagee.—*Gurdeo Singh v. Chandrikah Singh*, 36 C. 193; 5 C. L. J. 611 (1 C. L. J. 337 (351), referred to). See also *Ram Narain v. Bandi Pershad*, 31 C. 737; *Debendra Narain v. Ramtaran*, 30 C. 599 (F. B.); 7 C. W. N. 766; *Raj Coomary v. Preo Madhub*, 1 C. W. N. 453; *Srinivasa v. Yamunabhai*, 29 M. 84; 16 M. L. J. 50, *Nawaba Waziri Begam v. Sashi Bhusan*, 4 P. L. T. 546; 74 I. C. 830.

**Parties in suits on mortgages—Puisne mortgagee in a suit for foreclosure or sale by prior mortgagee.**—A puisne mortgagee is a necessary party to a suit by a prior mortgagee to enforce his mortgage as he is entitled to redeem and if he is not made a party his right of redemption is not affected by the decree.—*Het Ram v. Shadi Ram*, 45 I. A. 130; 40 A. 407 (P. C.); 22 C. W. N. 1033; 35 M. L. J. 1; 45 I. C. 798; *Matru Mal v. Durga Kunwar*, 47 I. A. 71; 42 A. 364 (P. C.); 55 I. C. 969; *Ram Narain v. Bandi Pershad*, 31 C. 737; *Umes v. Zahur Fatima*, 18 C. 164 (P. C.); *Namdar v. Karam Razi*, 13 A. 315, *Muhammad Samiuddin v. Man Singh*, 9 A. 125; *Gajadhar v. Mul Chand*, 10 A. 520; *Baldeo Singh v. Jaggu Ram*, 23 A. 1; *Kudratullah v. Kubra*, 23 A. 25; *Alam Singh v. Gokal Singh*, 35 A. 484; 11 A. L. J. 749; *Maung Shwe v. Karambu*, 6 R. 122; 110 I. C. 701; A. I. R. 1923 Rang. 127; *Pandurang v. Sakharchand*, 31 B. 112; *Goverdhan v. Veerasami*, 26 M. 537; *Sital v. Asho*, 2 P. 175; 69 I. C. 677.

**Parties in suits on mortgages—Persons having an interest in the mortgage security or in the right of redemption.**—Order XXXIV, r. 1 requires that not only a person having an interest in the mortgage security but also a person having an interest in the right of redemption shall be joined as a party to any suit relating to the mortgage. But S. 85 of the T. P. Act which is repealed by Or. XXXIV, r. 1 required that a person having an interest in the mortgage security only should be made a party to such a suit.—*Shananda Chandra v. Sri Nath*, 17 C. W. N. 871; 17 I. C. 432.

The only persons who are proper parties to a suit to enforce a mortgage are persons having an interest in the property comprised in the mortgage, that is, the interest which a mortgagor is competent to transfer by way of mortgage at the date of the transaction.—*Jaggewar Dutt v. Bhuban Mohan*, 33 C. 435; 3 C. L. J. 205. The rule does not require the joinder in a suit on a prior mortgage of a subsequent mortgagees whose mortgage was only executed subsequent to the filing of such suit; it was so held under S. 85 of the Transfer of Property Act, 1882.—*Ishaq Ali v. Chunni*, 21 A. 149. A person having no interest at the date of the suit need not be joined as a party.—*Ragho v. Daud*, 13 B. 51; *Trimbak v. Sakharam*, 16 B. 599.

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Part owners of a mortgaged property who did not execute the indenture of mortgage and did not receive any money and were not interested in the equity of redemption are not necessary parties in a suit to enforce a mortgage.—*Mon Mohini v. Parvati*, 32 C. 746.

Persons interested in the right of redemption would of course include such persons as are specifically mentioned in S. 91 of the Transfer of Property Act, 1882. The expression would include (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon the mortgaged property or in or upon the right to redeem the same; and (b) any surety for the payment of the mortgage debt or any part thereof; and (c) any creditor of the mortgagor who has in a suit for administration of his estate obtained a decree for the sale of the mortgaged property. The interest referred to in Cl. (a) of S. 91 is a present interest and not a mere contingent right such as the reversionary beirs of the deceased husband the mortgagor have during the life-time of his widow.—*Ram Chandar v. Kallu*, 30 A. 397; 5 A. L. J. 631; (1903) A. W. N. 225; *Pramatha v. Bhuvan*, 25 C. W. N. 535. A person with an inchoate title need not be made a party.—*Nanjundappa v. Hemappa*, 9 B. 10. But a person who has a vested remainder is a necessary party in a suit for foreclosure against the life-estate holder in which a decree is obtained on the basis that he is an absolute owner.—*Swami Dayal v. Ramadhar*, 134 I. C. 865; 8 O. W. N. 566; A. I. R. 1931 Oudh 353.

Any person entitled to a maintenance charged upon the property should be made a party; but the mere fact that a person is entitled to be maintained out of the income of the property is not sufficient.—*Roshan v. Balwant*, 22 A 191 (P. C.) (affirming 18 A. 253).

In a suit for redemption by one co-mortgagor the other co-mortgagors who are not suing have a right to redeem and so are necessary parties.—See *Ahmed Husain v. Muhammad Qasim*, 48 A 171; 24 A. L. J. 88, *Musst. Ghura v. Bishun Ram*, 119 I. C. 97; 27 A. L. J. 908; A. I. R. 1929 All 814.

The interest possessed by Government in property attached under S. 88 (7), Criminal Procedure Code is not that of a mere attaching creditor but is at least analogous to that of a receiver, and the Government's right of redemption is not affected if it is not made a party.—*Alagammal v. Sadasiva*, 60 M. L. J. 72; A. I. R. 1930 Mad. 1017; 129 I. C. 47.

A Receiver appointed in a partition suit previous to the suit for enforcement of the mortgage is not a necessary party.—*Elizabeth Toomey v. Bhupendra*, 111 I. C. 57; 7 P. 520; A. I. R. 1923 Pat. 304.

In a suit for account against the assignee decree-holder who had purchased the mortgaged properties and who had been declared by the Court to hold the properties as trustee for the co-mortgagors who owned distinct interests therein, and a suit brought by some one of them without joining the others is bad for non-joinder of parties.—*Naba Kumar v. Radhashyam*, 54 C. L. J. 274 (P. C.); 35 C. W. N. 977; 61 M. L. J. 294; A. I. R. 1931 P. C. 229; 134 I. C. 654.

In execution of a Small Cause Court decree the appellant attached the stock in trade of the judgment-debtor. The respondent then put in a claim to the attached property and the property was released from attachment on the respondent's undertaking to pay the decretal sum if the claim failed. The claim failing, the respondent instituted the suit alleging that the stock.

in trade of the judgment-debtor had been hypothecated to him and praying for enforcement of the charge, and in that suit he impleaded the appellant. *Held* the appellant had no interest in the property from the moment as he got the undertaking and the suit was not maintainable against him.—*Padamchand v. Bhicum Chand*, 36 C. W. N. 397.

A creditor who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the Will; and in a suit to foreclose, the purchaser is rightly made a party.—*Nilkant v. Peari Mohan*, 3 B. L. R. 7: 11 W. R. 21.

Under Or. XXXIV, r. 1, in a suit for redemption of a mortgage, only those parties should be joined who claim an interest in the mortgage security or in the right to redeem; outsiders who claim a title to the property independently of the rights of the mortgagor and the mortgagee need not be made parties.—*Satagauda v. Satappa*, 22 Bom. L. R. 815.

A co-heir of the plaintiff having an interest in the mortgage at the time of the redemption suit, is a necessary party to it, but not otherwise.—*Trimbak Jiwaji v. Sakharam Gopal*, 16 B. 599.

In a suit for redemption, all persons jointly entitled to the right of redemption, e.g., all the heirs of a mortgagor, must be joined.—*Bhauddin v. Ismail*, 11 B. 425.

In a suit for redemption of a mortgage, persons who are alleged to be the tenants of the mortgagee are proper parties, where they set up a title which requires adjudication; the case being an exception to the general rule that a question of paramount title cannot be gone into in a mortgage suit.—*Krishna v. Vithal*, 28 Bom. L. R. 759: A. I. R. 1926 Bom. 522.

Where in a suit for redemption of a mortgage effected in favour of three persons, the mortgagor plaintiff withdrew the suit as against one of them, *held*, that the suit was liable to be dismissed under Or. XXXIV, r. 1, for non-joinder of parties.—*Dhuri Patak v. Timal Singh*, 4 P. L. W. 391: 45 I. C. 650.

Where a joint family property, though held in certain shares by the several co-parceners, was mortgaged as a whole and redeemable on payment of the whole sum, *held*, in a suit by one of joint tenants, or tenants in common to redeem the whole estate, that all persons in whom portions of equity of redemption were vested must be made parties to the suit.—*Naro Hari v. Vithalbhat*, 10 B. 648.

Where out of three properties subject to one mortgage two had been redeemed by payment of a proportionate part of the mortgage-debt and the third alone was the subject of a suit for redemption upon payment of the balance of the mortgage money, a person, having an interest in one of the properties already redeemed, is not a necessary party to such a suit.—*Nazir Husain v. Nihalchand*, 2 A. L. J. 628: (1905) A. W. N. 156.

The transferee of a mortgaged property in breach of a covenant against alienation may be made a party to a foreclosure suit.—*Taj Singh v. Patiram*, 55 I. C. 433.

For other cases see notes under other headings in this rule and also in the other rules, *post*.

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Parties in suits on mortgages—Persons with paramount title.—Whether or not S. 85 of the T. P. Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join a party defendant, in a suit for sale on mortgage, a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee.—*Khairali v. Banni Begam*, 30 A. 240: 5 A. L. J. 604 (33 C. 425 referred to); *Joti Prasad v. Aziz Khan*, 31 A. 11: 1 I. C. 53; *Gobardhan v. Munna Lal*, 40 A. 584: 46 I. C. 559; *Sataganda v. Salapa*, 44 B. 698: 57 I. C. 577; *Jogo Mohan v. Daudong*, 12 C. W. N. 94. An outsider who claims a title in the property independently of the rights of the mortgagor and mortgagee should not be made a party.—*Radhakunwar v. Resti Singh*, 43 I. A. 187: 38 A. 489 (P. C.): 20 C. W. N. 1279: 24 C. L. J. 303: 35 I. C. 939; *Bisnath v. Mus. Ram Kali*, A. I. R. 1927 Oudh 607; *Ishwar Das v. Hira Lal*, 130 I. C. 105: 26 N. L. R. 359: A. I. R. 1931 Nag. 20; *Brij Lal v. Punjab & Kashmir Bank Ltd.*, 136 I. C. 729: 33 P. L. R. 240. A question of paramount title ought not to be agitated in mortgage suits since it introduces a different cause of action in which some only of the several defendants are substantially interested.—*Tinkarhi v. Narendra*, 59 C. 548 (discussing and explaining 29 C. W. N. 784). But see *Gokul Chandra v. Rashesewari*, 14 C. L. J. 108, in which it has been held that the rule laid down in *Jaggewar v. Bhuban*, 33 C. 425, that in a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and the mortgagee are not proper parties, is not inflexible. Order XXXIV, r. 1, C. P. Code, does not prohibit a person claiming a title paramount or opposed to that of a mortgagor being made a party to a mortgage suit.—*In re Obalampalli*, (1914) M. W. N. 623: 22 I. C. 976: 4 P. L. W. 417; *Jaggewar v. Bhuban*, 33 C. 425; *Gobardhan v. Munna Lal*, 40 A. 584: 16 A. L. J. 639; *Hari Das v. Girindra*, 33 C. L. J. 301; *Galstaun v. Mirza Abid Husain*, 10 C. L. J. 263: 73 I. C. 428; *Nirode v. Nrispendra*, 96 I. O. 698: A. I. R. 1926 Cal. 1192. Although in a mortgage suit it is not proper that the title of a person who claims adversely to the mortgagor should be gone into, it is fair that an issue as to whether the property was ancestral or self-acquired should be raised and determined if the necessary parties are before the Court and should not be left over to be determined in execution.—*Muthiah Servai v. Somasundaram*, 107 I. C. 814: A. I. R. 1928 Mad. 199. See also *Ramasamy v. Marimuthu*, A. I. R. 1928 Mad. 764.

A Full Bench of the Calcutta High Court has held that under Or. XXXIV, r. 1 a puisne mortgagee may sue for sale without making a prior mortgagee a party to the suit; that if he seeks to redeem a prior mortgage in his suit for sale he may make the prior mortgagee a party and a complete decree may then be made as prescribed in the Form laid down in the Code; but that if a person is joined as a defendant for enforcement of the right under a mortgage he should be dismissed from the action as soon as he sets up a prior title.—*Sayamali v. Anisuddin*, 50 C. L. J. 152 (F. B.) (following *Nilkant v. Suresh*, 12 I. A. 171: 12 C. 414 (P. C.)).

Persons claiming a paramount title and not interested in the equity of redemption are not necessary parties to a mortgage suit. But this general rule is subject to exceptions. And where a paramount title has been adjudicated on in a mortgage or redemption suit the defeated party will not be allowed to raise a plea that the Court was wrong to decide the contention.—*Ganshyam v. Ragho*, 10 P. 234: 130 I. C. 257: A. I. R. 1931 Pat. 64.

Parties in suits on mortgages—Where a party has been wrongly joined.—Where a prior mortgagee is impleaded by mistake the decree should ordinarily be for sale of the property subject to the prior mortgage.—*Phool Kuari v. Bhagwan Das*, 52 A. 426 : 124 I. C. 476 : A. I. R. 1930 All. 113.

A prior mortgagee impleaded as such in a puisne mortgagee's suit is not bound to set up his prior mortgage in defence of his rights; but if he has a subsequent mortgage as well he is a necessary party in such a suit and then he must set up not merely his later but his prior mortgage as well failing which he will be debarred by the rule of *res judicata* from suing to enforce his earlier mortgage.—*Krishna Doyal v. Syed Md.*, 19 C. W. N. 942 : 26 I. C. 673. The rule that a question of paramount title cannot be investigated is subject to exceptions, and so where a defendant in a mortgage suit has a two-fold character, namely, purchaser of the equity of redemption and also the holder of a paramount title, though he is impleaded in the former capacity only he could set up the latter title also, and consequently if he does not plead it the decree in the mortgage suit is binding on him.—*Srimanta v. Bindubasini*, 38 O. L. J. 183. This has been doubted on the view that a paramount title cannot be pleaded, and it has been held that in a subsequent suit he may assert such title.—*Sonahannessa v. Abdul*, 35 C. W. N. 510 : 134 I. C. 892 : A. I. R. 1932 Cal. 12 : 58 O. 1222.

The accident that two capacities reside in one person will not simplify the proceedings or essentially alter the position. In assuming the capacity of a holder of a paramount title and setting up such title the defendant becomes in effect a third party and sets up pleas so that the case will not be covered by Or. III, r. 2 as the two causes of action will not be against the same defendant within the meaning of the rule.—*Ramasamy v. Marimuthu*, A. I. R. 1928 Mad. 764.

The following propositions have been deduced from authoritative judicial decisions :—(1) Where a party who is a prior mortgagee and nothing more is impleaded and nothing is alleged in derogation of his priority he will be taken to have been impleaded under Or. XXXIV, r. 12 and his priority is not affected; (2) where the party impleaded is a prior mortgagee and nothing more and an allegation is made in the plaint detracting from his priority, his priority is barred; (3) where the party impleaded is a puisne mortgagee and therefore a necessary party but claims priority he must assert and prove his priority.—*Brijmohan v. Dukhan*, 9 P. 816 : 130 I. C. 168 : A. I. R. 1931 Pat. 33 [referring to *Radha Krishna v. Khurshed*, 47 I. A. 11 : 47 C. 662 (P. C.) : 55 I. C. 959 : A. I. R. 1920 P. C. 81; *Srigopal v. Prithi Singh*, 29 I. A. 118 : 24 A. 429 (P. C.); *Muhammad Ibrahim v. Ambika Prasad*, 39 I. A. 68 : 39 C. 527 : 14 I. C. 496]. See also *Fazal Rab v. Manzoor*, 28 A. L. J. 1222 : A. I. R. 1931 All. 76.

A firm A as prior mortgagees, sued the mortgagors impleading a firm S as subsequent mortgagees. The suit was decreed in terms of an agreement arrived at between the mortgagors and the A firm. The Court added to the decree a note dismissing the suit against the S firm who did not put in appearance. The mortgagors not having made payments according to agreement, the property was put up for sale and purchased by the A firm in execution of its decree. Meanwhile the S firm also obtained a decree on the mortgage. On a contest as to priority, held that the mere fact that the

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puisne mortgagees were brought on the record and the suit was dismissed against them did not affect the priority of the A firm or their right to keep their first mortgage as a shield.—*S. K. &c. Chettyar Firm v. A. L. &c. Chettyar Firm*, 9 R. 1: 132 I. C. 281: A. I. R. 1931 Rang 105.

**Parties in suits on mortgages**—Members of a joint Hindu family.—In the earlier cases a good deal of conflict is noticeable on the question whether in suits on mortgages by or against the manager of a joint Hindu family, the other members are necessary parties. These cases have now lost much of their importance. The Judicial Committee in the case of *Sheo Shankar v. Jaddo Kunwar*, 36 A. 383 (P. C.) upheld the decision of the Allahabad Court on the ground that the plaintiffs, who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing member of the Hindu joint family of which the plaintiffs were also members, and their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions including foreclosure actions when the managers of a Hindu joint family effectively represented all the members of the family as a whole. In the case of *Kishan Prasad v. Har Narain*, 38 I. A. 45: 33 A. 272 (P. C.): 15 C. W. N. 321: 13 C. L. J. 345: 9 I. C. 739, their Lordships held further that the plaintiffs in that case were entitled as the sole managers of the family business, to make in their own names the contracts which gave rise to the claim, and thus they could sue on such contracts without joining the other members of the family. So in Allahabad and in Madras it has been held that in suits on mortgages by or against the manager the other members were necessary parties.—See *Hori Lal v. Nimman*, 34 A. 549 (F. B.): 15 I. C. 126; *Madan v. Kishan*, 34 A. 572: 15 I. C. 138; *Chetan v. Sartaj*, 46 A. 709 79 I. C. 1001; *Sheikh Ibrahim v. Rama Aiyar*, 35 M. 685 10 I. C. 874. The Patna High Court has also taken the same view and has held that a suit by a Karta of a Mitakshara joint family on behalf of all the members is a valid suit under Or. XXXIV, r. 1, and it is not necessary that the Karta should mention expressly that the suit is instituted by him in his capacity as Karta, provided the fact that the suit is brought by him in his representative capacity is obvious from the pleadings in the case.—*Jag Sah v. Ramchandra*, 2 P. L. T. 553: 63 I. C. 564, *Shashk Abdul Rahman v. Shib Lal*, 2 P. L. T. 572: 63 I. C. 570. See also *Girwar v. Musst. Makbulunnissa*, 1 P. L. J. 463: 36 I. C. 542; *Raghunandan v. Parmeshwar*, 2 P. L. J. 306: 39 I. C. 779; *Sital v. Asho*, 2 P. 175: 69 I. C. 677. *Parmeshwar v. Raj Kishore*, 3 P. 825: 80 I. C. 34. The Calcutta High Court refused to accept the view propounded in *Hori Lal v. Nimman*, 34 A. 549 (F. B.): 15 I. C. 126 and *Madan v. Kishan*, 34 A. 572 (F. B.): 15 I. C. 138 and held that where the Karta of a joint Hindu family, who was the holder of a usufructuary and a simple mortgage brought a suit on the latter without joining as party one of the members of the family, who had a joint interest with him in the usufructuary mortgage, the plaintiff was under the terms of S. 85 of the Transfer of Property Act, and Or. XXXIV, r. 1, C. P. C. bound to make him a party.—*Debi Prasad v. Dharamjit*, 41 C. 727 (following *Lala Surja Prasad v. Golabchand*, 27 C. 724 and 28 C. 517). See also *Biswanath v. Jagdip*, 40 C. 343; *Sidheswari v. Dharamjit*, 19 C. L. J. 437. The position has been reviewed by Mookerjee, J. in an elaborate judgment in *Kalipada v.*



*Raja Sati Prasad*, 36 C. L. J. 234 in which the Calcutta view has been dissented from and it has been observed thus:—

"The proposition that in suits relating to transactions affecting a joint Hindu family, all the members thereof need not always be joined, was foreshadowed by Sir James Colville in *Jogendra v. Funindro*, 14 M. I. A. 367: 17 W. R. 104; when he observed that cases sometimes occur "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, which may afterwards be considered as binding upon all that members of the family, their interest being taken to have been sufficiently represented by the party in the original suit". This assumes that in respect of the subject-matter of the litigation, the members of the family had no conflicting interests *inter se*. This principle has been reiterated by the Judicial Committee in two recent decisions. In *Kishan Prasad v. Har Narain*, 38 I. A. 45: 33 A. 272: 13 C. L. J. 345, where the Judicial Committee reversed the decision of the Allahabad High Court in *Shamrathi v. Kishan*, 29 A. 311, Lord Robson observed as follows:

"The Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all."

"Again, in *Seo Sankar v. Jaddo Kunwar*, 41 I. A. 216: 36 A. 383 (P. C.): 18 C. W. N. 968: 20 C. L. J. 282, where the Judicial Committee affirmed the decision of the Allahabad High Court in *Jaddo v. Sheo Shaukar*, 33 A. 71, Lord Moulton observed as follows:

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"These pronouncements by the Judicial Committee weaken the effect of the decisions in *Bal Kishan v. Topenwar*, 15 C. L. J. 446: 17 C. W. N. 219: *Lala Suraj Prasad v. Golab Chand*, 28 C. 517; *Debi Prasad v. Dharamjit*, 41 C. 727; and *Biswanath v. Jagdip*, 40 C. 342, which has already been doubted by the Full Bench in *Brijnandan v. Bidya Prasad*, 42 C. 1068: 21 C. L. J. 543, namely, that all the co-parceners are necessary parties to a suit on a mortgage of joint-family property, so that if a decree is passed in such a suit without their being joined as parties, the decree is not binding on them, and they are entitled to sue for a declaration that their interests are not bound thereby. The opinion expressed by the Judicial Committee,

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"The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of universal application. The language of S. 26 of the Civil Procedure Code, 1892, corresponding to Or. I, r. 1 of the present Code is that 'all persons may be joined in one suit as plaintiffs, in whom the right to any relief ..... is alleged to exist, whether jointly, severally, or in the alternative .....'. Section 30 of the Code of 1892, corresponding to Or. I, r. 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in S. 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legal principle but on the facts of the case. The rule is subject to the exceptions stated in S. 345 : 9 I. C. 739 : 13 C. L. J. 345 already referred to, shows that the case of the manager of a Hindu family is such an exception."

This view does not militate against the decisions of the Judicial Committee in *Balwant Singh v. Rockwell Clancy*, 39 I. A. 109 : 34 A. 296 : 15 C. L. J. 475; and *Ganesha Row v. Tuljaram*, 40 I. A. 132 : 36 M. 295 : 17 C. W. N. 765 : 18 C. L. J. 1.

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"These pronouncements by the Judicial Committee weaken the effect of the decisions in *Bal Kishan v. Thapewar*, 15 C. L. J. 446: 17 C. W. N. 219: *Lala Suraj Prasad v. Golab Chand*, 28 C. 517: *Debi Prasad v. Dharamjit*, 41 C. 727; and *Biswanath v. Jagdip*, 40 C. 342, which has already been doubted by the Full Bench in *Brijnandan v. Bidya Prasad*, 42 C. 1063: 21 C. L. J. 543, namely, that all the co-parceners are necessary parties in a suit on a mortgage of joint-family property, so that if a decree is passed in such a suit without their being joined as parties, the decree is not binding on them, and they are entitled to sue for a declaration that their interests are not bound thereby. The opinion expressed by the Judicial Committee.

namely, that where a suit is brought on a mortgage by or against a manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, which will consequently not fail by reason of their non-joinder, harmonises with the rule enforced in Allahabad in *Hori Lal v. Nimman*, 34 A. 549 (F. B.) and *Madan Lal v. Kishan Singh*, 34 A. 572 (F. B.); in Madras in *Sheik Ibrahim v. Rama Aiyar*, 35 M. 685, and in Patna in *Abdul v. Shiblul*, 2 P. L. T. 572; *Baij Nath v. Dahir*, (1920) P. 261 : 1 P. L. T. 589; *Muhammed v. Khedan*, 1 P. L. J. 154 : 2 P. L. W. 365; *Girwar v. Makbulunnessa*, 1 P. L. J. 468, and *Raghunandan v. Parmeswar*, 2 P. L. J. 206. In Bombay, a similar result has been reached by a circuitous process, for although it has been held that all the co-parceners are necessary parties to a suit brought on a mortgage by or against the manager, the decree in a suit, not so constituted against all the members, but brought against the manager alone in his representative character, when executed, passes the interest of the other co-parceners also in the property, though the sale may be avoided by them on the ground that they were not liable for the debt contracted by the manager; see *Ramchandra v. Shripatrao*, 40 B. 248; *Laxman v. Vinayak*, 40 B. 329; *Chimna v. Sada*, 12 Bom. L. R. 811; *Ramkrishna v. Vinayak*, 34 B. 354; *Madhusudan v. Bhau*, 15 Bom. L. R. 36. The true position is tersely put by Benson and Sundara Iyer, JJ. in *Sheik Ibrahim v. Rama Aiyar*, 35 M. 685.

"The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of universal application. The language of S. 26 of the Civil Procedure Code, 1882, corresponding to Or. I, r. 1 of the present Code is that 'all persons may be joined in one suit as plaintiffs, in whom the right to any relief ..... is alleged to exist, whether jointly, severally, or in the alternative.....' Section 30 of the Code of 1882, corresponding to Or. I, r. 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that all persons having such interest must be joined as plaintiffs, and others, who are not parties to the suit, may be added as defendants, or has not been laid down as a rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The judgment of the Judicial Committee in *Kishan Prasad v. Har Narain*, 38 I. A. 45; 33 A. 272 (P. C.) : 15 C. W. N. 321 : 13 C. L. J. 345; 9 I. C. 739; 13 C. L. J. 345 already referred to, shows that the case of the manager of a Hindu family is such an exception."

This view does not militate against the decisions of the Judicial Committee in *Balwant Singh v. Rockwell Clancy*, 39 I. A. 109 : 34 A. 296 : 15 C. L. J. 475; and *Ganesha Row v. Tuljaram*, 40 I. A. 132 : 36 M. 295 : 17 C. W. N. 765 : 18 C. L. J. 1.

The Calcutta High Court, however, laid down that where the doctrine of representation is properly applicable to the facts and where it is established that that the mortgagee was not aware of the existence of a member of a joint Mitakshara family as interested in the equity of redemption and consequently did not bring him before the Court in the mortgage suit, the

principle laid down by the Judicial Committee in *Sheo Shankar v. Jadoo-Kunwar*, 36 A. 383 (P. C.) should be applied in preference to that adopted in *Lala Suraj Prosad v. Golab Chand*, 28 C. 517.—*Raghoram v. Rajani*, 21 C. L. J. 452. See also *Halli Jha v. Bhyia Lal*, 21 C. L. J. 454.

The mere omission to describe the *Karta* of a family as such in the plaint does not debar the plaintiff from claiming or proving that the managing member represents the family for the purposes of the suit.—*Gobind v. Baldeo*, 126 I. C. 369: A. I. R. 1980 Pat. 293.

The more recent decisions of the Judicial Committee in *Ganpat v. Bindbasini*, 47 I. A. 91: 47 C. 924 (P. C.): 24 C. W. N. 924: 56 I. C. 274 and *Lingangowda v. Basangowda*, 54 I. A. 122: 51 B. 450: 101 I. C. 44 are ample authority for the proposition that the manager represents all the other members of the family and so it does not matter whether any individual member is a party or not. Sons are not necessary parties to suits on mortgages of self-acquired properties executed by the father; in such a suit the other members are not necessary parties.—*Yadilal v. Shah Khushal*, 27 B. 157. In a suit for sale in respect of a mortgage of ancestral properties the plaintiffs' father and grand-father, the latter having executed the mortgage, were parties, but the plaintiffs were not and a decree was obtained. Plaintiffs then sued for a declaration that the property was not liable to be sold as they had not been made parties to the suit. Held on the finding that the mortgage was for discharging antecedent debts and bound the plaintiffs' estate, and that they had been effectively represented by their father—*Madhusudan v. Bhagwan*, 53 B. 444: A. I. R. 1929 Bom. 213: (referring to the propositions laid down in *Brij Narain v. Mangal Prasad*, 51 I. A. 129: 46 A. 95 (P. C.): A. I. R. 1924 P. C. 50).

In the Punjab under the customary law a son, in the presence of his father, has no interest in the property to give him a title to be impleaded in the suit against the father for the sale of property mortgaged by him.—*Shir Dev Singh v. Jai Ram*, 125 P. R. 1919: 53 I. C. 411.

**Parties to suits on mortgages—Mahomedan heirs.**—There is no right of representation under the Mahomedan law and the property on the death of a Mahomedan descends in different shares and is not contingent on the payment of his debts, the doctrine of representation not applying, the question arises as to whether a suit against some of the heirs of the mortgagor is maintainable or what passes at a sale in execution of a decree passed in such a suit. A Mahomedan effected a simple mortgage and died; on his death the mortgagee instituted a suit against one only amongst several of his heirs, and when objection was taken added the other heirs as defendants but after the period of limitation was over. It was contended by the added defendants that the suit as against them was barred under S. 22 of the Limitation Act. It was held thus:—"The suit was properly brought by the plaintiff to enforce payment of money charged upon immovable property within 12 years of the date when the money sued for became due. The money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage. A decree for sale obtained after contest in the suit as originally constituted would have been binding on the other heirs."

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even though they had not been added. The suit therefore was, as originally filed, one in which the plaintiff could have obtained the relief sought...As pointed out in *Guruvayya v. Dattatraya*, 23 B. 11 the addition of parties after the expiry of the time for the institution of the suit does not necessarily involve its dismissal under S. 22.—*Virchand v. Kondu*, 39 B. 729; 31 I. C. 180.

The plaintiff, a mortgagee, sued to recover the mortgage-debt by sale of the mortgaged properties; the original mortgagor, who was a Mahomedan, having died before the suit, only his widow and daughters were made defendants. It was contended that the suit was bad for non-joinder of other heirs of the mortgagor. *Held* that the non-joinder of parties was not fatal to the suit, in as much as the suit was properly constituted at the date of the plaint, so as to enable the Court to adjudicate as between the parties impleaded, and that a decree as against the shares of those parties might be passed; but the observation in *Virchand v. Kondu*, 39 B. 729; 31 I. C. 180, that the mortgage-decree would have been binding on the Mahomedan co-heirs who were not parties was dissected from.—*Shahasaheb v. Sadashiv*, 43 B. 575. 51 I. C. 223; 21 Bom. L. R. 369.

In a suit on a mortgage by an executor under a Mahomedan Will two of the beneficiaries under the Will were impleaded but the suit was dismissed as they were not served with summons. *Held* that by virtue of Or. XXI, r. 1 the executor sufficiently represented the estate.—*Athrones v. Ahmed*, 33 Bom. L. R. 1056; A. I. R. 1931 Bom. 533.

**Parties in suits on mortgages—Sub-mortgagees.**—See notes under rr. 2 and 3, rr. 4 and 5 and rr. 7 and 8, *post*.

**Parties in suits on mortgages—Attaching creditor.**—An attaching creditor, under the Transfer of Property Act as it stood before the amendments of 1929, had the right to redeem. In a large number of decisions it has been held that the creditor of a mortgagor who obtains execution of his decree by attachment of the mortgagor's interest in the mortgaged property or part of it is entitled to redeem.—*Ghulam Husain v. Dina Nath*, 23 A. 467; *Dina Nath v. Lachmi Narain*, 25 A. 446; *Kedarnath v. Uma Charan*, 6 C. W. N. 57; *Venkata v. Venkataramayya*, 37 M. 418; *Lakshpat v. Fakhruddin*, 39 A. 536; 15 A. L. J. 471. It was held that where a mortgaged property was attached by a holder of a money-decree and after attachment... ed a decree for sale... the order for sale... *Tedula*, 15 I. C. 334.

But it has been also held that although an attaching creditor is entitled to redeem he has no interest in the mortgaged property, a purchaser at a sale held under such attachment has no right to redeem the purchaser at the mortgage-sale or to resist his getting possession of the property.—*Shananda v. Sri Nath*, 17 C. W. N. 571; *Veyindramuthu v. Maya*, 43 M. 696; *Chamiyappa v. Rama*, 44 M. 232 (a Court-sale of the judgment-debtor's interest in attached property puts an end to the attachment and incidentally to the attaching creditor's right of redemption under S. 91 of the Act); *Subramania v. Sinnammal*, 53 M. 881 (F. B.); 127 I. C. 624; 59 M. L. J. 634; A. I. R. 1930 Mad. 601; *Kiernander v. Benimadhab*, 59 C. 598; 134 I. C. 561; A. I. R. 1931 Cal. 763; *Koramal v. Raghubir*, A. I. R. 1929 All. 861.



Certain paddy land was mortgaged to the plaintiffs with the standing crops. A creditor of the mortgagor attached the paddy after the crops had been cut and realized the sale-proceeds. The mortgagee instituted a suit to enforce his mortgage impleading the mortgagor and attaching creditor as parties. *Held*, that as the claim against the mortgagee was based on contract and that against the attaching creditor was based on trust the joinder of the two causes of action in the same suit was not justified under 'Or. I, r. 3.—*C. T. & Co. Chettyar v. N. S. & Co. Chettyar Firm*, 133 I. C. 482; A. I. R. 1931 Rang. 108.

By the amendments of 1929 Cl. (f) of S. 91 has been omitted as attachment does not create any interest such as a charge or a lien on the property attached (29 C. 428 (F. B.); 32 M. 429) and there is no reason why an attaching creditor should have the right to redeem.

Parties in suits on mortgages—Trustees, etc.—On account of the rule of representation of Trustees, Executors and Administrators contained in Or. XXXI, r. 1, in mortgage suits by or against them in respect of property vested in them the beneficiaries need not be parties.—See *Athronce v. Sheikh Ahmed*, 33 Bom. L. R. 1056; A. I. R. 1931 Bom. 533.

Parties in suits on mortgages—Benamdars.—There was a conflict of judicial opinion on this question also, but it has been set at rest by the decision of the Judicial Committee in *Gur Narayan v. Sheoklal*, 46 I. A. 1: 46 C. 566 (P. C.); 23 C. W. N. 521; 49 I. C. 1, in which it was explained that a *benamdar* though he has no beneficial interest in the property or business standing in his name, represents in fact the real owner, and is, as far as their relative legal position is concerned, a mere trustee for him. The conflicting cases are noted in the arguments in that case.

A person who is named in a mortgage deed as a mortgagee, although in fact merely a *benamdar* for those beneficially interested, can institute a suit in his own name, either for foreclosure or sale and the suit should not be dismissed merely because the beneficial owner is not added as a party. The principle extends to a mortgage taken by some only of the members of a joint Hindu family who, unlike as in the cases of a *benamdar*, have a beneficial interest themselves in addition to their authority to act on behalf of the family.—*Hit Lal v. Jiboo Mahton*, 75 I. C. 378.

See also the following cases in which the *benamdar's* right to maintain a suit on a mortgage has been upheld.—*Bhola Prasad v. Ram, Lal*, 24 C. 34; *Surendra v. Kshitindra*, 29 C. L. J. 434; *Yad Ram v. Umrao Singh*, 21 A. 380; *Vaitheswara v. Srinivasa*, 42 M. 348 (F. B.); *Ravji v. Mahadev*, 22 B. 672.

Parties in suits on mortgages—Persons holding subordinate interests.—The expression "any interest or charge upon property" is not necessarily confined to rights of ownership but includes such minor interest as that of a tenant or of a person holding a charge.—*Paya Malathil v. Kovamel*, 19 M. 151; *Baikuntha v. Mohesh*, 22 C. W. N. 128 (dismissing from *Girish v. Juramoni*, 5 C. W. N. 83). A *putnidar* is a necessary party, so that he may have the opportunity to redeem.—*Kasimunnissa v. Nilratna*, 8 C. 72; 9 C. L. R. 173; *Kokil v. Duli Chund*, 5 C. L. R. 243; *Jugul v. Kartic*, 21 C. 116. If not so joined a *putnidar* or *durputnidar* is entitled to redeem by a separate suit.—*Jnanendra v. Shorashi Oharan*, 49 C. 626. A *sureshgidar* is also a necessary party.—*Radha Pershad v. Monohur*, 6 C. 317:

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7 C. L. R. 293. So also a permanent lessee.—*Raghnandan v. Ambika*, 29 A. 679; 4 A. L. J. 703.

But a person having a merely ryoti interest is not, because his interest is not such as will entitle him to redemption.—*Girish v. Juramoni*, 5 C. W. N. 83. Nor the holder of a *maurashi mokurari* potta under the mortgage.—*Sripoti v. Mohip*, 9 C. 643; 13 C. L. R. 119; but see *Musst. Nand Kuar v. Kunj Behari Lal*, 109 I. C. 750, in which it was held that the *mokarraridar* was entitled to redeem and consequently the plaintiff mortgagee's remedy lay in a suit not for possession but for sale (relying on *Hargu Lal v. Gobind*, 19 A. 541 (F. B.); *Madan Lal v. Bhagwan*, 21 A. 235 (F. B.); and *Balli v. Bindeswari*, 35 I. C. 532; 1 P. L. J. 133).

**Explanation.**—The object of the explanation has been stated in the notes under the heading "History," ante. The prior mortgagee has a paramount claim outside the controversy; if without the prior mortgagee being made a party a decree is passed the property would be sold subject to the prior mortgage; even if he is made a party, the decree for sale would be subject to his rights unless it can be established that his mortgage was impugned and the plaintiff puisne mortgagee did in point of fact seek to displace the title of the prior mortgagee and to postpone it to their own.—*Radha Kishun v. Khurshed Hossain*, 47 I. A. 11; 47 C. 662 (F. C.); 25 C. W. N. 417; 55 I. C. 959.

If a person holds two independent mortgages of different dates he may sue on the later mortgage subject to his rights under the earlier mortgage unless restrained by a covenant to the contrary; *Subramania v. Balasubramania*, 38 M. 927 (F. B.); 30 I. C. 317; *Jagernath v. Mohra*, 2 P. L. J. 118; 39 I. C. 76; *Nawaba Waziri Begum v. Shashi Bhusan*, 2 P. 874; 74 I. C. 820; *Keshav Ram v. Ranchhod*, 30 B. 156; *Dhondo v. Bhikaji*, 39 B. 138; 27 I. C. 1005; *Lakshmanan v. Muthaya*, 40 M. L. J. 126; 62 I. C. 833; *Ram Saran v. Abdul*, 50 A. 742; 26 A. L. J. 529; A. I. R. 1923 All. 378; 114 I. C. 38. A doubt was expressed in the Calcutta High Court in *Hari Narain v. Kusum Kumari*, 37 C. 589; but the same view was expressed in *Nilu v. Asirbad*, 25 C. W. N. 129; 33 C. L. J. 232; 60 I. C. 809.

The explanation implies that on a decree for sale by a puisne mortgagee the decree should ordinarily be for the sale of the property subject to the prior mortgage and the interest of the prior mortgagee would not be affected.—*Phool Kuari v. Bhagwan*, 52 A. 426; 124 I. C. 476; 28 A. L. J. 321; A. I. R. 1930 All. 113.

**Mortgages of immoveable property.**—They are defined in the Transfer of Property Act, 1882, S. 58, being Simple Mortgages, Mortgages by Conditional Sale, Usufructuary Mortgages, English Mortgages, Mortgages by deposit of Title Deeds and Anomalous Mortgages.

Section 67, Cl. (a) of the Act says:—"Nothing in this section shall be deemed to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgage as such or a mortgagee by a conditional sale as such to institute a suit for sale". Section 96 of the Act says:—"The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a

mortgage by deposit of title deeds". The result of these provisions now is as follows :—A suit for sale can only be brought by an English mortgagee or a simple mortgagee or a mortgagee by deposit of title deeds (to whom a period of 2 years, *i. e.*, up to the 1st April 1932 has been given, so far as Bombay is concerned, to enforce his remedy by way of foreclosure by the Transfer of Property (Amendment) Supplementary Act, 1929). A simple mortgagee or an English mortgagee cannot institute a suit for foreclosure, a usufructuary mortgagee as such cannot institute a suit either for sale or for foreclosure. A mortgagee by conditional sale can institute a suit for foreclosure but not a suit for sale; an anomalous mortgagee can institute a suit for foreclosure only if the terms of his bond entitle him to foreclose, and his rights and liabilities shall be determined by the contract in the mortgage deed and, so far as such contract does not extend, by local usage (S. 98). A mortgagor has the right to redeem (S. 60). And a usufructuary mortgagor has the right to recover possession (S. 62).

**Simple mortgage, mortgage by conditional sale, usufructuary mortgage.**—See S. 58, (b) (c) and (d) of the Transfer of Property Act.

**English mortgage.**—In an English mortgage there is a conveyance by the debtor of his property to the creditor and a covenant to pay the debt within a certain time, and a proviso that on this condition being fulfilled the property shall be reconveyed by the mortgagee to the mortgagor. The three essentials of an English mortgage, as defined in S. 58 (c) of the T. P. Act, are (1) that the mortgagor should bind himself to repay the mortgage-money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. See *Narayana Ayyar v. Venkaramana*, 25 M. 220 (F. B.). An English mortgage is somewhat similar to a mortgage by conditional sale. The main distinction between these two classes of mortgages is, that in an English mortgage, the possession usually remains with the mortgagor and it is not essential to the mortgagee's title that he should take possession. English mortgages made between Hindus in the mofussil have been treated as mortgages by conditional sale.—*Shurnamoyee v. Srinath Das*, 12 C. 614.

**Equitable mortgage.**—Equitable mortgage had not been defined in S. 58 of the T. P. Act prior to its amendment in 1929 but its validity was recognized in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon in the last para. of S. 59 of the T. P. Act. An equitable mortgage is created by deposit of the title deeds of property, in order to secure the advance of money required to prevent the sale of such property. In order to give the creditor an equitable mortgage it must appear that money had already been advanced when the deposit took place, and then it is not material that they were deposited for the purpose of having a mortgage executed, nor is it necessary that all the title deeds should be deposited. It is now defined in S. 58 (f) of the Act.

In India, there is no such distinction between legal and equitable estates as is known in English law. The deposit of mortgage deeds by a mortgagor with the agent of his creditors at Calcutta as security for the

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debts due to the creditors created a good equitable sub-mortgage and the mortgage is concluded on the day the deposit is made and is a valid mortgage. A deposit of title deeds of certain property under a verbal arrangement to secure payment of a debt, is not an oral agreement or declaration within the meaning of S. 48 of the Registration Act. A letter containing an admission of a previous mortgage as having been already made does not require registration.—*Gokul Dass v. The E. M. Co.*, 33 C. 410: 10 C. W. N. 276: 4 C. L. J. 102 (31 C. 57, 8 C. W. N. 41, 11 C. 158, referred to as to registration; 20 W. R. 150 followed).

Where a loan is taken in Calcutta by deposit of title deeds of property in order to secure the advance of money required to prevent the sale of such property, held, that there is an equitable mortgage in favour of the creditor.—Priority of a subsequent simple mortgage over a prior equitable mortgage.—*Giridhari Lal v. Paresh Nath*, 4 C. L. J. 495: 11 C. W. N. 1.

The defendant borrowed money from the plaintiff by deposit of title deeds relating to immovable properties situate partly inside and partly outside the town of Calcutta, as collateral security. Held, that the mortgage was valid as an equitable mortgage, and the appropriate remedy for such a mortgage is a decree for sale.—*Raja Sreenath v. Gadadhar Das*, 24 C. 348: 1 C. W. N. 225 (14 B. 239 and 269, referred to). See also *Madho Das v. Ram Kishan*, 14 A. 238, and *Himalaya Bank v. Quarry*, 17 A. 252.

Where a mortgage deed for Rs. 25,000 was executed and subsequently an advance of Rs. 8,000 on a promissory note was made and it was agreed that the said sum should constitute a further charge on the properties included in the mortgage, the title deeds of which were in the possession of the mortgagee, held that a mortgage with deposit of title deeds will cover future advances if such is the agreement when the first advance is made.—*Grinder Coomar v. Kumud Kumari*, 2 C. W. N. 356: 25 C. 611.

The following recent cases are important.—In the case of *Paranji-van Das Mehta v. Chan Ma Phee*, L. R. 43 I. A. 122: 43 C. 895 (P. C.): 20 C. W. N. 925: 24 C. L. J. 314, the Judicial Committee laid down the law as follows:—

"The law upon the subject is beyond any doubt: (1) where titles are banded over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title; (2) where, however, titles are handed over accompanied by a bargain, that bargain must rule; (3) lastly when the bargain is a written bargain, it, and it alone must determine what is the scope and extent of security."

Their Lordships then quoted from *Shaw v. Foster*, L. R. 5 H. L. 321, the words of Lord Cairns:—

"Although it is a well established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, is sufficient to create a mortgage, I apprehend that where a deposit is accompanied by a written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

In the case of *Subramonian v. Lutchman*, L. R. 50 I. A. 77 : 50 C. 338. (P. C.) : 28 C. W. N. 1 : 38 C. L. J. 41 : 71 I. C. 650 : 44 M. L. J. 602, their Lordships quoted the dictum of Couch, C. J. in the case of *Kedar Nath v. Sham Loll*, 11 B. L. R. O. C. J. 405 and the passage in *Pranjivandas Mehta v. Chan Ma Phee*, 43 I. A. 122 : 43 C. 895 (P. C.) noted *ante* and *Shaw v. Foster*, L. R. 5 H. L. 321, referred to above and then proceeded to consider whether the document before them constituted the bargain between the parties or whether it was merely the record of an entirely completed transaction. On the evidence and upon the terms of the document their Lordships held that the memorandum in question was the bargain between the parties.

In the case of *Obla Sundara Chariar v. Narayana Ayyar*, 58 I. A. 68, their Lordships referring to the case of *Subramonian v. Lutchman*, 50 I. A. 77 noted *ante*, observed thus:—

"While their Lordships do not think that the language of Lord Carson "conveys or was intended to convey the meaning that no memorandum relating to the deposit of title deeds can be within S. 17 of the Registration Act unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties."

It should be observed here that in *Subramonian's case* their Lordships considered the oral evidence relating to the transaction and laid stress on the terms of the memorandum in which the words were "we hand you *herewith* the title deeds" and "please also hold this as further security" and came to the conclusion that the memorandum in question constituted the bargain between the parties. It should further be noted that in *Obla Sundara Chariar's case* although the promissory note and the memorandum were dated one and the same day and were handed to the lender at one and the same time, their Lordships referred to the evidence relating to antecedent negotiations and referred to the words of the memorandum which were, "As agreed upon in person I have delivered to you the undermentioned documents as security," and held that the memorandum merely recorded the particulars of the deeds, the subject of the deposit, and held that it did not require registration.

Although the proviso to S 59 of the Transfer of Property Act merely provides that nothing in that section shall render invalid mortgages by deposit of title deeds at the places mentioned therein, but does not itself validate such mortgages, the validity of such mortgages must be deemed as recognised by the Act. When, therefore, such a mortgage is created at one of the places mentioned in the proviso and the property is situated at a place where too the Transfer of Property Act wholly applies, the onus is on the party impugning the validity of the mortgage to establish its invalidity by proving some special prohibition. The onus is not on the mortgagee to prove the validity of the mortgage independently of the Act on the ground that the Act does not expressly recognize such mortgages.—*Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 M. I. A. 303 referred to.—*Papish Naidu v. Naganatha Sethupathi*, 35 C. W. N. 1061 (P. C.).

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**Anomalous mortgage.**—Section 98 of the Transfer of Property Act, which contained a definition of 'Anomalous Mortgage' has been repealed and the definition is now given in S. 59 (g) by the Transfer of Property (Amendment) Act 1929. As to the nature and effect of such mortgages and the rights and liabilities of parties under them, see *Hikmatulla v. Imam Ali*, 12 A. 203; *Visvalinga v. Palaniappa*, 21 M. 1; *Amarchand v. Kila Morar*, 27 B. 600; *Neelakandan v. Ananthakrishna*, 30 M. 61; 16 M. L. J. 462; *Gopalan Nair v. Kunhan Menon*, 30 M. 300; 17 M. L. J. 189; *Tukaram v. Ramchand*, 26 B. 252 (F. B.).

When a plaintiff, in the case of an anomalous mortgage providing both for foreclosure and for sale at his option, sues for foreclosure only, the mortgagor cannot compel him to accept a decree for sale. There is nothing in Or. XXXIV, r. 1, Cl. 2, which can override the provisions of S. 98 of the T. P. Act—*Baqar Hussain v. Balak Ram*, 18 I. C. 24.

Where there was a mortgage with possession under a deed which contained also a personal covenant to pay principal and interest and there was, further, a lease of the property to the mortgagor on a rent equal to the interest of the mortgage amount, to be realised in default of payment, from the income of the property mortgaged and leased back: *Held*—That the mortgage in question was not a pure usufructuary mortgage but an anomalous mortgage or a combination of simple and usufructuary mortgage to which S. 62 of the Transfer of Property Act could not apply. The section applicable was S. 61 under which the mortgagor was entitled to redeem only if he paid off both the mortgage money and the arrears of rent under the lease. That the mortgage and the lease were parts of the same transaction, the latter being in the nature of machinery for realising the interest. That under Or. XXXIV, r. 1, C. P. C. all claims affecting the equity

*Panaqanti Ramarayanimgar v. Maharaja of Venkatagiri*, 31 C. W. N. 670. (P. C.): 45 C. L. J. 395.

**Pledge—Lien Hypothecation of moveables—Mortgage of intangible property.**—A pledge as defined in the Contract Act is the bailment of goods as security for payment of a debt or performance of a promise (S. 172). A bailment as defined in the said Act is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them (S. 148). There must be delivery of the goods to the pledgee and a keeping of them by him; the delivery need not be simultaneous with the lending of the money; the delivery may be a *de facto* or an actual delivery, *e. g.*, a manual delivery if the goods are not bulky; the delivery may also be symbolical or constructive, *e. g.*, by delivery of the key of the warehouse where the goods are stored, or something may be done which is equivalent to delivery, *e. g.*, a keeping of the goods, without any actual delivery or when the pledgee already has the goods.—*Beal on the Law of Bailments*, p. 143.

Mortgage of goods at common law has no analogy to a simple mortgage. The distinction between a mortgage of goods at Common Law and a lien or pledge is thus explained:—Lien arises from the mode of dealing between.

In the case of *Subramonian v. Lutchman*, L. R. 50 I. A. 77 : 50 C. 338 (P. C.) : 28 C. W. N. 1 : 38 C. L. J. 41 : 71 I. C. 650 : 44 M. L. J. 602, their Lordships quoted the dictum of Couch, C. J. in the case of *Kedar Nath v. Sham Loll*, 11 B. L. R. O. C. J. 405 and the passage in *Pranjivandas Mehta v. Chan Ma Phee*, 43 I. A. 122 : 43 C. 895 (P. C.) noted *ante* and *Shaw v. Foster*, L. R. 5 H. L. 321, referred to above and then proceeded to consider whether the document before them constituted the bargain between the parties or whether it was merely the record of an entirely completed transaction. On the evidence and upon the terms of the document their Lordships held that the memorandum in question was the bargain between the parties.

In the case of *Obla Sundara Chariar v. Narayana Ayyar*, 58 I. A. 68, their Lordships referring to the case of *Subramonian v. Lutchman*, 50 I. A. 77 noted *ante*, observed thus:—

"While their Lordships do not think that the language of Lord Carson 'conveys or was intended to convey the meaning that no memorandum relating to the deposit of title deeds can be within S. 17 of the Registration Act unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties.'

It should be observed here that in *Subramonian's case* their Lordships considered the oral evidence relating to the transaction and laid stress on the terms of the memorandum in which the words were "we hand you *herewith* the title deeds" and "please also *hold this* as further security" and came to the conclusion that the memorandum in question constituted the bargain between the parties. It should further be noted that in *Obla Sundara Chariar's case* although the promissory note and the memorandum were dated one and the same day and were handed to the lender at one and the same time, their Lordships referred to the evidence relating to antecedent negotiations and referred to the words of the memorandum which were, "As agreed upon in person I have delivered to you the undermentioned documents as security," and held that the memorandum merely recorded the particulars of the deeds, the subject of the deposit, and held that it did not require registration.

Although the proviso in S. 59 of the Transfer of Property Act merely provides that nothing in that section shall render invalid mortgages by deposit of title deeds at the places mentioned therein, but does not itself validate such mortgages, the validity of such mortgages must be deemed as recognised by the Act. When, therefore, such a mortgage is created at one of the places mentioned in the provision and the property is situated at a place where too the Transfer of Property Act wholly applies, the *onus* is on the party impugning the validity of the mortgage to establish its invalidity by proving some special prohibition. The *onus* is not on the mortgagee to prove the validity of the mortgage independently of the Act on the ground that the Act does not expressly recognize such mortgages—*Yarden Seth Sam v. Luckpathy Royjee Lallah*, 9 M. I. A. 303 referred to.—*Papiah Naidu v. Naganatha Sethupathi*, 35 C. W. N. 1061 (P. O.).

**Anomalous mortgage.**—Section 98 of the Transfer of Property Act, which contained a definition of 'Anomalous Mortgage' has been repealed and the definition is now given in S. 58 (g) by the Transfer of Property (Amendment) Act 1929. As to the nature and effect of such mortgages and the rights and liabilities of parties under them, see *Hikmatulla v. Imam Ali*, 12 A. 203; *Visvalinga v. Palaniappa*, 21 M. 1; *Amarchand v. Kila Morar*, 27 B. 600; *Neelakandan v. Ananthakrishna*, 30 M. 61; 16 M. L. J. 462; *Gopalan Nair v. Kunhan Menon*, 30 M. 300; 17 M. L. J. 189; *Tukaram v. Ramchand*, 26 B. 252 (F. B.).

When a plaintiff, in the case of an anomalous mortgage providing both for foreclosure and for sale at his option, sues for foreclosure only, the mortgagor cannot compel him to accept a decree for sale. There is nothing in Or. XXXIV, r. 1, Cl. 2, which can override the provisions of S. 98 of the T. P. Act.—*Baqar Hussain v. Balak Ram*, 18 I. C. 24.

Where there was a mortgage with possession under a deed which contained also a personal covenant to pay principal and interest and there was, further, a lease of the property to the mortgagor on a rent equal to the interest of the mortgage amount, to be realised in default of payment, from the income of the property mortgaged and leased back: *Held*—That the mortgage in question was not a pure usufructuary mortgage but an anomalous mortgage or a combination of simple and usufructuary mortgage to which S. 62 of the Transfer of Property Act could not apply. The section applicable was S. 61 under which the mortgagor was entitled to redeem only if he paid off both the mortgage money and the arrears of rent under the lease. That the mortgage and the lease were parts of the same transaction, the latter being in the nature of machinery for realising the interest. That under Or. XXXIV, r. 1, C. P. C. all claims affecting the equity of redemption should be disposed of in one and the same suit and the mortgagee being entitled to be paid off the mortgage money as well as the rent under the lease was not bound to institute a separate suit for the latter charge.—*Panaqanti Ramarayaningar v. Maharaja of Venkatagiri*, 31 C. W. N 670 (P. C.); 45 C. L. J. 395.

**Pledge—Lien Hypothecation of moveables—Mortgage of intangible property.**—A pledge as defined in the Contract Act is the bailment of goods as security for payment of a debt or performance of a promise (S. 172). A bailment as defined in the said Act is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them (S. 148). There must be delivery of the goods to the pledgee and a keeping of them by him; the delivery need not be simultaneous with the lending of the money; the delivery may be a *de facto* or an actual delivery, *e. g.*, a manual delivery if the goods are not bulky; the delivery may also be symbolical or constructive, *e. g.*, by delivery of the key of the warehouse where the goods are stored, or something may be done which is equivalent to delivery, *e. g.*, a keeping of the goods, without any actual delivery or when the pledgee already has the goods.—*Deal on the Law of Bailments*, p. 143.

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**Pledge—Lien Hypothecation of moveables—Mortgage of intangible property.**—A pledge as defined in the Contract Act is the bailment of goods as security for payment of a debt or performance of a promise. (S. 172). A bailment as defined in the said Act is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them (S. 148). There must be delivery of the goods to the pledgee and a keeping of them by him; the delivery need not be simultaneous with the lending of the money; the delivery may be a *de facto* or an actual delivery, *e. g.*, a manual delivery if the goods are not bulky; the delivery may also be symbolical or constructive, *e. g.*, by delivery of the key of the warehouse where the goods are stored, or something may be done which is equivalent to delivery, *e. g.*, a keeping of the goods, without any actual delivery or when the pledgee already has the goods.—*Beal on the Law of Bailments*, p. 143.

Mortgage of goods at common law has no analogy to a simple mortgage. The distinction between a mortgage of goods at Common Law and a lien or pledge is thus explained:—Lien arises from the mode of dealing between,

the parties, the usage of the trade on it is given by express contract. It is the right of a creditor to retain the goods until the debt is paid or satisfied. Pledge is a delivery of goods to the creditor as security for his debt and the right to the property vests in the creditor so far as is necessary to secure the debt. The pledgee has a special property in the goods pledged. Mortgage is more than a pledge, it is a conveyance of the goods to the mortgagee conditionally that if the goods are not redeemed at the time stipulated the title of the mortgagee becomes absolute at law.—*Beal on the Law of Bailments*, p. 133. The distinction between such a mortgage and a pledge has been explained in *Ryall v. Rolle*, (1749) Atk. 164; *Jones v. Smith*, (1794) 2 Ves. 372; *Re Morrit, Ex parte Official Receiver*, (1886) 18 Q. B. D. 22, C. A. See also *Story on Bailments*, 9th Edn., S. 287.

Hypothecation of moveables, though not accompanied by delivery of possession has been recognized in this country and had sometimes been enforced even against bona fide purchasers.—*Deane v. Richardson*, 3 N. W. P. 54; *Shamsundar v. Oheita*, 3 N. W. P. 71; *Ko Kywetnee v. Ko Kounq*, 5 W. R. 189; *Sitaram v. Dhan*, 4 Bom. L. R. 577; *Shrish v. Mungri*, 9 C. W. N. 14; *Damodar v. Atmaram*, 8 Bom. L. R. 344; *In the matter of Summers*, 23 C. 592; *Punithavelu v. Bhaskyam*, 25 M. 406.

Hypothecation of property to come into being in future, is also valid. "It is not governed by the Transfer of Property Act or by the Contract Act. "The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in future and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."—*Per Jessel, M. R. in Collyer v. Isaacs*, L. R. 19 Ch. 342. See also *Hobroyd v. Marshall*, L. R. 10 H. L. 191.

Mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction and is in the nature of an agreement to mortgage moveable property that may come into existence in future.—*Misri Lal v. Mozhar Hossain*, 13 C. 262. Hypothecation of property to come into existence in future has been recognized in this country.—See *Bansidar v. Sant Lal*, 10 A. 133; *Palaniappa v. Lakshmanan*, 16 M. 429; *Baldeo v. Miller*, 31 C. 667; *Ram Sarup v. Mohan Lal*, 75 I. C. 816; *Baluram v. Ram Sarup*, 89 I. C. 410.

Mortgage of palas or turns of worship in the temple at Kalighat is warranted by custom though in a limited market and a suit for foreclosure of such a mortgage by way of conditional sale was upheld in *Mahamaya v. Haridas*, 42 C. 455; 20 C. L. J. 183; 27 I. C. 400.

The rules of Or. XXXIV are based on the principle of equity, which, in the absence of statutory provisions, applies to suits on mortgages of moveables as in *Ltd. v. Surendra*, 36 C. W. N. 263.

rr. 1, 2.

Distinction between mortgage and charge.—See notes under Or. XXXIV, r. 15, *post*.

Floating security.—In *Houldsworth v. Yorkshire Woolcombers' Association Limited*, (1903) 2 Ch. 284, Romer, L. J. said.—“I certainly do not intend to give an exact definition of the term ‘floating charge,’ nor am I prepared to say that there will be a floating charge within the meaning of the Act which does not contain all the three characteristics that I am about to mention but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge: (1) if it is a charge on a class of assets of a company, present or future; (2) if that class is one which in the ordinary course of business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.”

In the same case Cozens Hardy, J. said.—“My view is that the floating charge need not be on the whole undertaking nor the whole property of the company. It must, I think, embrace both present and future property and property of a particular class. It must I think contain expressly or by necessary implication a right in the company to deal with it for a certain time as though the charge had never been executed. When these conditions are found, I think you have a floating charge within the meaning of the Act.”

A floating security is not a future security, it is a present security which presently affects all the assets of the company expressed to be included in it. On the other hand it is not a specific security. The holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific security of the assets *plus* a licence to the mortgagor to dispose of him in the course of his business, but is a floating mortgage applying to every item comprised in the security but not affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.—*Per Buckley, L. J. in Evans v. Rival Granite Quarries Ltd.*, (1910) 2 K. B. 979.

‘Floating security’ has also been explained in *Wheatley v. Silkstone and High Moor Coal Co. Ltd.*, (1885) 29 Ch. D. 715; *Tailby v. Official Receiver*, (1888) L. R. 13 A. C. 523; *Driver v. Broad*, (1893) 1 Q. B. 744; *Government Stock and other Securities Investment Co. v. Manila Railway Co.*, (1897) A. C. 81; *Illingworth v. Houldsworth*, (1904) A. C. 355; *National Provincial Bank of England v. United Electric Theatres Ltd.*, (1916) 1 Ch. 132; *Hamer v. London City and Midland Bank Ltd.*, (1918) 87 L. J. K. B. 973. See also *J. D. Jones & Co. Ltd. v. Ranjit*, 54 C. 513.

Preliminary  
decree in fore-  
closure suit.

2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

- (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—
  - (i) principal and interest on the mortgage,

- (ii) the costs of suit, if any, awarded to him, and
  - (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or
- (b) declaring the amount so due at that date; and
- (c) directing—
- (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter paye such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and
  - (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff

shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

**3.** (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,  
and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

- (ii) the costs of suit, if any, awarded to him, and
  - (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or
- (b) declaring the amount so due at that date; and
- (c) directing—
- (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and
  - (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff

shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

**3. (1)** Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.



(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

### COMMENTARY.

**History.**—The above rr. 2 and 3 were substituted for the old rr. 2 and 3 by the Transfer of Property (Amendment) Supplementary Act 1929 which came into operation on the 1st April, 1930. The old rules are reproduced below:—

**Preliminary** 2. In a suit for foreclosure, if the plaintiff succeeds, decree in foreclosure suit. the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property. [S. 86.]

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree, and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem.

the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Power to enlarge  
time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

(3) On the passing of a decree under sub-rule (2), the debt secured by the mortgage shall be deemed to be discharged [S. 87.]

Section 86 of the T. P. Act, IV of 1892, was in these words:—*"In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court, the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property."*

Clauses (a) and (b) of old r. 3 corresponded to the first para. of the old section with some change of words only.

Clause (c) corresponded to para. 3 of the old section with some modifications. The words *"that if the defendant pays into Court the amount so due"* were substituted for the words *"that upon the defendant paying to the plaintiff or into Court the amount so due,"* which occurred in the beginning of para. 2 of the old section; and the words *"and shall, if so required, re-transfer the property"* were substituted for the words *"transfer the property"* which occurred in the old section after the words *"mortgaged property"*; and the words *"free from mortgage"* were added before the words *"all incumbrances."* The other changes were merely verbal.

Clause (d) was almost similar to para. 3 of the old section with the omission of the word *"absolutely"* which stood before the word *"debarred"* in the old section. The omission seems to have been made in view of sub-rule (3) of r. 69, Or. XXI, which is applicable to all sales under this Code including sales of mortgaged property.

The reasons given were as follow:—

*"The Committee have inserted the words 'if necessary' before 're-transfer,' as, according to established practice, a re-transfer, is not ordinarily required and they think this practice should be altered."*—See the Report of the Special Committee.

*"The Committee have omitted the provisions as to the defendant paying money to the plaintiff. They think it better that in every case he should pay it into Court."*—See the Report of the Special Committee.

Section 87 of the T. P. Act, IV of 1882, was in these words:—"If payment is made of such amount and of such subsequent costs as are mentioned in S. 94, the defendant shall (if necessary) be put into possession of the mortgaged property. If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff: Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit from time to time postpone the day appointed for such payment. On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged. In the Code of Civil Procedure, Sch. IV, No. 129, for the words 'Final decree,' the words 'Decree absolute' shall be substituted."

Sub-rule (1) of old rule 3 corresponded to para. 1 of the old section, with several additions and alterations. Clauses (a) and (b) were new.

Sub-rule (2) corresponded to para. 2 of the old section with several modifications. The most important change seems to have been the omission of the word "absolutely" which stood after the word "debarred" in the old section. The omission seems to have been made in view of sub-rule (3) of r. 79, Or. XXI, as that rule is applicable to all cases under this Code. The proviso was almost similar to the proviso to the old section; the only change made in it being the substitution of the word "fixed" for the word "appointed," which occurred in the old section.

Sub-rule (3) corresponded to para. 4 of the old section with some verbal changes only.

The last para. of the old section was omitted as unnecessary.

Present changes.—They may be summarized as follows:—

(1) The old rr. 2 and 3 spoke of a 'decree.' The new r. 2 expressly states that the Court shall pass a 'preliminary decree' and the new r. 3, a 'final decree.'

(2) Under the old r. 2 if an account was to be taken it was to be with reference to 'the date next hereinafter provided'. The expression was not very clear and might mean 'the date of such decree' or 'the day fixed by the Court.' This has been made clear in the new r. 2 which says that the account is to be taken up to the date of the preliminary decree.

(3) The provision in the new r. 2 for including in the account other costs, charges and expenses is new.

(4) The new r. 2 in sub-rule (1) (c) (i) makes it clear that a date is to be fixed for payment. For this there was no provision in the old r. 2.

(5) The provision as to 'subsequent costs, charges and expenses as provided in r. 10' which was in old r. 3 has been transferred into the new r. 2.

(6) The provision as to subsequent interest in the new r. 2 is new.

(7) Sub-rule (1) (c) (i) of the new r. 2 provides that the costs of re-transfer are to be borne by the mortgagor. This is new.

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(8) Sub-rule (1) (c) (ii) of the new r. 2 expressly states that in case of default of payment by the mortgagor the plaintiff shall be entitled to apply for a final decree. This is new.

(9) The provision in the provision to old r. 3 sub-rule 2 as regards the power of the Court to extend the time for payment has been reproduced in the new r. 2, sub-rule (2).

(10) Sub-rule (3) of the new r. 2 refers to the Forms which are applicable. This is new.

(11) The words 'on or before the day fixed' which occurred in old r. 3, sub-rule (1) have been substituted by the words 'before the final decree debarring the defendant from all right to redeem the mortgaged property' in the new r. 3.

(12) It is expressly provided in the new r. 3 sub-rule (1) that the final decree is to be passed 'on the application made by the defendant in this behalf.'

(13) It is expressly provided in the new r. 3 sub-rule (3) that on the passing of a final decree for foreclosure 'all liabilities to which the defendant is subject in respect of the mortgage shall be deemed to be discharged.'

**Foreclosure suit.**—A suit to obtain a decree that the mortgagor shall be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure. *See* S 67, Transfer of Property Act, Rules 2 and 3 relate to decrees in suite for foreclosure.

**Who can institute a suit for foreclosure.**—Until the 1st April, 1930 on which date the Transfer of Property (Amendment) Act 1929 came into operation a suit for foreclosure could be brought only by an English mortgagee and a mortgagee by way of conditional sale. Since that date it is no longer open to an English mortgagee to sue for foreclosure. The remedy by way of foreclosure was held to be open in case of mortgagors by deposit of title deeds in Bombay and this has been allowed to continue for two years, i.e., till the 1st April, 1932 by the Transfer of Property (Amendment) Supplementary Act, S. 15 (2). The Transfer of Property (Amendment) Act 1929 has allowed the remedy by way of foreclosure in cases of mortgages by way of conditional sale and anomalous mortgages where there is an express stipulation in that behalf (Ss 67 and 98).

**Effect of foreclosure decree and discharge of the debt.**—Foreclosure proceedings to which a purchaser from the mortgagor is not made a party, cannot affect the purchaser.—*Brajanath v. Khilatchandra*, 8 B. L. R. 104 (P. C.) : 16 W. R. 33 (on appeal from 6 W. R. 269).

A preliminary decree for foreclosure does not extinguish the right of the mortgagor to redeem the mortgage.—*Mohan Lal v. Ram Charan*, 130 I. C. 196 : A. I. R. 1931 All. 223 : 29 A. L. J. 265.

Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as a security for the money lent. The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money.—*Sham Narain v. Rughoobur Dyal*, 3 C. 503 : 1 C. L. R. 343.

The mortgage security does not lose its character until an order absolute for foreclosure is passed. It remains a debt secured upon the property. It is only when the order absolute for foreclosure is passed that the debt is discharged and, in lieu of it, the mortgagee acquires the absolute ownership of the property.—*Sham Sundar v. Muhammad Ihtisham Ali*, 27 A. 501 (F. B.): 2 A. L. J. 180.

In the case of a mortgage by way of conditional sale until the order in terms of sub-rule (2) is made by the Court on an application by the mortgagee debarring the mortgagor absolutely from redeeming the property, the mortgagor is entitled to redeem, even though an order absolute in terms of S. 89 of the T. P. Act, 1882, has been made.—*Alimea v. Roshun Ali*, 3 C. L. J. 533.

Where land was sold with an agreement to re-purchase, it was held to be a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan. The mortgaged property is the only security which the mortgagee must look to for the satisfaction of his debt. There is no covenant on the part of the mortgagor by conditional sale, to indemnify his creditor for the inadequacy of his security.—*Balkishen Das v. W. F. Legge*, 22 A. 149 (P. C.): 4 C. W. N. 153 (19 A. 434 confirmed). The old r. 3, sub-rule (3) provided that on the passing of a final decree for foreclosure the debt secured by the mortgage shall be deemed to be discharged. The recent amendment has changed the position and the new r. 3, sub-rule (3), says on the passing of a final decree for foreclosure all liabilities to which the defendant is subject in respect of the mortgagor on account of the suit that is to say all costs, charges and expenses, vide r. 2 (1) (a) (iii) shall be deemed to have been discharged.

"That an account be taken of what will be due"—Principles of accounting in mortgage suits.—The scheme and intention of the T. P. Act IV of 1882, was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should henceforth depend, not on the contents of the bond, but on the directions in the decree.—*Sundar Koer v. Rai Sham Krishen*, 34 C. 150 (P. C.): 11 C. W. N. 249: 5 C. L. J. 106.

In order to avoid a multiplicity of mortgage suits, if in a mortgage suit all mortgagees, prior and subsequent, are parties, a decree for accounts is made on the plaintiff's mortgages, and the defendants if they appear and prove the mortgages, are entitled to ask for a decree for an account on each of their mortgages and a declaration of their right to participate in the surplus sale proceeds in order of priority. An account is then taken of what is due on each mortgage and the sums so found due to each mortgagee are included in one report, and the sale proceeds are divided subsequently between the plaintiff and the puisne mortgagees in accordance therewith.—*Berhamdeo v. Tara Chand*, 33 C. 92.

The essence of a foreclosure and redemption suit is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure

is bound, upon accounts being taken, if the balance is against him, to pay that balance; on the other hand, a plaintiff claiming a redemption, must submit to a decree for sale or foreclosure, if he makes default in payment; and to avoid a multiplicity of suits, it is necessary under a decree for foreclosure or redemption that the accounts between the parties should be settled and discharged, if the balance is against any party he must pay it (6 C. 377, 16 C. 682 *referred to*). In a redemption suit, the mortgagor is entitled, as in a question with his mortgagee, to have a general account taken of what is due upon the mortgage, and the fact that the mortgagor then declared in his pleading his intention of bringing a separate action for recovery of the profits received by the mortgagee after refusal of his tender, does not entitle him to maintain an action for damages for wrongful detention of property after the tender, which would have been wholly unnecessary, if the claim urged in the latter action, had been put forward and given effect to in that litigation.—*Satyabadi Behara v. Hira Bati*, 5 C. L. J. 192: 34 C. 223 (20 C. 322 *referred to*).

When a mortgagee undertakes to collect rents from the tenants of the property comprised in his security and to apply them in satisfaction of his dues, if he himself is one of the tenants he must, when accounts are taken, allow credit for the rents payable by him, although, if, at that time, a suit was brought for recovery of the rent, it might be held to be barred by limitation.—*Ram Nath v. Brahmamoyi*, 1 C. L. J. 531. See also *Sheo Saran Singh v. Mahabir Pershad*, 32 C. 576: 2 C. L. J. 73.

Where a mortgage-deed is silent as to possession, and there is no agreement to the contrary, a mortgagee, who takes possession, takes also the obligation upon him to account for the rents and profits during the time he is in possession.—*Madari v. Baldeo Prasad*, 27 A. 351 (F. B.) See also *Ganga Mulik v. Bayaji*, 6 B. 669, 670.

Where a person who had an interest in the mortgaged property was not made a party in the suit brought by the mortgagee, his rights are not affected and he is still entitled to redeem. In allowing him to redeem, accounts must be taken on the footing of a mortgage which subsists and which it is sought to redeem and not merely on payment of the decretal amount: In calculating the amount payable, interest should be made payable at the mortgage-rate up to the date fixed in the decree for redemption.—*Jnanendra Nath v. Shorashi Charan*, 49 C. 626.

In a suit for redemption of an usufructuary mortgage, the mortgagee is not responsible for the amount of the gross rental as shown in the *jamabandi*, but only for such sums as were actually received by him or on his behalf and such sums, if any, as might have been received by him, but for his own neglect or fault.—*Banarsi Parshad v. Ram Narain*, 7 C. W. N. 514 (P. C.).

In a suit for redemption, mode of taking accounts and calculating interest pointed out.—*Nandu Sahu v. Ram Lakkan*, 9 C. L. J. 633.

A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid. The duty of the mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursements. The mode of taking accounts pointed out.—*Kundanmal v. Kashibai*, 26 B. 363.

Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks for redemption also.—*Hari v. Lakshman*, 5 B. 614 and *Shankaraya v. Danapa*, 5 B. 604.

The fact that a purchaser of the equity of redemption received a certain sum for payment to the mortgagee does not preclude him from claiming from the mortgagee an account of the income of the mortgaged property.—*Jafree Begum v. Gunga Ram*, 3 Agra 91.

In a redemption suit, a mortgagee is entitled to credit for reasonable costs of repairs, if he renders an account of rents and profits.—*Lakshman v. Hari*, 4 B. 584.

Under the ordinary law of mortgage, the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expense incurred in protecting the title.—*Damodar v. Vamanray*, 9 B. 435. See *Pokree Sahib v. Pokree Beary*, 21 M. 32.

In a suit for account and redemption, if the mortgagee, on taking the accounts, is found to have been overpaid, the general practice is to order the payment, by him, of the balance due to the mortgagor with interest from the date of the institution of the suit.—*Janoji v. Janoji*, 7 B. 185. See also *Ramchandra v. Janardan*, 14 B. 19.

In a suit by a mortgagor for redemption, the assignee of a mortgagee is bound by the state of the account between the mortgagor and the mortgagee, where the assignment was made without the knowledge of the mortgagor.—*Chinnayya v. Ohidambara Chetti*, 2 M. 212.

In a suit for redemption of land which has been sub-mortgaged by the mortgagee in which the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the . . . . . to the latter of the sum due to . . . . . see and on payment of . . . . . rt- mortgage both shall receive . . . . . 2.

Where a mortgagee in possession pays the Government revenue which was payable by the mortgagor, he has a right to tack on the amount so paid to his mortgage debt.—*Imdad Hasan v. Badri Prasad*, 20 A. 401; *Kamaya Naik v. Devapa*, 22 B. 440. See also *Jaijit v. Gobind*, 6 A. 303.

A mortgagee in possession is bound to produce the accounts of collection and disbursement and to swear to them.—*Mokund Lal v. Goluck Chunder*, 9 W. R. 592; *Goluck Chunder v. Mohun Lall*, 5 W. R. 271; *Ram Lochun v. Kunhya Lall*, 6 W. R. 84; and *Ramphul v. Wahed Ali*, 14 W. R. 66.

A mortgagee is entitled to claim the value of lasting improvements if they are reasonable ones but he should not be allowed to improve the property to such an extent as to deprive the mortgagor, in effect, of the right to redeem.—*Nijalingappa v. Chaubasawa*, 43 B. 69; *Dnyanu Laruman v. Fakira*, 45 B. 1301. Where a mortgagee in possession of a mortgaged garden land voluntarily planted fruit trees in it; held that he was not entitled to compensation for the value of the trees on redemption by the mortgagor.

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because they were not an accession necessary for the preservation of the property and they were not planted with the consent of the mortgagor.—*Ma E v. Maung Po Ko*, 8 R. 233 (ref. to *Nageshar v. Nand Lal*, 48 A. 70).

As to the mode of taking accounts where the defendant is a mortgagee in possession, see *Hunooman Pershud v. Munraj Koonweree*, 6 M. I. A. 393: 18 W. R. 81-n.

As to the mode of taking accounts, see also *Jaijit Rai v. Gobind Tiwari*, 6 A. 303 and 310, and *Madari v. Baldeo*, 27 A. 351 (F. B.).

**Decrees in foreclosure suit.**—The decree passed under this rule is not a money-decree. The order absolute for foreclosure, so far from directing the payment of the mortgage-debt, has the effect of discharging the debt. If, in a foreclosure suit, the mortgagor thinks fit to pay the mortgage-debt, and thus save his interest in the property, he does so by reason of the obligation, which he undertook when he executed the mortgage security, and with a view to preserve the property, and not in obedience to the order of the Court. Any payment made by him will not be in execution of the decree. The decree *nisi* puts him under no obligation to pay the debt, but simply declares what the consequences of the non-payment will be.—*Sham Sunder v. Muhammad Ihtisham Ali*, 27 A. 501: 2 A. L. J. 180 (F. B.).

Where in a suit upon a mortgage by conditional sale, the plaintiff mortgagee prayed that the defendant should be debarred from the right to redeem in case the money was not paid within a certain time and the Court passed a decree in the following terms, "that the claim be decreed with costs and interests and that the defendant do pay to the plaintiff the decretal money within two months." *Held*, that the decree though irregular as to the form, was, in effect, a decree for foreclosure within the meaning of this rule and that after the decree had been made absolute, it was not open to the defendant to object to the delivery of possession.—*Jogendra Chandra v. Rama Nath*, 4 C. L. J. 533.

Pendency of an appeal against a preliminary decree made under this rule does not prevent the Court which passed the decree from making it absolute.—*Madan Mohor v. Ram Hur*, 1 C. W. N. 197

A foreclosure decree obtained by a prior mortgagee was redeemed by a puisne mortgagee, who was a party to the suit. *Held*, that the puisne mortgagee acquired all the rights and powers of the prior mortgagee as such; but the rights so acquired were not such as could be worked out in execution of the decree made in favour of the prior mortgagee, that decree having been discharged by payment. A separate suit to enforce the rights was not barred by S. 244, C. P. Code, 1882 (S. 47). The form of order given in this rule contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case.—*Gopi Narain v. Bansidhar*, 32 I. A. 123: 9 C. W. N. 577 (P. C.): 2 C. L. J. 173 (24 A. 179 reversed).

In case of several incumbrances, the second mortgagee has the first right to redeem, and is liable to be foreclosed in default of payment. After the foreclosure of the second mortgagee, the third mortgagee is entitled to redeem on payment of the amount originally certified to be due to the first.



Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks for redemption also.—*Hari v. Lakshman*, 5 B. 614 and *Shankarapa v. Danapa*, 5 B. 604.

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mortgagee together with the subsequent interest and costs due to the first mortgagee. In default, he is foreclosed. The process continues in this way until the mortgagor is reached, and if the mortgagor fails to redeem, the mortgaged property becomes vested in the mortgagee free from all incumbrances.—*Narayan Venkoba v. Pandurang*, 7 B. 526; *Tulsa v. Khub Chand*, 13 A. 581; *Auhindra v. Chunnoololl*, 5 C. 101 and *Narayan v. Ganoji*, 15 B. 692; *Muthu Vijia v. Venkatachellam*, 20 M. 35; and *Gokul Das v. Debi Prasad*, 28 A. 638; 3 A. L. J. 548.

**Sub-mortgagee's right to sue for foreclosure.**—A sub-mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself.—*Muthu Vijia v. Venkatachallam*, 20 M. 35; *Zaki Hasan v. Deonath*, 10 C. L. J. 470. For other cases, see notes under rr. 4 and 5 post under heading "Sub-mortgagee's right to sue for sale."

**Effect of appeal on the date fixed for payment.**—Where, in a suit on a mortgage, the decree of the appellate Court simply dismisses the appeal leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court.—*Bhola Nath v. Kanti Chundra*, 25 C. 311 (11 B. 172 distinguished). Approved in *Fairuzdi Sardar v. Asimuddi Biswas*, 11 C. W. N. 679, *Basanta Kumar v. Radharani*, 26 C. W. N. 440; 36 C. L. J. 159; 70 I. C. 735; *Ramaswami v. Sundar*, 31 M. 28; *Aminabi v. Sidhu*, 17 B. 547; *Panchu Sahu v. Sheikh Muhammad*, 7 P. 76. See *contra*, *Satwaji v. Sakharlal*, 39 B. 175.

When a decree gives a right of redemption within a certain specified period with a certain specified result to follow, if redemption is not made within such period, the mere fact of an appeal . . . . . will not suspend the operation of such a decree . . . . . extends the period limited by the original decree . . . . . will be barred if not exercised within the period.—*Dharam Singh*, 18 A. 455 (18 A. 223 applied). The mere fact of an appeal having been preferred does not operate to stay the proceedings under Or. XXXIV, r. 3.—*Rajbans v. Askaran*, 125 I. C. 113; A. I. R. 1930 Pat. 227.

But the Court should, when the appeal is dismissed, give the mortgagor an opportunity to make an application for extension of time.—*Manavikraman v. Unniappan*, 15 M. 170.

The summary dismissal of an appeal cannot have the effect of extending the time fixed for payment under the decree appealed from.—*Dattatraya v. Wasudeo*, 47 B. 956; 76 I. C. 1023; A. I. R. 1924 Bom. 98. Withdrawal of the appeal does not give a fresh period.—*Patloji v. Garu*, 15 B. 370; *Ohudasama v. Mohant Ishwargar*, 16 B. 243.

**Delivery of title deeds.**—Where the preliminary and the final decree in a mortgage suit directed defendants to deliver up to plaintiffs all documents in their possession or power relating to the plaintiff property but did not provide for an alternative relief, viz., payment of damages, in the event of non-delivery, held, that the Court could not grant such alternative relief by way of execution; *Marath Sivaraman v. Sesha Pattar*, 42 M. L. J. 356; 16 L. W. 589.

**Partial foreclosure.**—Where several parties have an interest in a mortgage, it is not competent for one of them to foreclose in respect of his fractional share.—*Bhora Roy v. Abilack Roy*, 10 W. R. 476.

A suit for foreclosure was partly decreed and partly dismissed, and the plaintiff appealed against the portion of the claim dismissed. The appeal was also dismissed and within three years from the dismissal of the appeal the decree-holder applied for an order absolute for foreclosure. *Held*, that the application was not barred; the proceedings to foreclosure must be proceedings to foreclose the mortgage as a whole. There can be no partial foreclosure.—*Sham Sundar v. Muhammad Ihtisham*, 27 A. 501 (F. B.): 2 A. L. J. 110. See also *Fitzholmes v. Bank of Upper India Ltd.*, 54 I. A. 52: 8 L. 253: 100 I. C. 22: A. I. R. 1927 P. C. 25.

Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person entitled to one moiety of the debt foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interests in the mortgaged property in virtue of the mortgage and foreclosure; *held*, that the foreclosure was invalid and the suit was not maintainable.—*Bishan Dial v. Mann; Ram*, 1 A. 297. See also *Chandika Singh v. Pohkar Singh*, 2 A. 906. But see *Bisheshar Singh v. Laik Singh*, 5 A. 257.

If an order absolute for foreclosure or sale can be made without notice to the mortgagor.—An order absolute for the foreclosure under this rule cannot be made without previous notice to the mortgagor.—*Venkata Narayana v. Papayya*, 8 M. L. J. 205: 22 M. 133; *Tara Prosad v. Bhobodeb*, 22 C. 931. But see *Krishna v. Muthusami*, 25 M. 506; *Pandu Prabhu v. Juge Lobo*, 27 M. 40; *Tara Pado v. Kamini*, 29 C. 644 and *Mallikarjunadu v. Lingamurti*, 25 M. 244 and 300; *Mahadeo v. Sobha Nath*, 97 I. C. 277: 24 A. L. J. 914: A. I. R. 1926 All. 757, where a contrary view was taken. In the Full Bench case of *Bibi Tasliman v. Harihar Mahto*, 32 C. 253 (F. B.): 9 C. W. N. 81, it has been held that where an order absolute has been made under Ss. 87 or 89 of the T. P. Act, without notice to the mortgagor, the Court has an inherent power to deal with an application to set aside the *substantiated* 10 C. W. N.

In *Mahomed Taki v. W. A. Thomas*, 4 C. L. J. 317, it has been held that no notice to the mortgagor is necessary before an order absolute for sale and that the Full Bench case of *Bibi Tasliman v. Harihar Mahto*, 32 C. 253 (F. B.) does not lay down any such rule.

Notice to the judgment-debtor is not prescribed by law before making a final decree on the application of the decree-holder but in practice it is given on the principle that it is just and proper to hear the opposite party: *Babooji v. Ram Gopal*, 19 N. L. R. 124: 73 I. C. 32; *Rasan v. Rangayan*, 30 L. W. 551: (1929) M. W. N. 867. It must be given where no date has been fixed for the passing of a final decree.—*Sri Maruthi v. Subramania*, 118 I. C. 831: A. I. R. 1929 Mad. 393.

In a suit for foreclosure of a mortgage in which a minor defendant was interested the plaintiffs named the minor's father as his guardian and on his

not appearing the *Nazir* of the Court was appointed guardian. A preliminary decree was passed. At the time of the final decree notice was served on the father and not on the *Nazir*. On a suit by the minor to have the final decree set aside, held that the minor was not prejudiced and so was not entitled to the relief claimed.—*Mahadeo v. Somnath*, 48 A. 828 : 97 I. C. 277 : A. I. R. 1926 All. 757. So far as the Central Provinces are concerned there is a practice of giving notice ; and if the notice has not been served the Court has jurisdiction to set aside an *ex parte* decree so made.—*Pochanna v. Pochanna*, 120 I. C. 332 : A. I. R. 1930 Nag. 136 Though not obligatory, notice should be given, and if it is not given the Court does not act *ultra vires*—*Venkatarama v. Marudachala*, A. I. R. 1931 Mad. 795.

Defendant absent at the passing of final decree—Decree is *ex parte* and Or. IX, r. 13 applies.—Although no notice to the defendant has been prescribed under r. 3, Or. XXXIV, and thus no notice is necessary, the proceedings between the preliminary and the final decree in a suit for foreclosure, that is, between the decree prescribed by r. 2 and the decree prescribed by r. 3, are proceedings in the suit and for that reason the provisions Or. IX, will attach to those proceedings. A decree passed in the absence of the defendant must be considered an *ex parte* decree and the provisions of r. 13, Or. IX apply to have it set aside. The Court has therefore jurisdiction to set it aside under r. 13 and the defendant has a right to show, that he was prevented by a sufficient cause from appearing at the passing of the final decree; *Mt. Fahiman v. Awadh Behari Lal*, A. I. R. 1929 All. 279 : 27 A. F. J. 376 : 119 I. C. 246 (A. I. R. 1926 All. 757, 39 A. 532, A. I. R. 1922 All. 383, 32 C. 253 (F. B.), applied).

Power to enlarge time—In granting time, the Court should take into consideration the magnitude of the sum involved, the arrears of interest and the value of the security, and whether the mortgagor has prospects of raising the required money.—*See Fisher on Mortgages, Para 1958*.

Under the Transfer of Property Act it was held that in a foreclosure action the mortgagor can redeem at any time until the order absolute is made under this rule.—*Poresh Nath v. Ramjodu*, 16 C. 246 : *Somesh v. Ram Krishna*, 27 C. 705 : 4 C. W. N. 699 : *Narayana v. Papayya*, 22 M. 133 : *Nihali v. Mittar Sen*, 20 A. 446 : *Alimea v. Roshan Ali*, 3 C. L. J. 533 : *Ysaf Ali v. Kasim Ali*, 26 C. W. N. 532. In *Salig Ram v. Muradan*, 25 A. 231 (following 20 A. 446 and 27 C. 705), it has been further held that the mortgagor is not deprived of his right to redeem by the fact that under an order of the Court, not being an order under S. 87 of the T. P. Act, the mortgagee has been put into possession of the mortgaged property. See also *Debi v. Jaikaran*, 24 A. 479. It has been held under the Code that if the mortgagor deposits the redemption money into Court before the passing of the final decree, though after the date fixed for payment and the deposit is accepted by the Court it becomes an effectual deposit.—*Depin Behary v. Mokunda Lal*, 36 C. 122 : 1 I. C. 780 : *Ysaf Ali v. Kasim Ali*, 26 C. W. N. 532 (following *Poresh v. Ramjodu*, 16 C. 246 and *Alimea v. Roshan Ali*, 3 C. L. J. 533). But it has also been held that the proviso to Or. XXXIV, r. 3 (2) gives the Court a discretionary power to extend the time for the payment of the decretal amount, but a mortgagor has no absolute right to pay the money after the expiry of the specified period even though no final decree has up to the time of such payment been

made.—*Ratnakar v. Chamra*, 4 P. L. J. 347: 51 I. C. 881; *Murugesu v. Ramasami*, 39 M. 882: 31 I. C. 200.

The Judicial Committee held that where no good cause is shown there is no jurisdiction in the Court to extend the time specified in the preliminary decree for payment of the mortgage money.—*Motilal v. Ujjar Singh*, 55 I. A. 207: 55 C. 821: 26 A. L. J. 600: 32 C. W. N. 796: 30 Bom. L. R. 856: 109 I. C. 467. Notwithstanding this it has been pointed out that where no final decree debarring the defendant from the right to redeem the mortgaged property has been passed, the defendant is entitled to make the payment and to ask for a final decree ordering delivery of documents, re-transfer, and possession.—*Sant Bakhsh v. Bhagwandin*, 131 I. C. 435: 8 O. W. N. 142: A. I. R. 1931 Oudh 121 (in this case the alteration made in 1929 as regards rr. 2 and 3 in this respect has been explained).

In the case of a decree for redemption or for foreclosure, both of which decrees stand in this respect upon the same footing, no extension of time limited by the decree for payment of the decretal amount can be made except for good cause shown.—*Ram Lal v. Tulsa Kuar*, 19 A. 180 (16 C. 246 dissented from; 16 M. 214 distinguished). See also *Raja Ram v. Chunni Lal*, 19 A. 205; *Haryas Rai v. Rameshar*, 20 A. 354; *Akkach Mondal v. Aminuddi Mullik*, 23 C. W. N. 439: 50 I. C. 937. But see *Kedar Nath v. Kali Churn*, 25 C. 703 (F. B.); *Musht. Manjari v. Surajmal*, A. I. R. 1928 Nag. 333: 25 N. L. R. 175: 111 I. C. 294.

Under Or. XXXIV, r. 3 sub-rule (2) in a suit for foreclosure where the payment ordered by the preliminary decree is not made within the time fixed, the Court is bound, on being moved in that behalf by the plaintiff, to pass a final decree for foreclosure. Under the proviso to sub-rule (2), however, the Court has power to enlarge the time for payment. But it is not at liberty to grant even a short extension of jurisdiction to grant an extension.—*Hakur Ujjar Singh*, 109 I. C. 467: 55 I. A. 207: 55 C. 821 (P. C.): A. I. R. 1928 P. C. 137.

The expression 'good cause' should be interpreted liberally with leniency to the debtor.—*Narayan v. Sangidas*, 109 I. C. 770: A. I. R. 1928 Nag. 301. It must be alleged and judicially proved.—*Wamanrao v. Bhagwan*, 119 I. C. 680. The mere fact that the amount was large and the delay small is not sufficient.—*Ramnarayan v. Ukanda*, 116 I. C. 511: A. I. R. 1929 Nag. 263.

An application to extend the time fixed by a preliminary decree for foreclosure made after the expiry of that time is entertainable. The question is a question of fact to be decided in each particular case.—*Kanhai*

Until an order for foreclosure absolute has been made under S. 87 of the T. P. Act, IV of 1882 (this rule), the mortgagor may be allowed, on a proper application, to redeem the mortgaged property.—*Narayana v. Papayya*, 22 M. 133; *Mallikarjunadu v. Lingamurti*, 25 M. 244, 239 (F. B.); *Vedapuratti v. Vallabha*, 25 M. 300 (F. B.); *Nandram v. Babaji*, 22 B. 771:

*Ishwar v. Gopal*, 23 B. 102; *Shaikh Somesh v. Ram Krishna*, 4 C. W. N. 699 (16 C. 246, 22 M. 133 referred to).

This rule does not allow the Court to postpone the date of payment on the application of an outsider. The provision regarding the power of the Court to postpone the date of payment relates to matters as between the mortgagor and mortgagee.—*Akshya Kumar v. Surja Kumar*, 6 C. W. N. 654.

The mere fact that an appeal has been lodged is not sufficient ground for enlarging the time.—*Iswargar v. Chunda Sama*, 13 B. 109; *Aminab v. Sidu*, 17 B. 547. See also *Ram Golam v. Barsati Singh*, 10 C. W. N. 910, where it has been further held that a Court has no power, of its own motion, to extend the time provided in S. 89 of the T. P. Act, for making an order absolute. The appellate Court, when it affirms the preliminary decree of the lower Court, is neither bound to fix a period of six months for payment after its decree nor is it bound to extend the time for payment fixed by the lower Court.—*Magbul v. Pateshri Partab*, 27 A. L. J. 976; 118 I. C. 670: A. I. R. 1929 All. 677.

Where no sufficient cause for non-payment is shown and no extension of time is granted the Court is bound to make the preliminary decree final.—*Bhanu v. Pratap*, 122 I. C. 443: A. I. R. 1930 Nag. 178.

**Appeal.**—An order under r. 3 or 4 or 8 of Or. XXXIV refusing to extend the time for the payment of mortgage money is appealable.—See Or. XLIII, r. 1, Cl. (c).

The preliminary and the final decree are separately appealable.—See S. 97 of the Code.

If the order refusing to extend the time is a part of the order which directs that the preliminary decree should be made final and a final decree is passed, an appeal from the order refusing the time, on the ground of its being an interlocutory order, is not maintainable.—*Tikaram v. Onkar*, 124 I. C. 241: A. I. R. 1930 Nag. 240.

An order dismissing an application for a final decree in a mortgage suit is a decree and appealable as such.—*Nathu Mal v. Uda Ram*, 137 I. C. 273: 33 P. L. R. 56: A. I. R. 1932 Lah. 214 (following 42 M. 52).

appeal and not from the date fixed for payment by the original decree.—*Jorad v. Gendan*, 53 I. A. 197: 6 P. 24 (P. C.): 98 I. C. 499: A. I. R. 1926 P. C. 93 (approving *Gajadhar v. Kishen*, 39 A. 641: 15 A. L. J. 734: 42 I. C. 93: following *Abdul Majid v. Jawahir*, 36 A. 350 (P. C.): 12 A. L. J. 624: 18 C. W. N. 963: 27 M. L. J. 17, and overruling *Madho v. Nihal*, 38 A. 21: 13 A. L. J. 985: 30 I. C. 494). See also *Nizamuddin v. Bohra*, 40 A. 203: 43 I. C. 870; *Jayanti v. Damiseti*, 44 M. 714: 64 I. C. 470. In the above cases it has been held that the application is governed by Art. 181 of the Limitation Act, the period being 3 years. And it has been held that even if the period of 3 years has elapsed during the pendency of the appeal, still the said period should run from the date of the decree of the appellate Court.—*Fitzholmes v. The Bank of Upper India Ltd.*, 54 I. A. 52: 8 L. 253: 100 I. C. 22: A. I. R.

1927 P. C. 25. In the case of an instalment decree by consent, the limitation is 3 years from date of default and not date of decree.—*Nanku v. Parmatmanand*, 130 I. C. 487: 29 A. L. J. 58: A. I. R. 1931 All. 340.

The dismissal of an application for a final decree in a mortgage suit for failure to pay batta cannot be construed as a dismissal of the suit itself. After a preliminary decree has been passed the Court has no power to dismiss the suit. Nor does the dismissal of the application preclude another for the same purpose.—*Sriramulu v. Firm of K. Sriramulu*, 140 I. C. 324: 63 M. L. J. 719: (1932) M. W. N. 1191.

Transferee from mortgagee may apply for a final decree.—See *Ratnakar v. Chamra*, 51 I. C. 891: 4 P. L. J. 347.

Payment into Court.—See notes under Or. XXXIV, rr. 4 and 5.

Consent decrees and awards.—See notes under rr. 4 and 5, *post*.

Costs and interest —See notes under Or. XXXIV, rr. 10 and 11, *post*.

**4.** (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the



Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in *Form No. 9, Form 10 or Form No. 11*, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

**5. (1)** Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

### COMMENTARY.

History.—The above rr. 4 and 5 were substituted for the old rr. 4 and 5 by the Transfer of Property (Amendment) Supplementary Act, 1929 which came into operation on the 1st April, 1930. The old rules are reproduced below:—

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in Cls. (a), (b) and (c) of r. 3 and also directing that, in default of the defendant paying, as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms. [S. 88.]

5. (1) Where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree, and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in r. 4.

[S. 89.]

Old r. 4 corresponded to S. 88 of the T. P. Act, 1882, with some modifications.

In sub-rule (1), the words, "*what is declared due to the plaintiff as aforesaid*" were substituted for the words "*what is found due to the plaintiff*" which occurred in the old section; and the words, "*together with subsequent interest and subsequent costs,*" were added before the words "*and that the balance (if any).*"

In sub-rule (2) the words "*if it thinks fit*" which occurred after the word "*including*" in the old section were omitted. The other changes were merely verbal. The old section is reproduced here for comparison:—

*"In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of S. 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is so found due to the plaintiff, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.*

*"In a suit for foreclosure, if the plaintiff succeeds, and the mortgage is not a mortgage by conditional sale, the Court may at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure the performance of the terms."*

Old r. 5 corresponded to S. 89 of the T. P. Act IV of 1882, with several additions and alterations. The old section was re-cast and re-arranged, and the changes introduced by the old rule will appear more clear on comparison of the rule with the old section. The words "*for an order absolute,*" which occurred in the old section, and the last sentence of the old section which ran as follows, "*and thereupon the defendant's right to redeem and the security shall both be extinguished,*" were omitted. Section 89, T. P. Act, 1882, ran as follows: "*If in any case under S. 88, the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the cost (if any) awarded to him, and subsequent costs as are mentioned in S. 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but, if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property . . . of the sale be dealt . . . defendant's right to redeem and the security shall both be extinguished."*

The above omissions seem to have been made for the reason that all the provisions of the C. P. Code of 1908, relating to execution and sale shall now apply equally to mortgage decrees. The word "*absolute*" was omitted because even after the final decree for sale, the defendant would be able to prevent the sale by paying the decretal amount under Or. XXI, r. 69 (3) to the officer conducting the sale (see 31 C. 863 (F. B.); 31 M. 354 and 19 A. 205).

r. 5.

The concluding sentence of the old S. 89 of the T. P. Act, 1882, was omitted for the reason that even after the passing of the final decree under this rule, the judgment-debtor by making a deposit under S. 310-A of the C. P. Code, 1882 (Or. XXI, r. 89), would be able to set aside the sale and get back the mortgage security, as by the wording of the old r. 5, the passing of the final decree would not deprive the judgment-debtor of the remedies provided by the rules above referred to. In this connection, see 19 A. 205, 20 A. 354, 25 B. 104, 23 A. 773, 31 M. 354, and 31 C. 863 (F. B.). The concluding words of S. 89 of the T. P. Act (IV of 1882) were subject to much discussion in all the Indian High Courts, and they agreed in holding that those words relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale. In other words, by the passing of a final decree for sale, neither the mortgagee's right to redeem nor the mortgage security will be extinguished. The Allahabad High Court, in *Shyam Lal v. Bashiruddin*, 28 A. 788, observed as follows: "It is not easy to say what was in the contemplation of the framers of the T. P. Act, in introducing the concluding word of S. 89 of the T. P. Act." In *Krishnaji v. Mahadev*, 25 B. 104, it had been held that provisions of S. 310-A of the C. P. Code 1882, are applicable to sales held in execution of a mortgage decree passed under the T. P. Act; in *Rajaram v. Ghunni Lal*, 19 A. 205, it had been held that Ss. 291 and 310-A of the C. P. Code, 1882, would apply to a sale held by virtue of an order absolute for sale passed under S. 89 of the T. P. Act. This case was followed in *Harjas Rai v. Rameshwar*, 20 A. 354. A similar view was taken in *Adipuram v. Gopalasami*, 31 M. 354. In *Bibijan Bibi v. Sachi Bewah*, 31 C. 863 (F. B.), it was held that the concluding words of S. 89, T. P. Act, relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale. In view of the rulings mentioned above, the Legislature probably considered it useless to retain the words "absolute" and the concluding sentence of S. 89 of the T. P. Act, and hence they were omitted from the rule. The effect of the omission was that the mortgage is kept alive for all purposes as regards persons having no interest but not made parties to the mortgage suit.—*Venkat Reddy v. Kunjappa*, 46 M. L. J. 391.

As regards the state of the law as it was under the Code of 1908 it is enough to quote the observations of the Judicial Committee in the case of *Sukhi v. Ghulam Sufdar*, 48 I. A. 465 : 43 A. 469 (P. C.) : 26 C. W. N. 279 : 65 I. O 151 : 24 Bom. L. R. 590 : 43 M. L. J. 15. Their Lordships said,— "In these rules the words above quoted (meaning the concluding words of S. 89) are omitted. Now the words being gone their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the end of the subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield."—In *Muhammad Musa v. Aidal Singh*, 65 I. C. 801, it has been held that the right of redemption remains in the mortgagor after the sale and for long afterwards. In any event the right does not remain after confirmation of the sale.—*Kalpada v. Basanta Kumar*, 35 C. W. N. 877 (authorities discussed).

"The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission, and we have provided in r. 3 (1), 5 (1) and 8 (1) for the passing of a final decree in such cases."—*See the Report of the Select Committee.*

This rule prescribes the procedure to be adopted in the case of a decree for sale. If on or before the day fixed the defendant pays into Court the amount declared to be due under r. 4, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree in accordance with the directions contained in Cls. (a), (b) and (c) of this rule. No attachment is necessary for the sale of the mortgaged premises, as the direction for sale in the decree is in itself sufficient authority for the sale.—*See the cases noted under Or. XXI, r. 54.*

The sale was to be regulated now under the Code of Civil Procedure and it might be stopped on the amount of debt and costs being tendered to the officer conducting the sale. *See Or. XXI, r. 69 (3)*, which is now applicable to all sales including the sales of mortgaged property. This rule did lay down, as r. 3 did, that on the passing of the final decree the mortgage debt shall be deemed to be discharged. Therefore, if the proceeds of the sale be found insufficient, then the mortgagee might proceed against the mortgagor personally or against his other properties by adopting the procedure laid down in r. 6.

**Present changes.**—They may be summarized as follows:—

(1) The old r. 4 spoke of a 'decree.' The new r. 4 expressly states that the Court shall pass a 'preliminary decree.'

(2) Under the new rr. 4 and 5, in case of default of payment on the part of the mortgagor the plaintiff has to apply for a final decree.

(3) In the new r. 4 there is a provision in respect of 'subsequent charges and expenses' which is new.

(4) The new r. 4 in sub-rule (2) makes an express provision empowering the Court to extend the time for payment which was not in the old rule.

(5) Sub-rule (4) of the new r. 4 refers to the forms which are applicable.

(6) The words "or at time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule" in sub-rule (1) of r. 5 are new.

(7) Under the new r. 5, if the mortgagor pays the amount into Court he has to apply for a final decree for re-transfer, and if he pays the amount into Court after the sale and before its confirmation he has to apply for an order for re-transfer.

(8) Sub-rule (2) of the new r. 5 is new.

**Suit for sale.**—A suit to obtain a decree that the property be sold is a suit for sale.—*See S. 67, Transfer of Property Act.*

**Who may obtain decree for sale.**—Only the simple mortgagee, the English mortgagee, the equitable mortgagee, and the holder of a charge as defined in S. 100 of the T. P. Act, IV of 1882, can sue for sale. Under Cl. (a) of S. 67 of the T. P. Act, usufructuary mortgagee, as such, has no right to institute a suit for foreclosure or sale. There was, however, considerable difference of opinion as to the right of a usufructuary mortgagee to obtain an order for sale. In *Venkatasami v. Subramanya*, 11 M 88, in *Ramayya v. Guruva*, 14 M. 232 and in *Sivakami Ammal v. Gopala*, 17 M 131 (F. B.), it has been held that a decree for sale may be obtained by an usufructuary mortgagee. But these cases have been dissented from in *Luchmeshar Singh v. Dookh Mochan Jha*, 24 C. 677 (11 A. 367 referred to), and in *Kashi Ram v. Sardar Singh*, 29 A. 157, where it has been held (distinguishing 21 A. 4) that a usufructuary mortgage with personal covenant to pay the mortgage debt on demand unaccompanied by any hypothecation of property cannot give the mortgagee a right to sell in the event of non-payment of the mortgage debt. In *Kangaya Gurukul v. Kalimuthu*, 27 M. 526 (F. B.) it has been held that where there is a combination of a simple and usufructuary mortgage and a covenant to pay personally or to realize the mortgage-money by sale, the mortgagee has a right to a decree for the mortgage-money and for sale.

**Decree for sale in a foreclosure suit.**—The second paragraph of this rule has been borrowed from the English Conveyancing Act, 1881 (44 and 45, Vict. Cl. 41, S. 25) and can apply to English mortgages. When there are several conflicting claimants to the mortgaged property the proper course is to direct a sale of the mortgaged property and to distribute the sale proceeds amongst the several incumbrancers according to their respective rights and priorities, the surplus, if any, being paid over to the ultimate owner of the equity of redemption.

In a suit upon an English or an equitable mortgage the Court may, in its discretion, order sale instead of foreclosure. The Court will direct a sale in cases where there is such a complication that the ordinary decree cannot conveniently be worked out; but not where it is likely to cause injury or be oppressive to the mortgagor or to other person is interested.

The instances in which the Court in the exercise of its discretionary power should pass a decree for sale instead of foreclosure, are clearly stated in *Daniell's Chancery Practice*, pp. 1409-1411.

The right of redemption is extinguished with reference to persons who are concluded by the decree for sale by the sale actually taking place. Once the sale has taken place the right does not subsist even till confirmation of the sale; the matter then passes from the domain of contract to that of judgment. That was the law under S. 89 of the Transfer of Property Act, and that was also the law under Or. XXXIV, r. 5 prior to the amendment of 1929; *Asia Khatun v. Nurjehan*, 36 C. W. N. 955.

The amendment of Or. XXXIV, r. 5 by Act IX of 1929 has no retrospective operation.—*Asia Khatun v. Nurjehan*, 36 C. W. N. 955.

**Preliminary decree in a suit for sale**—Court's power to adjust equities—Order in which properties are to be sold.—A *bona fide* purchaser for value of a portion of the mortgaged property without notice of such

mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first, and the portion purchased by him must be sold only for the balance, if any due. But it is competent to the Court under S. 88, T. P. Act, 1882 (r. 4), to order a sufficient portion of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first; and if the decree directs the sale of the whole property, the Court, in execution, may first bring to sale the portion unsold and if the sale proceeds be sufficient, stop the sale of the portion sold by the mortgagor.—*Appayya v. Rangayya*, 31 M. 419 (F. B.): 18 M. L. J. 229 (29 M. 217 explained; 17 A. 435 referred to).

A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree nisi or a conditional decree and cannot be executed unless it is made absolute under r. 5.—*Ram Lal v. Narain*, 12 A. 539; *Siva Pershad v. Nundo Lal*, 18 C. 139; *Poresb Nath v. Ramjodu*, 16 C. 246; *Tara Prosad v. Bhobodeb*, 22 C. 921; *Chunni Lal v. Abdul Ali*, 23 A. 331.

Though Or. XXXIV, r. 4, contemplates the sale of the properties mortgaged, the decree must be suitably modified when the mortgaged properties have already been converted into money.—*Narendra v. Jogendra*, 19 C. W. N. 537; 20 C. L. J. 469; 27 I. C. 139.

Until a final decree is passed, all proceedings following a preliminary decree in a mortgage suit are proceedings in a pending suit and an application made therein is not an application for execution.—*Bhuthnath v. Tara Chand*, 25 C. W. N. 595; 33 C. L. J. 115.

Where in a suit for enforcement of a mortgage, a decree was passed holding that the mortgage lien proportionate to the values of the *jotes* which came to be in plaintiff's possession was discharged and that it remained attached to the other *jotes* only proportionately to their values, and directing an account to be taken of what was due to the plaintiff and in default of payment within six months directing the sale of the property. Held that it was a preliminary decree for sale under Or. XXXIV, r. 4.—*Asharam v. Umesh*, 56 C. L. J. 221.

Ordinarily, the right of selling a property in a particular order rests with the decree-holder and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate the realization of his mortgage-debt. But the Court can in the circumstances of a case and in view of the equities arising in various parties, direct under Or. XXXIV, r. 4 the order in which the properties should be sold; *Raj Keshwar Prasad v. Mohammad Khalil-ul-Rahman*, 3 P. 522; 78 I. C. 796; A. I. R. 1924 Pat. 459. And it is also competent to the Court in executing a mortgage decree to exercise its control in bringing different items of the property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.—*Krishna Ayyar v. Muthu Kumarasawmiya*, 29 M. 217. See also *Jatadhari Singh v. Baldeolal*, 3 P. L. J. 207; 51 I. C. 444.

The power of the Court to direct the order for sale in order to adjust the equities of transferees or purchasers has been recognised.—See *Sitaram v.*

r. 5.

*Ramrao*, 130 I. C. 817; A. I. R. 1931 Nag. 91; *Kaisar Beg v. Sheo Shankar*, 53 A. 391: 129 I. C. 708: (1931) A. L. J. 108: A. I. R. 1932 All. 85.

The power of the Court to direct the order of sale is expressly set forth in Cl. 4 of r. 4 as now amended; in that clause only subsequent mortgagees are mentioned or persons deriving title from them and that must be taken to include subsequent purchasers also.—*Sitaram v. Ramrao*, 130 I. C. 817: A. I. R. 1931 Nag. 91.

**Award.**—An arbitrator is not bound by this rule. A decree in terms of an award may order the sale of the property mortgaged, although no preliminary decree under this rule or final decree under r. 5 has been passed.—*Nripendra v. Jhumak*, 3 P. 221: 80 I. C. 588: A. I. R. 1924 Pat. 263; *Punjab National Bank Ltd. v. Thakur Das*, 121 I. C. 79: A. I. R. 1930 Lah. 116.

**Consent-decree.**—In the case of a consent-decree, an order for the sale of the mortgaged property may be made, although no preliminary decree under this rule or final decree under r. 5 has been passed.—*Hemendra v. Fakir*, 50 C. 650: 74 I. C. 929: A. I. R. 1923 Cal. 626; *Ishan v. Nilratan*, 2 P. 538: 72 I. C. 1049: A. I. R. 1923 Pat. 375, *Sital Singh v. Baijnath*, 44 A. 668: 75 I. C. 485: A. I. R. 1922 All. 383; *Kora Lal v. Punjab National Bank Ltd.*, 5 L. L. J. 67: 55 I. C. 816; *Askari v. Jahangira*, 49 A. 297 (F. B.): 100 I. C. 59: A. I. R. 1927 All. 167; *Ganganand v. Maharaja Sir Rameshwar*, 6 P. 388: 102 I. C. 449: A. I. R. 1927 Pat. 271. See, however, *Kashi v. Priyanath*, 28 C. W. N. 550: 83 I. C. 424: A. I. R. 1924 Cal. 645, in which it was held that a consent-decree that the plaintiff, in case of default, would be competent to realize the whole amount by execution required to be made absolute on notice, before exsolution was taken out (following *Sundari v. Sevarani*, 10 C. W. N. 306; *Biswanath v. Bhagwan Din*, 14 C. L. J. 648; and *Shyam v. Satinath*, 24 C. L. J. 523).

A consent-decree directing payment by instalments is a perfectly valid mortgage-decree but it is not covered by Or. XXXIV, r. 5, C. P. Code. Consequently it is not necessary to make a final decree under Or. XXXIV, r. 5. It is open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree in the first instance.—*Ishan v. Nilratan*, 2 P. 538: 72 I. C. 1049: 4 P. L. T. 311: 1 P. L. R. 217; *Nripendra v. Jhumak*, 3 P. 221: 80 I. C. 588: 4 P. L. T. 694: 2 P. L. R. 9; *Askari Hassan v. Jahangira*, 49 A. 297 (F. B.): 100 I. C. 59: 25 A. L. J. 107: A. I. R. 1927 All. 167 (A. I. R. 1923 Pat. 375 and 10 C. L. J. 91 approved; A. I. R. 1922 All. 396 distd.); *Utanka Lal v. Tarak*, 48 C. L. J. 357; *Kunhammad v. Kozhutamal*, A. I. R. 1928 Mad. 38: 106 I. C. 395.

But the mere fact of an instalment decree being passed in a mortgage-suit on the consent of parties is not a circumstance which can *per se* exclude the application of the provisions contained in Or. XXXIV: whether they would apply or not depends on the terms of the decree.—*Musht. Manjlabai v. Surajmal*, 111 I. C. 294: A. I. R. 1928 Nag. 333.

A preliminary decree under Or. XXXIV, r. 4, may be passed in terms of a compromise by which a longer time than six months is provided for and



in such a case a final decree has to be applied for and passed before execution can be taken — *Mahomed Unis v. Janeskar*, A. I. R. 1929 All. 881.

Whether a decree passed is executable or not depends on its terms.— See *Sarat Chandra v. Joy Sankar*, 35 C. W. N. 332; 134 I. C. 80; A. I. R. 1931 Cal. 546.

Where the compromise on which the decree is based is silent as regards the manner in which the sale of the hypothecated property is to be obtained, the provisions of r. 14 would apply, the decree-holder can proceed against the person and other properties of the judgment-debtor in execution of the consent-decree, but if he desires to have the hypothecated property sold he should institute a suit under Or. XXXIV, r. 4.—*Posti Mal v. Radhakishan*, 54 A. 763; 138 I. C. 603; 30 A. L. J. 486; A. I. R. 1932 All. 439.

Difference between Or. XXXIV, r. 5, and S. 89, T. P. Act.— There is a substantial difference between the provisions of S. 89 of the T. P. Act and Or. XXXIV, r. 5, C. P. Code, and the former provision governs sales held before the new C. P. Code. As soon as an order absolute was made, the mortgage security was extinguished and the relative rights of the mortgagor and the mortgagee were regulated by the decree. But it does not follow that thereafter the mortgagee is debarred from proving that the description of the property mentioned in the schedule to the decree was itself erroneous.—*Nandi Lal v. Jogendra*, 23 C. W. N. 403.

Final decree, when can be passed — A final decree in a mortgage suit can be passed only when the preliminary decree has become conclusive between the parties. If there is an appeal pending from the latter, the final decree should be passed only after the disposal of the appeal; *Lalman v. Shiam Singh*, 93 I. C. 603; A. I. R. 1926 All. 291; *Gajadhar v. Kishan*, 39 A. 641 (F. B.); 42 I. C. 93; *Jowad Hossein v. Gendan*, 53 I. A. 197; 6 P. 24 (P. C.); 98 I. C. 499; A. I. R. 1926 P. C. 93; 31 C. W. N. 58; 44 C. L. J. 63; 51 M. L. J. 781. But the holder of the preliminary decree may apply for a final decree even though the appeal is pending, when the mortgagor has failed to pay.—*Bishamber v. Nizam Ali*, 103 I. C. 751. See also other cases noted under heading "Application for a final decree" under Or. XXXIV, rr. 2 and 3, ante. See however, *Khairunnissa v. Oudh Commercial Bank*, 51 A. 640; 27 A. L. J. 480; 119 I. C. 510; A. I. R. 1929 All. 287, and *Somar v. Deonandan*, 6 P. 780.

For cases of awards and consent decrees in which a final decree need not be passed, see notes under headings "Award" and "Consent decree," ante.

Rule 4, sub-rule (2)—Rule 5, sub-rule (1).—Under the Transfer of Property Act, 1883 there was no power expressly given to extend the date fixed for payment and it used to be held that the Court was bound to pass a final decree for sale if payment was not made within that date.—*Taniram v. Gajanan*, 21 B. 300. And a contrary view was also taken, holding that it was quite within the power of the Court to adjourn the sale in order to give the mortgagor time to raise money to pay off the decree.—*Shyam Kishan v. Sundar Kuer*, 31 C. 373 (distinguishing *Kedar Nath v. Koli Ohurn*, 25 C. 703 and dissenting from *Taniram v. Gajanan*, 24 B. 300).

There were conflicting views on the question whether the chapter on execution of the Code of 1882 or Or. XXI, r. 69 and Or. XXI, r. 89 of the Code of 1908 applied to sales under mortgage decrees and so whether the sale could be stopped by deposit of the amount due and costs or set aside by making a deposit.—*Rajaram v. Chunni*, 19 A. 205; *Harjas Rai v. Rameshar*, 20 A. 354, *Mallikarjunadu v. Lingamurti*, 25 M. 244 (F. B.); *Adipuranam v. Gopalasami*, 31 M. 354; *Krishnaji v. Mahadev*, 25 B. 104; *Pramatha v. Khetra*, 29 C. 651; *Bibiyan v. Sachi*, 31 C. 863 (S. B.); *Jogendra v. Methanee*, 6 C. W. N. 769 (in which it was said that the equitable right of the mortgagor to redeem at any time before the property is sold is not based on, but is outside the provisions of, the Transfer of Property Act). See also *Syed Shah v. Ismail Hasan*, 18 A. L. J. 622; 56 I. C. 172; *Kara Lal v. Punjab National Bank Ltd.*, 55 I. C. 816; *Dharam Singh v. Ganeshram*, 43 I. C. 399; *Moulvi Muhammad Musa v. Aidal Singh*, 65 I. C. 801. The words of sub rule (1) of r. 5, "at any time before the confirmation of the sale made in pursuance of a final decree passed under sub-rule (3) of this rule" have removed the conflict.

**Sub-mortgagee's right to sue for sale.**—The right of a sub-mortgagee who holds the mortgage of the mortgagee's rights but not an assignment of the original mortgage was negatived in *Ganga Prasad v. Chunni*, 18 A. 113; *Ramjatan v. Ramkul*, 27 A. 511; and in *Ajudhia v. Man Singh*, 25 A. 46, a similar view was taken. This view has been overruled by the Allahabad High Court in a Full Bench decision.—See *Ram Shankarlal v. Ganesh Prasad*, 29 A. 385 (F. B.). The Calcutta High Court has recognised this right.—See *Bansi Lal v. Durga Prasad*, 9 C. L. J. 429; *Zaki Hasan v. Deo Nath*, 10 C. L. J. 470; *Bhanessar v. Ram Khelawan*, 12 C. L. J. 137. Also Madras.—*Muthu Vijia v. Venkatachallam*, 20 M. 35. The Bombay High Court has denied the right of sale to a sub-mortgagee on the ground that there is no privity between the original mortgagor and the sub-mortgagee.—*Padgaya v. Baji*, 20 B. 549. In a later case in Bombay it was held that a suit for sale by a sub-mortgagee was maintainable but the mortgagor and the mortgagee were necessary parties.—*Someswar v. Naranbas*, 9 I. C. 765; 13 Bom. L. R. 90. The same view as to parties has been taken in Allahabad.—*Ahmed Ali v. Bilas Rai*, 5 A. L. J. 402; (1903) A. W. N. 191. But in Calcutta it has been held that though a suit by a sub-mortgagee in which the original mortgagor is joined as a party is better adapted to the adjudication of the rights of all the parties, his not being so joined does not make the frame of the suit improper.—*Bhanessar v. Ram Khelawan*, 13 C. L. J. 137.

**Right of puisne mortgagee to obtain a decree for sale.**—The Allahabad High Court has also held that a puisne mortgagee has no right to obtain a decree for sale without offering to redeem all the prior encumbrances.—*Salig Ram v. Har Charan*, 12 A. 548; *Kali Charan v. Ahmad Shah*, 17 A. 48; *Mahammad v. Ghaffar*, 21 A. 272. But in *Venkatachella v. Panjandien*, 4 M. 213; in *Gangadhara v. Sivarama*, 8 M. 346; and in *Kanti Ram v. Kutubuddin*, 23 C. 33, it has been held that a puisne mortgagee is entitled to the prior incumbrancer. See 7 C. W. N. 766; *Jageshwar v.*

As regards a mortgage suit for sale, the rights of the second mortgagee are very limited: he has the right to redeem the prior mortgage or to receive.

in such a case a final decree has to be applied for and passed before execution can be taken.—*Mahomed Unis v. Janeshar*, A. I. R. 1929 All. 891.

Whether a decree passed is executable or not depends on its terms. See *Sarat Chandra v. Joy Sankar*, 35 O. W. N. 332: 134 I. C. 80: A. I. R. 1931 Cal. 546.

Where the compromise on which the decree is based is silent as regards the manner in which the sale of the hypothecated property is to be obtained, the provisions of r. 14 would apply, the decree-holder can proceed against the person and other properties of the judgment-debtor in execution of the consent-decree, but if he desires to have the hypothecated property sold he should institute a suit under Or. XXXIV, r. 4.—*Posti Mal v. Radhalishan*, 54 A. 763: 138 I. C. 603: 30 A. L. J. 486: A. I. R. 1932 All. 439.

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**Final decree, when can be passed.**—A final decree in a mortgage suit can be passed only when the preliminary decree has become conclusive between the parties. If there is an appeal pending from the latter, the final decree should be passed only after the disposal of the appeal; *Lalman v. Shiam Singh*, 92 I. C. 608: A. I. R. 1926 All. 291; *Gajadhar v. Kishan*, 39 A. 64: (F. B.): 42 I. C. 93; *Jowad Hossein v. Gendan*, 53 I. A. 197: 6 P. 24 (P. C.) 98 I. C. 499: A. I. R. 1926 P. C. 93: 31 O. W. N. 58: 44 O. L. J. 63: 51 M. L. J. 781. But the holder of the preliminary decree may apply for a final decree even though the appeal is pending, when the mortgagor has failed to pay.—*Bishamber v. Nizam Ali*, 108 I. C. 751. See also other cases noted under heading "Application for a final decree" under Or. XXXIV, rr. 2 and 3, ante. See however, *Khairunnissa v. Oudh Commercial Bank*, 51 A. 640: 27 A. L. J. 480: 119 I. C. 510: A. I. R. 1929 All. 287, and *Somar v. Deonandan*, 6 P. 780.

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he may be regarded as having acquired the equity of redemption as it stood at the date of the mortgage together with the lien of the mortgagee or he may be looked upon as having acquired the property at the date of the sale, the property discharged from the mortgage lien. If the suit is properly constituted the title of the purchaser will be absolute and relate back to the time of the execution of the mortgage and it will make no difference to the rights of the purchaser whichever of the two views be proceeded upon. In cases where the constitution of the suit is defective in the sense that all parties having an interest are not parties, different results follow, and this has led to a divergence of judicial opinion.—*Digambar v. Sujan*, 33 C. W. N. 100. This conflict has been amply discussed and the conflicting decisions have been referred to in *Krishtopada v. Chaitanya*, 49 C. 1048; 28 C. W. N. 92 (see the cases referred to in this case).

Where a part of the mortgaged property was, after the execution of the mortgage, sold by the mortgagor to some third parties, but the vendees were not made parties to the suit, held that the auction-purchaser at the mortgage sale had no title to possession as against the vendees, and a subsequent suit against them calling upon them to redeem was not maintainable.—*Harqulal v. Gobind Ras*, 19 A. 541 (F. B.). Followed in *Banwari Lal v. Nand Ram*, 49 A. 923 and *Madan Lal v. Bagwan Das*, 21 A. 235 (F. B.) (case in which in a prior mortgagee's suit on his mortgage the prior mortgagee and the purchaser at the sale on his mortgage decree to which the prior mortgagee was not a party were not made parties); and *Entholi Kizhakk Kandy v. Vallath*, 30 M. 500 (case in which a purchaser of some of the mortgaged properties from a mortgagor subsequent to the mortgage was not made a party). A similar view was taken by the Calcutta High Court in *Habibullah v. Jugdeo*, 6 C. L. J. 609; *Grish Chunder v. Iswar Chunder*, 4 C. W. N. 452; *Aghore v. Deb Narain*, 11 C. W. N. 314. It was applied in the case of *Krishtopada v. Chaitanya*, 49 C. 1048; 28 C. W. N. 92, in which it was held that when a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption, he cannot by purchasing the property in execution claim possession as against the purchaser of the equity of redemption. (But in this case any such claim was barred at the date of the suit by the mortgagee purchaser).

#### Calcutta Cases.—

The above view has been disapproved in the more recent decisions of the Calcutta High Court.—*Kalu v. Abhoy*, 25 C. W. N. 253; *Bhagaban v. Tarak*, 45 C. L. J. 4; *Bhodai Sheikh v. Baroda Kanta*, 46 C. L. J. 570. See also *Jugdeo v. Habibullah*, 6 C. L. J. 619; *Gangadas v. Jagendra*, 11 C. W. N. 403.

Defendant No. 4, after having mortgaged a certain property to the defendants Nos. 1 and 2, sold the same to the plaintiffs. Subsequently the defendants Nos. 1 and 2 although aware of the plaintiffs' purchase brought a suit upon the mortgage-bond against the defendant No. 4 only and without making the plaintiffs a party, and after having obtained a decree sold the property in execution thereof and purchased it themselves. In a suit by the plaintiffs for confirmation of possession and declaration of title, held that the mortgage-decree was not binding on the plaintiffs, but that the plaintiffs did

his mortgage money out of the surplus sale proceeds after satisfaction of the prior mortgage, but he cannot ask for a sale of the property if the prior mortgagee's claim is satisfied before the sale, nor can he ask for sale of some other property included in his own mortgage and for either of these purposes he must bring a separate suit for sale on his own mortgage.—*Kalpada v. Basanta*, 35 C. W. N. 877 (in which the cases are referred to).

The Madras High Court has also held that in special circumstances the puisne mortgagee has a right of sale.—*Gangayam v. Gomperts*, 31 M. 425.

**Suit for sale—Effect of omission to join proper parties.**—It is obligatory upon a mortgagee to bring before the Court all persons interested in the equity of redemption, of whose interest he has notice; if he omits a party of whose interest he has no notice, the decree obtained by him, does not thereby become infructuous. A party excluded from a mortgage suit and who has not been afforded opportunity to redeem, is entitled to exercise his right of redemption upon the same terms, as if he had been made a party to the original suit. The principles upon which a puisne mortgagee, who has been left out of a prior mortgagee's suit, is entitled to have his liability determined, are explained.—*Ganga Das v. Jogendra Nath*, 5 C. L. J. 315. See also *Ganpat Lal v. Bindbasini*, 47 C. 924 (P. C.); 24 C. W. N. 954; 47 I. A. 91; 56 I. C. 274; *Sukhi v. Gulam Safdar Khan*, 43 A. 469 (P. C.); 48 I. A. 465; 26 C. W. N. 279; 42 M. L. J. 15; 24 Bom. L. R. 590; 65 I. C. 151; *Prabhuling Appa v. Gurunath Balaji*, 22 Bom. L. R. 389; 45 B. 453.

If a person interested in the mortgaged property has not been joined as a party to the suit by the mortgagee and he comes in before foreclosure or sale, he has all the right of redemption that his interest in the property gives him. In a suit for sale under a mortgage the mortgagee failed to effectively implead certain persons, interested in the mortgaged property. A decree was passed and the mortgaged property was sold under it and was purchased by the mortgagee. In a suit by the persons who should have been but were not impleaded in the prior suit for a declaration that their right to redeem was not extinguished, held, that after the sale has taken place, the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such and that unless the claim to set aside the sale was made in a properly constituted action and properly raised, the Court could not interfere with the possession which had been given him by the purchaser.—*Ganpat Lal v. Bindbasini*, 47 C. 924 (P. C.); 24 C. W. N. 954; 47 I. A. 91; 56 I. C. 274; *Sheikh Kalu Sharif v. Abbey Charan*, 25 C. W. N. 253.

**Suit by first mortgagee—Failure to join second mortgagee as party—Decree and sale thereunder—Purchase by first mortgagee—Subsequent suit for partition and possession.** Held, that the plaintiff was not entitled to obtain possession without paying off the second mortgage, and it was immaterial whether the plaintiff's failure to join the second mortgagee as a party of the previous suit was wilful or due to ignorance of the fact that a second mortgage existed.—*Rangasamy v. Komarammal*, 26 M. 484; *Mt. Danwanti v. Hargobind*, 5 P. L. T. 103.

As regards the rights of a purchaser at a mortgage sale where the suit is properly constituted, that is to say where all parties having an interest in the property comprised in the mortgage are parties, two views may be taken:

he may be regarded as having acquired the equity of redemption as it stood at the date of the mortgage together with the lien of the mortgagee or he may be looked upon as having acquired the property at the date of the sale, the property discharged from the mortgage lien. If the suit is properly constituted the title of the purchaser will be absolute and relate back to the time of the execution of the mortgage and it will make no difference in the rights of the purchaser whichever of the two views be proceeded upon. In cases where the constitution of the suit is defective in the sense that all parties having an interest are not parties, different results follow, and this has led to a divergence of judicial opinion.—*Digambar v. Sujan*, 33 C. W. N. 100. This conflict has been amply discussed and the conflicting decisions have been referred to in *Krishtopada v. Chaitanya*, 49 C. 1048: 28 C. W. N. 92 (see the cases referred to in this case).

Where a part of the mortgaged property was, after the execution of the mortgage, sold by the mortgagor to some third parties, but the vendees were not made parties to the suit; held that the auction-purchaser at the mortgage sale had no title to possession as against the vendees, and a subsequent suit against them calling upon them to redeem was not maintainable.—*Hargulal v. Gobind Ras*, 19 A. 541 (F. B.). Followed in *Banwari Lal v. Nand Ram*, 49 A. 923 and *Madan Lal v. Bagwan Das*, 21 A. 235 (F. B.) (case in which in a prior mortgagee's suit on his mortgage the puisne mortgagee and the purchaser at the sale on his mortgage decree in which the prior mortgagee was not a party were not made parties); and *Entholi Kizhakki Kandy v. Vallath*, 30 M. 500 (case in which a purchaser of some of the mortgaged properties from a mortgagor subsequent to the mortgage was not made a party). A similar view was taken by the Calcutta High Court in *Habibullah v. Jugdeo*, 6 C. L. J. 609; *Grish Chunder v. Iswar Chunder*, 4 C. W. N. 452, *Aghore v. Deb Narain*, 11 C. W. N. 314. It was applied in the case of *Krishtopada v. Chaitanya*, 49 C. 1048: 28 C. W. N. 92, in which it was held that when a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption, he cannot by purchasing the property in execution claim possession as against the purchaser of the equity of redemption. (But in this case any such claim was barred at the date of the suit by the mortgagee purchaser).

#### Calcutta Cases.—

more recent decisions of  
W. N. 253; *Bhagaban v. Kanta*, 46 C. L. J. 570. See also *Jugdeo v. Habibullah*, 6 C. L. J. 612; *Gangadas v. Jagendra*, 11 C. W. N. 403.

Defendant No. 4, after having mortgaged a certain property to the defendants Nos. 1 and 2, sold the same to the plaintiffs. Subsequently the defendants Nos. 1 and 2 although aware of the plaintiffs purchase brought a suit upon the mortgagee-hold against the defendant No. 4 only and without making the plaintiffs a party, and after having obtained a decree sold the property in execution thereof and purchased it themselves. In a suit by the plaintiffs for confirmation of possession and declaration of title, held that the mortgage-decree was not hindering on the plaintiffs, but that the plaintiffs did

not acquire by the purchase any other right than to redeem the mortgage and no decree could be passed in his favour such as he prayed for.—*Protap v. Ishan*, 4 C. W. N. 266.

Where the equity of redemption is entirely unrepresented it is possible to take the view that the purchaser at the sale does not acquire any rights under the mortgage, the same having been already extinguished by the order for sale and substituted by the right of sale.—See *Digambar v. Surjan*, 33 C. W. N. 100 at p. 105 (referring to *Hetram v. Shadiram*, 45 I. A. 130: 40 A. 407 (P. C.): 22 C. W. N. 1033; and *Matru Mal v. Durga Kunwar*, 47 I. A. 71: 42 A. 364 (P. C.): 32 C. L. J. 121: 22 Bom. L. R. 553: 38 M. L. J. 419: 55 I. C. 969). On the other hand it is possible to take the view that the decree is to be treated as a nullity on general principles because it was passed in respect of property which was entirely unrepresented and to hold that the purchaser acquired nothing.—*Ibid*.

Where the puisne mortgagee is not made a party to a suit by the first mortgagee his rights are not affected by the decree on sale thereunder and the puisne mortgagee has still the right to redeem the prior mortgage. He may notwithstanding the prior decree bring a suit on his mortgage. When the prior mortgagee brings his suit without impleading the puisne mortgagee, and obtains a decree against the mortgagor only and purchases the property himself and the mortgaged property is sold a second time at the instance of the puisne mortgagee and purchased by the latter, the purchaser under the first decree purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way.—*Sayamali v. Anisuddin*, 50 C. L. J. 152 (F. B.) (following *Ramnarain v. Bandi*, 31 C. 737: *Debendra v. Ramtaran*, 30 C. 599 and *Gopee Bundhoo v. Kalee Podo*. 23 W. R. 338).

A mortgagee who had purchased the properties in execution of his decree cannot be allowed to sue for recovery of possession from the holder of the equity of redemption, if at the time he brought his mortgage suit he had notice of the transfer of the equity of redemption but did not choose to implead the transferee in his suit on the mortgage.—*Mahommed Mahar v. Rash Behari*, 55 C. L. J. 299.

### Bombay Cases —

The view of the Bombay High Court will appear from the following cases:—First mortgagee got a decree without making the second mortgagee a party who was in possession. He purchased the property in the mortgage sale and then sued the defendant for possession. The Courts below held that the plaintiff was bound to redeem the defendant. On appeal the High Court allowed the plaintiff's claim subject to the right of redemption which the defendant could exercise. Here the mortgagor was a party to the suit and no question of notice of the existence of the second mortgage was raised. The principle adopted by the Court was that the plaintiff purchased the property in the same state as it stood at the date of mortgage.—*Mohan Manor v. Togu Uka*, 10 B. 224.

Mortgagee instituted a suit on the mortgage without making the subsequent purchaser of the equity of redemption a party. He purchased the property and sued the purchaser for possession. This claim was allowed

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subject to the defendant exercising the right of redemption. Here the equity of redemption, it seems, was wholly unrepresented.—*Dadoba v. Damodar*, 16 B. 486.

Puisne mortgagee in possession was not made a party. Stranger purchaser in execution sale under the first mortgagee's decree sued for possession: Defendant, puisne mortgagee, allowed to retain possession on payment of the plaintiff's dues.—*Desai Lallubhai v. Mundas*, 20 B. 390.

Puisne mortgagee defendant has precisely the same rights as he had against the mortgagor and the first mortgagee collectively.—*Pandurang v. Sakharchand*, 31 B. 112. The same principle was applied in *Shankar Venkatesh v. Sadashiv*, 33 B. 24.

Subsequent purchaser of equity of redemption was not made a party: mortgagee was himself the purchaser at the sale; *held*, suit for possession by the purchaser would not lie. In this case the suit for possession was dismissed as the equity of redemption was wholly unrepresented. The Court held that if plaintiffs were in possession different considerations might have prevailed.—*Dattatraya v. Venkatesh*, 24 Bom. L. R. 741.

#### Madras Cases.—

The Madras High Court in a Full Bench decision has held that a first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage is not entitled to a decree for possession against a puisne mortgagee with possession who was not impleaded in the first mortgagee's original suit, even subject to the puisne mortgagee's right of redemption, and as regards the respective rights of the first and the puisne mortgagees have laid down the following four propositions on an exhaustive review of the case-law:—(1) A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of his mortgage; (2) the purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage; (3) those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof; (4) the purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit.—*Mulla Vittal v. Achuthan*, 21 M. L. J. 213 (F. B.) (the views taken by the different High Courts on these questions and the cases bearing on them have been discussed in detail in this case). An exhaustive review of the case-law on the point will also be found in *Chinnu v. Venkatasamy*, 40 M. 77.

Where a simple mortgagee brought a suit for sale against the mortgagor without implicating certain subsequent purchasers of the equity of redemption and the properties were sold in auction in execution of the decree in that suit; *held* the purchasers are in the same position as puisne mortgagees and their rights are not affected by the suit and the decree obtained in their absence; also *held* that it is open to the simple mortgagee or the purchaser in execution of the mortgage decree to maintain a second suit for sale against the purchasers of the equity of redemption.—*Chandramma v. Seethan*, 133 I. C. 497; 61 M. L. J. 316; A. I. R. 1931 Mad. 542.



**Patna Cases.—**

The Patna High Court has also held that where the first mortgagee obtained a decree on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter, and on failure to get possession brought a suit against the second mortgagee who claimed to redeem all the properties; *held* that the integrity of the mortgaged property having been broken up by the purchase of the mortgaged properties by the plaintiff, the second mortgagee could only redeem the property mortgaged to him.—*Amir Chand v. Moti*, 134 I. C. 959 : A. I. R. 1931 Pat. 434.

**Allahabad Cases.—**

The Allahabad High Court has held in a Full Bench decision thus.—The auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the second mortgagee, the rights of the mortgagor who was a subsequent mortgagee was pending or the purchase in execution of the prior mortgagee's decree was earlier in point of time. If the first mortgagee be the earlier purchaser, the rights of the mortgagor to obtain possession will ultimately vest in him. If his mortgage is not time-barred, he can compel the subsequent mortgagee to redeem him, but if it is time-barred he must redeem the subsequent mortgage. Where a sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage the sale in the subsequent mortgagee's suit is affected by the rule of *lis pendens* so as to make the purchaser's right subject to the result of the prior mortgagee's suit. If *lis pendens* does not apply, and the second mortgagee is the earlier purchaser, the prior mortgagee will have the right to take possession as plaintiff if a suit on his mortgage be not time-barred. If the second mortgagee redeems him, the second mortgagee will retain the property. If the prior mortgage has become barred by time, the prior mortgagee cannot obtain possession.—*Ram Sanahi Lal v. Janki Prasad*, 53 A. 1023 (F. B.) : 134 I. O. 1 : 29 A. L. J. 729 : A. I. R. 1931 All. 466.

In another Full Bench case of the same Court the question referred was—“Is an auction-purchaser at a sale held in execution of a decree, passed on foot of a prior mortgage, to which the second mortgagee was no party, entitled to remove the materials of the building erected by him on a site included in the mortgaged property purchased by him, or is the building liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage?” *Held* by the majority that the question should be answered in the negative. *Held* also, that S. 63 of the Transfer of Property Act does not apply to the case, which is not one of a mortgagee in possession. The auction-purchaser's possession may in one sense be regarded as being analogous to that of a mortgagee in possession, as he is entitled to retain his possession until discharge of the prior mortgage which he can set up as a shield. Even then, as the house is an accession which is not capable of separate possession or enjoyment as a house apart from the land itself, and as it was neither made with the mortgagor's assent nor was it necessary for preservation of the land from destruction, forfeiture or sale, the auction-purchaser cannot

remove the materials or claim compensation, under this section.—*Nonnu Mol v. Ram Chandra*, 53 A. 334 (F. B.) (all relevant authorities have been discussed in the separate judgments delivered in that case).

#### Punjab Cases.—

In the Lahore High Court the following has been held :—Where a second mortgagee instituted a suit on his mortgage without impleading the prior mortgagees as parties and got a final decree for sale, and subsequently the first mortgagees sued on their mortgage impleading the second mortgagee also, but before the final decree was passed the second mortgagee brought the properties to sale in execution of his decree, and later the prior mortgagees also brought the properties to sale and purchased them themselves in execution. *Held* that the purchasers in the sale in pursuance of the decree on the first mortgage got the properties and were entitled to possession as against the first purchaser.—*Ramjidas v. Harjas*, A. I. R. 1928 Lah. 505; 112 I. C. 699.

#### Burma Cases.—

In the Rangoon High Court it has been held that where in a suit by a mortgagee a subsequent purchaser of the mortgaged property is not made a party and the suit is decreed and the property is sold, the latter cannot sue for a declaration that he is the absolute owner of the property but he is only entitled to a declaration that the mortgage-decree is not binding on him; his possession, however, cannot be disturbed by anyone without filing a suit against him.—*Ram Langam v. Mo Loke Gale*, 127 I. C. 371; A. I. R. 1930 Rang 175.

#### Other Cases.—

In a suit for sale by the first mortgagee if the second mortgagee is a party, the latter is there in order that he may have an opportunity of redeeming, if he so wished, and in order that he might receive his mortgage-money or part of it out of the surplus sale-proceeds after satisfaction of the first mortgage, but the decree is not really a decree in his favour and he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before or by means of the sale.—*Mackintosh v. Watkins*, 1 C. L. J. 31. *See also Sarat Chandra v. Nahapiet*, 37 C. 907; 8 I. C. 1142; *Vedavyasa v. Madura Hindu Sabha*, 42 M. 90; 49 I. C. 36.

Where a subsequent mortgagee seeks to bring to sale the property mortgaged to him and there are parties defendants to the suit, who have purchased the property and paid off prior mortgages, the plaintiff is not entitled to an order for sale unless he pays to such defendants the amount paid by them in respect of the prior mortgages together with the full amount due on such mortgages.—*Sri Ram v. Kesri Mal*, 26 A. 185.

A prior mortgagee obtained a decree for sale upon his mortgage in a suit to which the puisne mortgagee was a party. The prior mortgagee's decree being partly satisfied by sale of a portion of the mortgaged property, the balance was paid by the puisne mortgagee, who then applied for an order absolute for sale of the property comprised in the prior mortgage and also of some other property comprised in his own mortgage. *Held* that he was not entitled to any order in respect of his own mortgage.—*Jamna Das v. Misri Lal*, 26 A. 504 (24 A. 179 referred to).

"Payment into Court"—Before the Code of 1908 came into force it was held that applications for order absolute for sale under S. 89, T. P. Act

are applications for execution of the decree under S. 88, T. P. Act. To such applications S. 258, C. P. Code, 1882 (Or. XXI, r. 2), is applicable, and bars recognition of payments made out of Court unless such payments are certified in the manner prescribed by the section.—*Hakim Singh v. Ram Singh*, 30 A. 248 : 5 A. L. J. 272 (23 M. 473 (F. B.) followed; 8 C. W. N. 102 dissented from). See also *Harish Chandra v. Jagabandhu*, 12 C. W. N. 232 : 7 C. L. J. 581. But see *Pramatha Chandra v. Khelra Mohan*, 29 C. 651.

Under the Code of 1908 it has been held that in passing a final decree under Or. XXXIV, r. 5 the Court has no discretion except to follow the statutory form of the decree, when no payment has been made into Court, and that when a payment out of Court has been made it cannot be recognized unless certified under Or. XXI, r. 2.—*Piran v. Jitendriya*, 25 C. L. J. 553; *Singh Raja v. Pethu Raja*, 42 M. 61 : 48 I. C. 196. On the other hand it has also been held that Or. XXI has no application to such a case and therefore the payment could be taken into consideration even if it was not certified.—*Ramji Lal v. Karan Singh*, 39 A. 532 : 40 I. C. 424; *Jogendra v. Gouri Shankar*, 2 P. L. J. 533 : 40 I. C. 138 (case in which it has been held that Or. XXIII, r. 3 applies to adjustment out of Court in such a case). But it has also been held that the procedure of payment into Court was a restriction deliberately imposed and Or. XXIII, r. 3 cannot be read to override the clear terms of this rule in Or. XXXIV.—*Rasan v. Rangayan*, 30 L. W. 551 : (1929) M. W. N. 867. See also *Musht. Durpa v. Nand Lal*, 136 I. C. 732 : A. I. R. 1932 Lab. 231. The refusal of a Treasury Officer to take money, tendered in time, is not default on the part of the judgment-debtor.—*Mahomed Unis v. Janeshar*, A. I. R. 1929 All. 681.

Where the preliminary decree is based on a compromise and is not prepared in such accordance with Or. XXXIV, r. 4 it is open to the judgment-debtor on application made for a final decree, to prove that the preliminary decree has been satisfied out of Court.—*Sital Singh v. Baijnath*, 44 A. 668 : 20 A. L. J. 602 Order XXI, r. 2 applies to decrees of every description and does not exclude from its operation a mortgage-decree; but Or. XXXIV has no application where a decree in a mortgage-suit is not prepared under that order.—*Mangar Sahu v. Bhatoo Singh*, 57 I. C. 473 (case of a compromise decree).

One of joint decree-holders cannot alone certify satisfaction of the whole decree; if he does so, the other decree-holder can obtain an order absolute for sale in respect of his own share of the mortgage-debt.—*Tamman Singh v. Lachhmin Kunwari*, 26 A. 318.

**Finality of decrees.**—So long as an order under S. 89 of the Transfer of Property Act, 1882 making a decree absolute for sale under S. 88 of the Act subsists, it is enforceable and its validity cannot be questioned by the judgment-debtor in execution proceedings. If the order under S. 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law.—*Ram Jas v. Sheo Prasad*, 28 A. 193 (3 A. 421, 13 A. 278, 21 C. 19 distinguished).

After the passing of a preliminary decree on a mortgage the mortgagor died and his sons were brought on the record as his legal representatives; the latter objected that they were not the legal representatives and they also attacked the mortgage-decree on the ground that the mortgage was without consideration and legal necessity. Held that the Court was not entitled to

reopen questions which had already been determined by the preliminary decree.—*Kaloo v. Niadar*, 115 I. C. 462 : 27 A. L. J. 425 : A. I. R. 1929 All. 252.

The correctness of a preliminary decree cannot be questioned on an application to make it absolute.—*Murlidhar v. Vishnudas*, 40 B. 321.

When application for a final decree is dismissed for default, whether fresh application lies.—Where two applications for final decrees in two suits were dismissed on the ground that the plaintiffs though called upon to file complete lists of mortgaged properties and proper calculations did not comply and were absent under S. 11 or by reason of did not apply (following *Le* that the applications were Or. XXXIV, r. 5 it was not incumbent on the decree-holder to file fresh lists and that the Court was bound to rectify its own mistakes (following *Jodha Singh v. Gokarn*, 47 A. 546).—*Chandra Shekhar v. Amir Begam*, 49 A. 592 : 101 I. C. 676 : A. I. R. 1927 All. 439.

Contents of an application for a final decree.—A plaintiff is not bound to describe in his application for the making of a final decree for sale of mortgaged property, the properties with respect to which he asks for a final decree for sale unless it is his intention that any particular property should be omitted.—*Basant Lal v. Basanti*, 117 I. C. 102 : 27 A. L. J. 1097 : A. I. R. 1929 All. 551.

Stay of preparation of final decree.—It is generally expedient that proceedings for the preparation of the final decree should not be stayed pending an appeal from the preliminary decree, because the mere passing of the final decree will not in any way affect the rights of the parties to the appeal.—*Janki Dass v. Sheo Prasad*, 136 I. C. 75 : A. I. R. 1932 All. 238 : 30 A. L. J. 42.

Form of decree in a suit for sale.—In a suit by a mortgagee against the mortgagor and the purchasers of the mortgaged property, *held*, that the proper decree in the suit should be a money-decree against the mortgagor only, with a declaration that the mortgaged property is liable to be sold free of subsequent incumbrances.—*Bhairab Chandra v. Nadyar Chand*, 3 B. L. R. 357 : 12 W. R. 291.

In a suit for recovery of mortgage-money by sale where it appeared that the decree was in substance a decree for sale of the mortgaged properties though not in the prescribed form, *held*, that the decree was to be regarded as a mortgage-decree under the T. P. Act, IV of 1892.—*Lal Behary v. Habibur Rahaman*, 26 C. 166 (21 C. 473, 25 C. 530 referred to).

A suit on a mortgage was adjusted and a decree made treating a *solehnamah* filed by the parties as a part of the decree. It was agreed that the amount due should be paid in instalments and that the mortgaged property should be sold in default of payment. *Held*, that though the form of the decree is not strictly in accordance with the provisions of this section, still the decree is a valid one and the mortgaged property should be sold to satisfy the decretal amount. Whether an order under S. 89 of the T. P. Act, is necessary or not, the Court has general jurisdiction to direct a sale of the property. Section 89 of the T. P. Act contemplates a certain state of things, but where such a state of things does not exist that section does

not exclude other ways of enforcing a decree, if such decree is otherwise valid in law.—*Abir Paramanik v. Jahar Mahmud*, 34 C. 886; 11 C. W. N. 879; 6 C. L. J. 95. A similar view has also been taken in *Bechu Singh v. Bicharam*, 10 C. L. J. 91, where it has been further held that the provisions of S. 89, T. P. Act, are not applicable to consent decrees.

In a suit by the mortgagee against a Mitakshara father and son to enforce a mortgage-bond executed by the father within six years from the due date fixed by the mortgage, it was not proved that there was any legal necessity for the loan, or that the loan was contracted for illegal or immoral purposes: Held that the mortgagee was entitled to have the security enforced as against the share of the mortgagor and also against the share of the son in the ancestral property.—*Kishun Pershad v. Tipan Pershad*, 34 C. 735; 11 C. W. N. 613; 5 C. L. J. 569.

A combined decree under Ss. 88 and 90 of the T. P. Act (rr. 4 and 6), is contrary to the procedure prescribed by that Act. Where such a decree is passed and the decree-holder proceeds to execute it for the realization of the balance after the mortgaged property has been sold, the provisions of S. 230, C. P. Code, 1882 (S. 48), will apply.—*Chandi Charan v. Ambika Charan*, 31 C. 792 (25 A. 541 dissented from). See also *Damodar v. Vyanku*, 31 B. 244; 9 Bom. L. R. 199, and *Sadho Singh v. Maharaja of Benares*, 29 A. 12, in which it has been held that where a decree in a suit for sale of hypothecated property is both a decree for sale and a personal decree, there is no need for the decree-holder to apply for a separate decree under S. 90 of the T. P. Act (r. 6), and if he does so and his application is rejected, this will not operate as a bar to his executing the decree against the judgment-debtor personally.

In a mortgage-suit a decree may be passed for the sale of the mortgaged property subject to a charge for maintenance in favour of a particular person, the plaintiff in such a suit does not occupy the position of a second mortgagee.—*Lalman v. Mohar Singh*, 29 A. 205; 3 A. L. J. 848 (13 A. 432 distinguished).

Form of decree discussed, where a person who at a sale in execution of a mortgage-decree has purchased a portion of the mortgaged property, brings a suit for that portion against the assignee in possession as mortgagor.—*Bepin Behari v. Brojo Nath*, 8 C. 357.

In a suit on a mortgage for an account and sale of the mortgaged property, where a puisne mortgagee, who is made a defendant, appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale-proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants.—*Kissory Mohun v. Kally Churn*, 22 C. 100 (5 C. 101 referred to). See also *Kissory Mohan v. Kali Churn*, 24 C. 190. This case has been explained and distinguished in *Debendra Nath v. Abdul Samed*, 10 C. L. J. 150.

In a suit on a mortgage by a second mortgagee, to which the prior mortgagee was a party, and in which the plaintiff prayed that the amount due to him might be realized by a sale of the mortgaged property, held,

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that the plaintiff was entitled to a decree for sale of the mortgaged property subject to the lien of the prior incumbrancer.—*Kanti Ram v. Kutubuddin*, 23 C. 33 (referred to in *Beni Madhub v. Sourendra Mohun*, 23 C. 795). See also *Durga v. Chandra Nath*, 4 C. W. N. 541.

Suit by second mortgagees against purchaser of equity of redemption who had paid off a prior mortgage—Suit ignoring lien of purchaser of equity of redemption—Form of decree in such a suit.—*Kali Charan v. Ahmad Shah*, 17 A. 48 (followed in *Muhammad Niamat v. Ghaffar*, 21 A. 272). But see *Salig Ram v. Har Charan*, 12 A. 548 (8 A. 105 referred to).

Rights of persons advancing money to pay off prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree in such a suit.—*Tulsa v. Akhub Chand*, 13 A. 581.

First and second mortgagees—Second mortgagee not made party to suit by first mortgagees for sale of mortgaged property—Form of decree in such a suit.—*Muhammad Samiuddin v. Man Singh*, 9 A. 125.

In a sale held in pursuance of Or. XXXIV, r. 5, the stranger auction-purchaser acquires the right of the mortgagee and also of the mortgagor and it cannot be said that the right of redemption remained in the mortgagor after the sale or in any event after the confirmation thereof. Even where the purchaser is not a stranger but a puisne mortgagee himself his purchase is competent and then too the mortgagor's right to redeem the first mortgage is extinguished.—*Kalipada v. Basanta*, 35 C. W. N. 877.

Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee—Form of decree.—*Rangayya v. Parthasarathi*, 20 M. 120.

A mortgagor stipulated that if the mortgaged properties he sold for arrears of revenue, or for other causes, the money advanced might be recovered by execution against the person or other property of the mortgagor. Held, that no sale having taken place, the mortgagee could only obtain a decree against the mortgaged properties.—*Bunseedhur v. Sujaat Ali*, 16 C. 540 (10 C. 740 referred to).

Where the suit is based upon a mortgage by the express provisions of which the whole amount is payable in a lump sum, and there is also a surety for the payment of the sum due on the bond, the Court is not justified in fixing instalments; the entire amount must be paid in a lump or a sale is to be ordered.—*Maya Das v. Buta*, A. I. R. 1930 Lah. 132. See also *Hardeo Das v. Hukam Singh*, 2 A. 320; *Shankarappa v. Danappa*, 5 B. 604.

Where a co-mortgagee sues for sale impleading the other co-mortgagee as a party defendant, and the decree specifies their respective dues, there cannot be said to be two separate decrees in one suit, and so in form the decree is not objectionable.—*Upendra v. Kali Charan*, 123 I. C. 439; A. I. R. 1930 All. 634; 23 A. L. J. 1472.

Construction of mortgage-decree.—Where the plaintiff sued on a mortgage-bond by enforcement of lien on the property hypothecated, and

not exclude other ways of enforcing a decree, if such decree is otherwise valid in law.—*Abir Poramanik v. Jahar Mahmud*, 34 C. 886: 11 C. W. N. 879: 6 C. L. J. 95. A similar view has also been taken in *Bechu Singh v. Bicharam*, 10 C. L. J. 91, where it has been further held that the provisions of S. 89, T. P. Act, are not applicable to consent decrees.

In a suit by the mortgagee against a Mitakshara father and son to enforce a mortgage-bond executed by the father within six years from the due date fixed by the mortgage, it was not proved that there was any legal necessity for the loan, or that the loan was contracted for illegal or immoral purposes: *Held* that the mortgagee was entitled to have the security enforced as against the share of the mortgagor and also against the share of the son in the ancestral property.—*Kishun Pershad v. Tipon Pershad*, 34 C. 735: 11 C. W. N. 613: 5 C. L. J. 569.

A combined decree under Ss. 88 and 90 of the T. P. Act (rr. 4 and 6) is contrary to the procedure prescribed by that Act. Where such a decree is passed and the decree-holder proceeds to execute it for the realization of the balance after the mortgaged property has been sold, the provisions of S. 230, C. P. Code, 1882 (S. 48), will apply.—*Chondi Choran v. Ambika Charan*, 31 C. 792 (25 A. 541 dissented from). See also *Damodor v. Vyanku*, 31 B. 244: 9 Bom. L. R. 199, and *Sadho Singh v. Mahoraja of Benares*, 29 A. 12, in which it has been held that where a decree in a suit for sale of hypothecated property is both a decree for sale and a personal decree, there is no need for the decree-holder to apply for a separate decree under S. 90 of the T. P. Act (r. 6), and if he does so and his application is rejected, this will not operate as a bar to his executing the decree against the judgment-debtor personally.

In a mortgage-suit a decree may be passed for the sale of the mortgaged property subject to a charge for maintenance in favour of a particular person, the plaintiff in such a suit does not occupy the position of a second mortgagee.—*Lalman v. Mohar Singh*, 29 A. 205: 3 A. L. J. 848 (13 A. 432 distinguished).

Form of decree discussed, where a person who at a sale in execution of a mortgage-decree has purchased a portion of the mortgaged property, brings a suit for that portion against the assignee in possession as mortgagor.—*Bejn Behari v. Brojo Nath*, 8 C. 357.

In a suit on a mortgage for an account and sale of the mortgaged property, where a puisne mortgagee, who is made a defendant, appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale-proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants.—*Kissory Mohun v. Kally Churn*, 22 C. 100 (5 C. 101 referred to). See also *Kissory Mohan v. Kali Churn*, 24 C. 190. This case has been explained and distinguished in *Debendra Nath v. Abdul Samed*, 10 C. L. J. 150.

In a suit on a mortgage by a second mortgagee, to which the prior mortgagee was a party, and in which the plaintiff prayed that the amount due to him might be realized by a sale of the mortgaged property, *held*,

## r. 5.

that the plaintiff was entitled to a decree for sale of the mortgaged property subject to the lien of the prior incumbrancer.—*Kanti Ram v. Kutubuddin*, 22 C. 33 (referred to in *Beni Madhub v. Soudendra Mohun*, 23 C. 795). See also *Durga v. Chandra Nath*, 4 C. W. N. 541.

Suit by second mortgagees against purchaser of equity of redemption who had paid off a prior mortgage—Suit ignoring lien of purchaser of equity of redemption—Form of decree in such a suit.—*Kali Charan v. Ahmad Shah*, 17 A. 48 (followed in *Muhammad Niamat v. Ghaffar*, 21 A. 272). But see *Salig Ram v. Har Charan*, 12 A. 548 (8 A. 105 referred to).

Rights of persons advancing money to pay off prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree in such a suit.—*Tulsa v. Khub Chand*, 13 A. 581.

First and second mortgagees—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Form of decree in such a suit.—*Muhammad Samiuddin v. Man Singh*, 9 A. 125.

In a sale held in pursuance of Or. XXXIV, r. 5, the stranger auction-purchaser acquires the right of the mortgagee and also of the mortgagor and it cannot be said that the right of redemption remained in the mortgagor after the sale or in any event after the confirmation thereof. Even where the purchaser is not a stranger but a puisne mortgagee himself his purchase is competent and then too the mortgagor's right to redeem the first mortgage is extinguished.—*Kalipada v. Basanta*, 35 C. W. N. 877.

Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee—Form of decree.—*Rangayya v. Parthasarathi*, 20 M. 120.

A mortgagor stipulated that if the mortgaged properties be sold for arrears of revenue, or for other causes, the money advanced might be recovered by execution against the person or other property of the mortgagor. Held, that no sale having taken place, the mortgagee could only obtain a decree against the mortgaged properties.—*Bunseedhur v. Sujaat Ali*, 16 C. 540 (10 C. 740 referred to).

Where the suit is based upon a mortgage by the express provisions of which the whole amount is payable in a lump sum, and there is also a surety for the payment of the sum due on the bond, the Court is not justified in fixing instalments; the entire amount must be paid in a lump or a sale is to be ordered.—*Maya Das v. Buta*, A. I. R. 1930 Lab. 132. See also *Hardeo Das v. Hukam Singh*, 2 A. 320; *Shankarapa v. Danapa*, 5 B 604.

Where a co-mortgagee sues for sale impleading the other co-mortgagee as a party defendant, and the decree specifies their respective dues, there cannot be said to be two separate decrees in one suit, and so in form the decree is not objectionable.—*Upendra v. Kali Charan*, 123 I. C. 439; A. I. R. 1930 All. 634; 23 A. L. J. 1472.

Construction of mortgage-decree.—Where the plaintiff sued on a mortgage-bond by enforcement of lien on the property hypothecated, and



regarded as a simple money-decree, and not for enforcement of any lien.—*Thamman Singh v. Ganga Ram*, 2 A. 342; *Harsukh v. Meghraj*, 2 A. 345; *Janaki Prasad v. Baldeo*, 3 A. 216. But see *Debi Charan v. Purbhu Din*, 3 A. 388 (F. B.); *Ram Prasad v. Raghunandan*, 3 A. 239; and *Ramanath Dass v. Boloram*, 7 C. 677.

Where the decree contained the following terms: "The property hypothecated in the bond being also held liable for the whole amount thus awarded." Held, that the decree was in reality a decree for sale.—*Anna Pillai v. Thangathammal*, 20 M. 78.

A decree on a mortgage-bond ordered that the amount be realized from the mortgaged property without any provision to realize the money from any other property. Held, that the decree-holder's right was limited to the mortgaged property alone.—*Solano v. Moran & Co.*, 4 C. L. R. 11. See also *Pran Kuar v. Durga Prasad*, 10 A. 127; *Budan v. Ram Chandra*, 11 B. 537.

In a decree for sale of hypothecated property and against the judgment-debtor personally, the decree-holder is entitled to proceed either against the person or against the mortgaged property, whichever he may think best.—*Joharimal v. Sant Lal*, 9 A. 484 (4 A. 497 explained). See also *Luchmi Dai v. Asman Sing*, 3 C. 213; 25 W. R. 421 (followed in *Ram Baran v. Gobind*, 28 A. 295; 3 A. L. J. 95). But the mortgaged property must be sold first.—*Gopal Das v. Ali Muhammad*, 10 A. 632.

Where a mortgage is held invalid on the ground that the requirements of S. 59 of the T. P. Act, regarding registration were not complied with, a money-decree can be made upon the covenant in the bond.—*Tofaluddi Peada v. Mahar Ali*, 26 C. 78. The promise to repay the mortgage-money carries with it a personal obligation. Where there is in the mortgage nothing to the contrary, the remedy of the mortgagee is not restricted to the mortgaged property only; the mortgage merely gives the mortgagee an additional security in the shape of the pledged property.—*Bhugwan Das v. Parmeshwari Prasad*, 5 C. L. J. 287. See also *Parbati Charan v. Gobinda Chandra*, 4 C. L. J. 246 (19 W. R. 281, 12 C. 389 referred to; 10 C. 740 (P. C.), 16 C. 540 distinguished); *Abbakke Heggadth v. Kinhiamma*, 29 M. 491 (22 A. 453, p. 461, referred to) and *Musaheb Zaman Khan v. Inayatullah*, 14 A. 513.

On default in payment on a simple mortgage, a Court, instead of passing a decree for sale, passed a decree for possession by the mortgagee after a period of grace. Held, that the decree for possession did not amount to a decree for foreclosure, or preclude redemption.—*Papamma Rao v. Vira Pratapa*, 19 M. 249 (P. C.); 23 I. A. 32; 6 M. L. J. 53.

Under the terms of a compromise decree in a mortgage-suit the judgment-debtor was directed to pay the debt due to the decree-holder by certain instalments specified therein, and it was also further provided that in default of the judgment-debtor paying the money as therein mentioned, the property mortgaged by him to the decree-holder should be sold. Held, on a construction of the decree, that it was not a preliminary one within the meaning of Or. XXXIV, r. 4, C. P. Code, but a final decree directing the sale of the property of the judgment-debtor on default of payment.—*Kora Lal v. Punjab National Bank Ltd.*, 5 L. L. J. 67; 55 I. C. 816; A. I. R. 1921 Lah. 324.

rr. 5, 6.

Where a mortgage-decree omits to reserve rights of such persons whose rights are admitted, it ought to be construed with reference to the admission contained in the pleadings or made in the course of the case, and ought not to be so construed as to grant a larger measure of relief than is prayed for so as to negative rights admitted by all parties.—*Srinivasa v. Yamunabhai*, 29 M. 84.

A decree-holder obtained a decree under Or. XXXIV, r. 6 against the heirs of the mortgagors and sought to recover the same from out of the assets of the deceased in their hands. The decree-holder subsequently inherited her husband's share which was liable for the debts. *Held*, that the inheritance did not render her liable for the entire decree-debt but that the amount due was proportionately decreased.—*Asia Bibi v. Aziz Ahmad*, 137 I. C. 50: (1939) A. L. J. 230: A. I. R. 1932 All. 704.

Power to enlarge time.—Whatever might have been the view before the amendment of 1929, it is quite clear now by the amendment now made that the Court which passes a preliminary decree can, on good cause shown, postpone the date fixed by the Court.—*Sat Parkash v. Bahal Rai*, 53 A. 283 (F. B.): A. I. R. 1931 All. 386: 29 A. L. J. 508.

For other cases see notes under the same heading under rr. 2 and 3, ante.

Costs and interest.—See notes under rr. 10 and 11, post.

Appeal.—See notes under rr. 2 and 3, ante.

**6.** Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

Recovery of  
balance due on  
mortgage in suit  
for sale

## COMMENTARY.

History.—The above rule was substituted for the old r. 6 by the Transfer of Property (Amendment) Supplementary Act, 1929 which came into operation on the 1st April 1930. The old rule is reproduced below.

Recovery of  
balance due on  
mortgage

**6** Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass decree for such amount. [S. 90]

The old rule corresponded to S. 90 of the T. P. Act (IV of 1892) with some additions and alterations. No material change was made in the meaning as will appear on a comparison of this rule with the old section which ran as follows: "Where the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

The words "*amount due to the plaintiff*" were substituted for the words "*due for the time being on the mortgage*," which occurred in the old section. The reason for the substitution seems to be, that the costs incurred by the plaintiff in a suit for sale are not properly amounts due upon the mortgage. (See *Ram Lal v. Sil Chand*, 23 A. 439 and 26 A. 507); and in view of the observations made in the above rulings, the words of the old section were changed. From the above rulings it is also clear that the word "*defendant*" in this rule, means the mortgagor defendant, and not a puisne mortgagee or any other person who is made a co-defendant in the suit under r. 1.

The personal liability of a mortgagor arises only after exhausting all remedies against the property of the mortgagor but this does not mean that in a case where a portion of a mortgaged property is destroyed there can be no personal liability.—*Chand Mall v. Banbehari*, 50 C. 718.

**Present change.**—The words "*any sale held under the last preceding rule*" make it clear that this rule applies to a rule held in execution of a decree made under r. 5.

**Jurisdiction.**—In the case of a mortgage the existence of a charge on a property within the jurisdiction of a Court does not give that Court jurisdiction to entertain an application under Or. XXXIV, r. 6 because this rule only applies to a personal covenant under the mortgage.—*Bhup Singh v. Fateh Singh*, 29 A. L. J. 893; A. I. R. 1931 All. 192.

**Right to personal decree.**—In India a mortgage does not necessarily import a personal obligation to repay. *Prima facie* this obligation is present in simple mortgages; and of course, in English mortgages. *Prima facie* it is not present in mortgages by conditional sale and in usufructuary mortgages. In each case the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred. In these circumstances a decree for sale made in a mortgage suit, unless it contains an express decision as to personal liability, is not in any way an affirmation that such liability exists, or ever has existed. Even where it exists, the mortgagee is not in India allowed in a suit to enforce the security to have recourse to the personal covenant until he has first exhausted the security, and given credit for its proceeds. This is the real meaning of S 90 and of r. 6 of Or. XXXIV, and this is very different from a mere claim to have the decree for sale enforced.—*Per Rankin, J. in Pell v. Gregory*, 52 C. 528 (F. B.); 89 I. C. 1; A. I. R. 1925 Cal. 834.

The liability of a surety being co-extensive with that of the principal debtor, there is nothing to prevent a personal decree being passed against the surety.—*Tulshi Prasad v. Dip Prakash*, 29 A. L. J. 559; 132 I. C. 561; A. I. R. 1931 All. 631.

In all mortgages a personal covenant to repay the mortgage-money must be presumed unless there is something in the nature and the terms of the mortgage-deed to negative it. The nature of the deed may either raise a presumption for or a presumption against an interpretation as to the existence of a personal covenant. A clause in the deed of usufructuary mortgage that "the mortgagees shall be competent to recover the money in any

way they liked" enables the mortgagees to apply for a personal decree against the mortgagor.—*Pars Ram v. Brij Mohan*, 135 I. C. 33: A. I. R. 1932 Lah. 164.

Where some of the defendants in a mortgage-suit were made parties in their capacity of puisne incumbrancers and not on the ground of any liability for the mortgage-debt nor on the ground of their being in possession, no personal remedy can be obtained against them.—*Fala Kristo v. Jagannath*, 36 C. W. N. 709.

A charge-holder is, as much as a mortgagee, entitled to a personal remedy in the event of deficiency of the proceeds of sale.—*Fala Kristo v. Jagannath*, 36 C. W. N. 709.

A mortgagee who obtains a decree for sale but fails to execute it, is not entitled to apply under Or. XXXIV, r. 6, to obtain a decree over, as that rule contemplates that the property should be put to sale in execution of the decree before an application under its provisions can be made.—*Darbari Lal v. Moola Singh*, 18 A. L. J. 623: 56 I. C. 139. See also *Sham Lal v. Sheobaran Singh*, 20 I. C. 320 (29 A. 260 referred to). The holder of a mortgage-decree can proceed against the other property of the mortgagor, only if the mortgaged properties do not belong to the mortgagor. A mortgage-decree directing payment within a fixed date and in default ordering the sale of the hypothecated property is a personal decree and the decree-holder can proceed against the person and other property of the judgment-debtor without obtaining a decree under Or. XXXIV, r. 6.—*Periyasami v. Muthia*, 38 M. 677: 15 M. L. T. 232.

Where the mortgagor covenants to transfer the hypothecated properties indefeasibly to the mortgagee with the usual clause for redemption and further covenants to pay the mortgage-debt with interest to the mortgagee, his heir and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. Therefore in such cases, the mortgagee is not only entitled to a decree for sale but also to a personal decree against the mortgagor.—*Askaran Baid v. Gobordhan*, 26 C. W. N. 318.

It is the decree that is passed under this rule that is executable against the mortgagors personally, and in the absence of such a decree, the mortgagee is not entitled to proceed against the property of the mortgagors other than that covered by the mortgage. The preliminary decree under Or. XXXIV, r. 4 is not itself capable of execution and cannot therefore give a personal remedy against the mortgagors.—*Bulkee Bee v. Kaka Hajee Muhammad*, 50 M. L. J. 39: 93 I. C. 99: A. I. R. 1926 Mad. 415

Where a personal remedy was asked for in the plaint but the preliminary and the final decrees were silent about it, *held* that the absence of any reservation of rights to a decree under Or. XXXIV, 103 I. C. 523: 53 M. L. J. 439 A. I. R.

Where by consent there has been a departure from the strict form of a preliminary decree, such departure would not affect the applicability in

principle and substance of the provisions of Or. XXXIV, r. 6 to a personal judgment.—*Rai Saheb Sundermull v. J. C. Galstaun*, 33 C. W. N. 300: A.I.R. 1929 Cal. 387 (affirmed on appeal by the Privy Council in 36 C. W. N. 109).

In the case of a consent-decree no further decree is necessary if the consent-decree provides for a personal remedy in the event of the sale proceeds proving insufficient.—*Aditya v. Hargovind*, 3 Luck. 411: 108 I. C. 723: A. I. R. 1928 Oudh 490. See the cases noted under heading "Consent decree" under rr. 2 and 3.

"Are found to be insufficient to pay the amount due."—Where after sale of mortgaged property in execution of mortgage-decree, the sale is set aside and mortgagee is required to refund the proceeds to the purchaser, he can apply under this rule, as the proceeds in such a case are nil and therefore insufficient.—*Badal v. Debi Saran*, 49 A. 506: 25 A. L. J. 485: 100 I. C. 775: A. I. R. 1927 All. 395 (*Pirbhu Narain v. Baldeo*, 29 A. 260 not followed; *Kedar Nath v. Chandu Mal*, 26 A. 25 followed).

Where as a result of proceedings subsequently taken, the sale is set aside and the auction-purchaser gets refund of the purchase-money, the mortgagee may obtain a personal decree under Or. XXXIV, r. 6.—*Badal v. Debi Saran*, 49 A. 506: 25 A. L. J. 485: 100 I. C. 775: A. I. R. 1927 All. 395.

The sale contemplated by S. 89, T. P. Act, 1882 (r. 5), is the sale of the whole or of a sufficient portion of the mortgaged property. A personal decree under this rule can only be made where the net sale proceeds are insufficient to pay the amount due on the mortgage. A mortgagee may release a portion of the mortgaged property from the debt, but he cannot by so doing impose upon the mortgagor a personal liability to which otherwise he would not be subject. The condition precedent to enable a Court to pass a decree under this rule is the sale of all the mortgaged properties. Where the mortgagee released substantial portions of the mortgaged property and also the purchasers of those portions from the mortgage-debt, there being no consent or acquiescences on the part of the mortgagor and there being nothing to show that the amount which the purchasers paid to the mortgagee was the full and true value of the property, which they purchased; held, that the mortgagor was entitled to claim to have the mortgaged property sold before a decree could be passed against him under S. 90, T. P. Act.—*Lal Behary v. Habibur*, 26 C. 166; *Ram Ranjan v. Indra Narain*, 33 C. 890: 10 C. W. N. 862: 3 C. L. J. 83-n; *Satish Ranjan Das v. Mercantile Bank of India Ltd.*, 45 C. 702: 48 I. C. 322; *Badri Das v. Inayat Khan*, 22 A. 404; *Damodar v. Vyanku*, 31 B. 244; *Aiyasamier v. Venkatachela*, 40 M. 989: 37 I. C. 741 (F. B.). But see *Sheo Prasad v. Behari Lal*, 25 A. 79; *Ghafur Hassan v. Muhammad Kifayatulla*, 28 A. 19: 2 A. L. J. 413; *Shriam Sundar v. Ganesh Prasad*, 28 A. 674: 3 A. L. J. 465; *Kedar Nath v. Chandu Mal*, 26 A. 25; *Pirbhu Narain v. Amir Singh*, 29 A. 369. In these Allahabad cases it has been held that a mortgagee, is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under this section (rule) for any balance due. It would thus appear that there is difference of opinion on the point. The Allahabad High Court has also held that if before sale a personal decree is passed without contest, the defendant is not entitled to object as it binds him.—*Teja v. Tika Ram*, 46 A. 32: 77 I. C. 37: A. I. R. 1924 All. 225. See also *Rakhal Chandra v. Sidhi Nath*, (1919) P. 390: 53 I. C. 923.

The plaintiff as second mortgagee obtained a final decree, but before he could sell the properties a prior mortgagee brought a suit against the mortgagor and the plaintiff on his own mortgage obtained a decree and sold the properties. *Held* that the plaintiff could ask for a personal decree, and it could not be said that the plaintiff should put the properties to sale before he could apply for a personal decree.—*Adhar Chandra v. Sarnwamoyi*, 32 C. W. N. 1160: 117 I. C. 530: A. I. R. 1929 Cal. 121. See also 32 Bom. L. R. 724, where a part of the mortgaged property was extinguished by fire and another portion was acquired by the Municipality.

Where the remedy by sale is shown to be no remedy at all, *e. g.*, by the discovery that the mortgagor never had any title to the property to be sold, or that the mortgagor has lost his right to the property in some way the reason for suspending the passing of a personal decree for sale is gone and a personal decree may at once be passed.—*Sahu Bisheshar v. Chandu Lal*, 108 I. C. 459: A. I. R. 1928 All. 71: 25 A. L. J. 1042.

A Full Bench of the Oudh Chief Court has on a review of the cases of all the Courts held that an application for a personal decree under r. 6 cannot be made unless a sale in pursuance of the preceding rule has in fact taken place.—*Shyam Behari v. Musst. Mohammedi*, 126 I. C. 700 (F. B.): 7 O. W. N. 744: A. I. R. 1930 Oudh 377. (See the cases referred to in this case).

Where a mortgagee decree-holder has, in execution of his decree, sold some of the properties covered by the decree but has not realised sufficient money to pay off the amount due, and is unable to sell the remaining properties by reason of their being situated in a Native State which will not execute the decree of a British Indian Court, the decree-holder is entitled to a personal decree.—*Samanta Gagarnath v. Lokenath*, 61 I. C. 635. Also where through inadvertence an insignificant portion has been left unsold.—*Gopal v. Baikuntha*, 42 I. C. 56: 2 P. L. J. 538.

Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgaged property at the date of the mortgage, Or. XXXIV, r. 6 can have no application. Under that rule the plaintiff cannot obtain a simple money-decree before the sale of the mortgaged property and the sale proceeds proving insufficient to satisfy the mortgage money.—*Zia Uddin v. Akbar Ali*, 136 I. C. 829: 30 A. L. J. 317: A. I. R. 1932 All. 358; *Babu Lal v. Raghunandan*, (1932) A. L. J. 311.

Where in a suit for sale by the mortgagee against the mortgagor and his sons, the property hypothecated was sold and the plaintiff applied for a personal decree against the father for the balance due under the mortgage and costs, and against the sons for the amount due for costs, *held*, that it was open to the plaintiff notwithstanding the amalgamation of the amount due under the mortgage, subsequent interest and costs into one sum to assume that costs were part of the mortgage balance and to ask for a decree for costs as if from the sons.—*Rajagopala-swami v. Pala*, 1932 Mad. 155. 578: 62 M. L. J. 93: A. I. R.

Where a mortgagor has been adjudged an insolvent with reference to certain debts which were provable in insolvency, the order of adjudication and the order of discharge cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were provable in insolvency. The orders cannot take away the statutory right of the decree holder to apply for a decree under Or. XXXIV, r. 6.—*Niaz Ahmed v. Phul Kunwar*, 30 A. L. J. 237; A. I. R. 1932 All. 336.

When a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by personal judgment against the borrower until he has exhausted his remedies against the security. It is wrong at the time of making a final order for sale to order that if the proceeds are insufficient there will be a personal decree. The usual practice is certainly that the personal decree is not even granted until the sale has been carried out and the deficiency ascertained. It is a form of relief which in the ordinary way will not be given to a mortgagee unless and until this stage has been reached. The power of the Court to give that form of relief does not depend upon r. 6 of Or. XXXIV which is a provision giving direction to the Court as to the time and manner at and in which the relief is to be given. That power is not derived from the inclusion of the clause reserving leave to the plaintiff in the final decree.—*Sundermull v. J. C. Galstain*, 36 C. W. N. 109 (P. C.): 54 C. L. J. 400; 62 M. L. J. 170.

A personal decree against the mortgagor can only be passed after it has been ascertained that the proceeds of the sale of the mortgaged properties are insufficient to pay the amount of the decree. But the words of the section are satisfied in cases where the Court passes a decree that on the happening of the event when the net proceeds of the sale are found to be insufficient the balance should be paid by the mortgagor. So a combined or a composite decree in the first instance is not invalid or incompetent. The question whether a further decree could be had or not would depend on the terms of the decree already had.—*Fala Kristo v. Jagannath*, 36 C. W. N. 709.

The holder of a mortgage decree, which simply directs the sale of the mortgaged property, and contains no other directions for realization of the balance from the person or other property of the mortgagor, in case the sale-proceeds prove insufficient to satisfy the decree, may on the proceeds proving insufficient, ask for and obtain a decree under this rule for realization of the balance from the other properties of the debtor.—*Sonatan Shah v. Ali Nawaz*, 16 C. 423 (discussed in *Musahab Zaman v. Inayatullah*, 14 A. 513). See also *Lalla Terhini v. Lalla Hurruk*, 21 C. 26.

The decree contemplated by this rule can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.—*Raj Singh v. Parmanand*, 11 A. 486. See also *Durga Dai v. Bhagwat Prasad*, 13 A. 356. Indeed a fresh suit for this purpose would be barred unless in cases in which the mortgagee would be unable to include both claims in one suit by reason of the cause of action not having arisen or the defendant not residing within the territorial jurisdiction of the Court having jurisdiction over the mortgaged property, in which cases he might reserve to himself the right to institute a fresh suit

under leave under Or. II, r. 2.—*Mallikarjunadu v. Lingamurti*, 25 M. 244 (F. B.) at p. 287.

The sale contemplated by this rule must be a sale in execution of the decree of the mortgagee who applies for the personal decree and not some other mortgagee.—*Kamta Prasad v. Saiyed Ahmad*, 31 A. 373; *Muhammad Akbar v. Munshi Ram*, (1899) A. W. N. 208; *Badri v. Inayat*, 22 A. 404; *Darbari v. Mula*, 42 A. 519.

A decree for sale of the mortgaged property cannot be treated as a money-decree. The mortgagee must first sell the mortgaged property and if the sale-proceeds be insufficient, then the balance may be recovered, and he can then recover the balance from the person or other property of the mortgagor, if it is legally recoverable.—*Gopal Das v. Ali Muhammad*, 10 A. 632. See also *Surja Kumar v. Pramada Sundaree*, 17 C. W. N. 1039; 20 I. C. 829; *Arunachella v. Venkatarama*, 33 M. L. J. 93; 26 M. L. T. 192.

'Amounts due' would include costs even though the same were not ordered specifically to be covered by the mortgage-decree under r. 5.—*Magbul v. Lalta Prasad*, 20 A. 523 (F. B.). The expression means the amount to recover which the decree for sale has been previously passed.—*Chotey Lal v. Lai Singh*, A. I. R. 1929 All. 15.

A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99 of the Transfer of Property Act (IV of 1882) limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under S. 67 of the Act.—*Jadub Lal v. Madhub Lal*, 21 C. 34; *Kaveri v. Ananthayya*, 10 M. 129; *Azimullah v. Najmunnessa*, 16 A. 415

Where on a previous occasion a mortgage-decree was executed against the other property of the judgment-debtor without an order under this rule, and the judgment-debtor after service of notice upon him did not raise any objection, held, that the judgment-debtor was estopped from raising the objection in a subsequent application for execution.—*Madhu Sudan v. Kailash Chunder*, 2 C. W. N. 254.

Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief against non-hypothecated property. Unless in exceptional cases, he can obtain such relief only under this rule, and if such relief is refused, the refusal will not bar a subsequent application under this rule. Observations on the meaning and application of Ss. 83, 89 and 90 of the T. P. Act (rr. 4, 5 and 6).—*Musakeb Zaman v. Inayatullah*, 14 A. 513 (16 C. 423 discussed). Every mortgage carries with it a personal liability.—See 5 C. L. J. 237; 4 C. L. J. 246; 29 M. 491, noted under rule 5 and *Jangi Singh v. Chandar Mol*, 30 A. 383; 5 A. L. J. 670 (11 B. 475 not followed; 21 M. 242 referred to).



If a person promises to pay a certain sum of money with interest and hypothecates property as security without any express covenant that he would be personally liable, or without stating any mode of payment, he is personally liable, and a decree under S. 90, T. P. Act, should be passed against the mortgagor, if the sale-proceeds of the mortgaged property prove to be insufficient and the remedy is not time-barred.—*Ram Kishore v. Surajdeo Pershad*, 13 C. W. N. 138: 9 C. L. J. 5 (4 C. L. J. 246 approved; 10 C. 740, 16 C. 540 referred to).

The holder of a charge is like a mortgagee suing for sale, entitled to ask for and obtain a decree under S. 90 of the T. P. Act, 1882 (r. 6). An unpaid vendor has not only a charge on the property sold in execution of his decree, but he has also a personal remedy under this rule against the vendees.—*Uttam Ishlok v. Phulman Rai*, 2 A. L. J. 379: (1905) A. W. N. 144 (21 A. 454, 22 B. 846, 14 A. 513 referred to). See the decision in Letters Patent appeal reported in 28 A. 365: (1906) A. W. N. 44: 3 A. L. J. 171.

Where the decree is in substance a mortgage-decree, though not in the prescribed form, it is not open to the decree-holder to proceed against non-hypothecated property before exhausting the mortgaged property and without obtaining an order under this rule.—*Lal Behary v. Habibur Rahman*, 26 C. 166: 3 C. W. N. 8 (24 C. 473: 25 C. 580 referred to; 22 C. 818 distinguished). See also *Karimulla v. Mirza Muhammad*, 3 P. L. J. 649: 48 I. C. 603.

A mortgagee obtained a decree for sale of properties partly in India and partly in England. In pursuance of the decree some of the mortgaged property was sold in India, and at the request of the mortgagor some of it was subsequently sold in England. Held, that the sale which took place in England must be treated as a sale held in connection with the decree passed in this country and that the mortgagee was entitled to a decree under this rule.—*Gajadhar v. The Alliance Bank of Simla Ltd*, 28 A. 660.

Where a part of the mortgaged property was sold privately by consent of the parties, and consideration went towards payment of the mortgage-decree, and the sale-proceeds of the remaining mortgaged properties were found insufficient to satisfy the decree. Held, that the decree-holder is entitled to a personal decree under this section (rule). The sale of the mortgaged property by public auction is not essential.—*Udit Narain v. Baquar Sajjad*, 2 A. L. J. 353: (1905) A. W. N. 124.

A puisne mortgagee of property upon which there existed several incumbrances, obtained a decree for sale after redemption of prior incumbrances. The prior incumbrances were redeemed and the mortgaged property was sold, but the sale-proceeds were insufficient even to cover the amounts due upon the prior incumbrances, not to mention the amount due upon his puisne mortgage. Held, that the puisne mortgagee-decree-holder is entitled to a decree under this rule in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage.—*Ali Jan v. Mariam Bibi*, 26 A. 93.

Where a plaint contains a prayer for a personal decree and the decree passed under Form No. 4 of the Appendix for sale directs that if the

r. 6.

sale-proceeds are insufficient the plaintiff would be at liberty to apply for a personal decree, this amounts to an adjudication that the plaintiff has a right to get a personal decree, and unless it is set aside by appeal, the question cannot be reopened on the application for personal decree subsequently made.—*Ram Nath v. Nageshwar*, 7 O. W. N. 774 (F. B.): 126 I. C. 689: A. I. R. 1930 Oudh 378.

A puisne mortgagee sued the prior mortgagees for redemption and a decree was passed for redemption or sale. He did not pay the decretal amount and the property was sold on the application of the prior mortgagees, but it failed to realize the full amount due to the prior mortgagees, who thereupon applied under S. 90 of the T. P. Act, to recover the balance from the puisne mortgagee personally. *Held*, that this rule does not apply to such a case. The word "defendant" which occurs in this rule does not include a puisne mortgagee.—*Mata Amber v. Sri Dhar*, 26 A. 507. See also *Ram Lal v. Sil Chand*, 23 A. 439, where it has been held that the word "defendant" in S. 90 of the T. P. Act, 1882, must mean the mortgagor-defeasant, and that the money recoverable, by reason of the proceeds of the mortgaged property proving insufficient to pay off the decree passed under S. 89, T. P. Act (r. 5), from the person whose property had been mortgaged and sold, is legally recoverable from him.

A purchaser of the equity of redemption is under no personal liability to the mortgagee though he agreed to pay off the mortgage.—*Nanku Prasad v. Kamla Prasad*, 95 I. C. 970: 26 C. W. N. 771: A. I. R. 1923 P. C. 54.

Where a decree was passed under Or. XXXIV, r. 6 against the assets of the mortgagor in the hands of his widow and the next reversioner to whom she had surrendered the estate and thereafter in pursuance of an agreement between the widow and the next reversioner, she obtained a decree for a maintenance allowance with a charge on the property in his possession, and the mortgagee in execution of his decree sought to attach not only the corpus of the property in the hands of the reversioner but also the decree for maintenance obtained by the widow, *held*, that the decree was not a part of the assets and could not be attached.—*Musst. Ram Sri v. Thakur Narain*, 129 I. C. 374: A. I. R. 1931 All. 368.

"If the balance is legally recoverable."—The words "balance is legally recoverable" mean that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation.—*Musaheb Zaman v. Inayatullah*, 14 A. 513 (referred to in *Baqeshri Dial v. Muhammad Naqi*, 15 A. 331). See also *Parbati Charan v. Gobinda Chandra*, 4 C. L. J. 246 (23 B. 630 referred to). The transferee from a mortgagee who has agreed with the mortgagor to pay the mortgagee the amount due to him is not a person from whom the balance is recoverable legally under this rule because there is no contract between him and the mortgagee; hence no personal decree may be passed against him under this rule; *Jamna Das v. Ram Aular*, 34 A. 63 (P. C.): 16 C. W. N. 97: 15 C. L. J. 69: 39 I. A. 7: 13 I. C. 304 (affirming 31 A. 352); *Nanku Prasad v. Kamla Prasad*, 95 I. C. 970: 26 C. W. N. 771 (P. C.): A. I. R. 1923 P. C. 54.

Where a mortgage-decree gives the mortgagee a remedy against the mortgaged properties, the personal remedy on the money claim against the

**Award decrees.**—An award decree directing that the mortgagee will recover personally any deficit after sale is not invalid.—*Karachi Bank Ltd. v. Khemchand*, 115 I. C. 336 : A. I. R. 1929 Sind 44.

**Application for supplementary decree—Service of notice and production of succession certificate, if necessary.**—A personal decree for a large sum should not be passed *ex parte*. The person against whom the decree is sought to be obtained, has a right to be heard as to his personal liability, whether his property is liable for the debt and whether the amount claimed is correct.—*Abdul Sattar v. Satya Bhushan*, 35 C. 767.

Where a mortgagee died after preliminary decree and his heirs were substituted and a decree absolute for sale was made in their favour, but the sale-proceeds of the mortgaged property proving insufficient they applied for a personal decree under this rule for the recovery of the balance. *Held*, that no such decree could be made in their favour until they obtained a certificate under the Succession Certificate Act, VII of 1889.—*Sahadev Sukul v. Sakhawat Hossein*, 12 C. W. N. 145 : 7 C. L. J. 658 and *Abdul Sattar v. Satya Bhushan*, 35 C. 767.

**Dismissal of one application for default whether bars another.**—It has been *held* that it is barred.—*Dharamchand v. Sheoramlal*, 124 I. C. 249 : A. I. R. 1930 Nag. 188 : 26 N. L. R. 154 ; *A. K. Etc. Chettyar Firm v. Maher Singh*, 8 R. 316 : 126 I. C. 648 : A. I. R. 1930 Rang. 257.

**Limitation as regards personal remedy.**—In a suit for sale on the basis of a mortgage deed the proper stage for deciding whether the mortgagee's claim for a personal decree is barred by limitation is after the net proceeds of the sale have been found insufficient to pay the decretal amount. The personal remedy on the basis of a registered mortgage bond can be enforced within six years under Art. 116 of the Limitation Act.—*Ratnasabapathy v. Devasigamony*, 52 M. 105 (F. B.) : 116 I. C. 817 : 56 M. L. J. 10 : A. I. R. 1929 Mad. 53 (in this case the decisions of the Judicial Committee in the cases of *Ram Din v. Kalka Prasad*, 12 I. A. 12 : 7 A. 502 (P. C.) and *Ganesh Lal v. Khetra Mohan*, 5 P. 585 (P. C.) : 53 I. A. 134 : 31 C. W. N. 25 have been fully explained and distinguished); *Jai Indra v. Khairati*, 4 Luck. 107 : 113 I. C. 489 : 5 C. W. N. 836 : A. I. R. 1928 Oudh 465 ; *Sahu Radha Krishna v. Tej Saroop*, 52 A. 363 (F. B.) : 123 I. C. 321 : 27 A. L. J. 1294 : A. I. R. 1930 All. 69 ; *Dharanidhar v. Indra Narayan*, 36 C. W. N. 117 ; *Kanto Mohan v. Galstaun*, 51 C. L. J. 283 ; *Umapada v. Haripada*, 35 C. W. N. 1030.

See also cases cited under the previous heading, "If the balance is legally recoverable."

**Limitation for an application under this rule.**—The limitation governing an application for a personal decree under this rule is that prescribed by Art. 181 of the Limitation Act.—*Pell v. Gregory*, 52 C. 828 (F. B.) : 89 I. C. 1 : A. I. R. 1925 Cal. 834. (See the authorities referred to and discussed in this case). Time runs from the date of confirmation of the sale.—*Krishnabandhu v. Panchkari*, 58 C. 741 : 35 C. W. N. 231 : 130 I. C. 815 : 52 C. L. J. 531 : A. I. R. 1931 Cal. 166.

**Appeal.**—An application for a decree under Or. XXXIV, r. 6 cannot be considered to come under 'plaint,' and so an appeal does not lie under Or. XLIII, r. 1 (1) from an order returning such an application to be presented to the proper Court.—*Bhup Singh v. Fateh Singh*, 29 A. L. J. 893 : A. I. R. 1931 All. 192.

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7. (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

Preliminary  
decree in redemp-  
tion suit.

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and
- (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon ; or

(b) declaring the amount so due at that date ; and

(c) directing—

- (i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Clause (a), or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in r. 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property ; and

- (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the

Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

- (a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or
- (b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

**8.** (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

### COMMENTARY.

History.—The above rr. 7 and 8 were substituted for the old rr. 7 and 8 by the Transfer of Property (Amendment) Supplementary Act, 1929 which came into operation on the 1st April 1930. The old rules are reproduced below:—

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

Preliminary decree in redemption suit.

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the

mortgage and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that, if the plaintiff pays into Court the amount so due one day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold. [S. 92.]

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—  
Final decree in redemption-suit.

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree, and, also, if necessary,

(c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what.

is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such Power to enlarge terms (if any) as it thinks fit, from time to time postpone time. the day fixed for payment. [S. 93.]

The old rule 7 corresponded to S. 92 of the T. P. Act, IV of 1882, with some additions and alterations. The old section is reproduced here for the purpose of comparison :—

*" In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—*

*" that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ;*

*" that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property ; and*

*" that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold "*

Excepting Cl. (d), the provisions of this rule corresponded with the provisions of r. 2, which related to a preliminary decree for foreclosure.

The old rule 8 corresponded to S. 93 of the T. P. Act, IV of 1882, with several additions and alterations as will appear on a comparison of this rule with the old section, which ran as follows :—

*" If payment is made of such amount, and of such subsequent costs as are mentioned in S. 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property.*

*" If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.*

*" If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.*



"If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

"On the passing of any order under this section, the plaintiff's right to redeem and the security shall as regards the property affected by the order, both be extinguished :

"Provided that the Court may, upon good cause shown, and upon such terms (if any) as it thinks fit from time to time, postpone the day fixed under S. 92 for payment to the defendant."

Clauses (a) and (b) were now There were no similar provisions in the old section. The word "absolutely" which stood after the word "debarred" in the old section has been omitted. Several other material alterations were made in this rule, as will appear on comparison.

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in rr. 3 (1), 5 (1) and 8 (1) for the passing of a final decree in such cases.—See the Report of the Select Committee.

It will be observed that under sub-rule (3), on the passing of a final decree in a redemption suit, the debt secured by the mortgage shall be deemed to be discharged. But under the old section (93), the effect of passing a final decree was to extinguish the mortgage security as well as the plaintiff's right to redeem.

The proviso attached to this rule was almost similar to the proviso attached to the old section. The indulgence allowed by the proviso was seldom required to be granted in a suit from redemption by the mortgagor, who generally comes into Court with his money ready and offers to pay the amount that will be found due to the defendant.

In a suit for redemption it is necessary to take accounts in order to ascertain whether or not the mortgage has been paid off.

It is noticeable that the payments under these rules are to be made into Court and not to the defendant. The provisions as to payment to defendant which were contained in the old sections have been omitted from these rules, the reason being that the Special Committee thought it better that in every case the payment should be made into Court.

**Present changes.**—Those stated under rr. 3 to 5 apply *mutatis mutandis* to these rules.

The new rule 7 sub-rule (1) (c) (ii) Cls. (a) and (b) specify the different kinds of mortgages in respect of which decrees for foreclosure or decrees for sales may be passed. (See S. 67 of the Transfer of Property Act, 1882).

**Right of redemption.**—The mortgagor has, at any time after the mortgage money has become payable by him, a right, on payment or tender of

up to him all documented property and right to redeem." redemption. Rules 7 and 8 provide for decrees in suits for redemption.—See Transfer of Property Act, S. 60.

No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee.—*Bhagwat Das v. Parshad Singh*, 10 A. 602. See also *Rose Ammal v. Rajarathnam*, 23 M. 33 (5 B. 22, 16 M. 486 considered). See, however, *Raghubar Dayal v. Budhu Lal*, 8 A. 95; *Setrucherla v. Vairi Cherla*, 2 M. 314.

Section 93 of the T. P. Act (IV of 1882) (r. 8) does not, in its literal terms, apply to a case where there is no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case. The position of the defendant who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale.—*Bepin Behary v. Mukunda Lal*, 8 C. L. J. 547: 36 C. 122.

One Karya Bharthi, who owned two villages, mortgaged them in 1904, without possession, with defendants, and in November 1908 he sold same to the defendants in lieu of the amount due to them under the mortgages, and the defendants obtained possession of the villages under the sale. Prior to the said sale, however, the plaintiff in execution of his money decree against the mortgagor (Karya Bharthi) had attached the villages in question in September 1908 and bought the equity of redemption at the auction sale in August 1909. The present suit was brought by the plaintiff to recover possession of the villages from the defendants on the ground that the latter's purchase of November 1908 was invalid by reason of the provisions of S. 64, Civil Procedure Code, 1908. Held, that the sale of November 1908 being admittedly invalid as against the plaintiff, the plaintiff was entitled to an unconditional decree for possession and as the mortgages of 1904 in defendant's favour did not give them any right to possession, and they obtained possession only by virtue of the invalid sale of November 1908, they were not entitled, in the present suit, to set up their mortgages as shields against the plaintiff's claim for possession.—*Bijai Saran v. Rudra Bageshwari Prasad*, 51 C. L. J. 70 (P. C.).

A mortgagor who has made default in the payment of the mortgage money within the time limited by the decree in a suit for redemption is not entitled to apply for execution of the decree after the time limited.—*Vallabha Valiya v. Vedapurathu*, 19 M. 40 (F. B.).

**Suit for redemption.**—Under Or. XXXIV, r. 7 of the C. P. Code it is open to the Court either to order that an account shall be taken of what will be due to the defendant for principal and interest due on the mortgage and for his costs of the suit, if any, or to declare the amount due at the date of such order; but in either case, the Court should

proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be.—*Mohkan Singh v. Thakur Chandra Pal*, 10 O. L. J. 374.

There was a certain amount of inconsistency between old rules 7 and 8, Or. XXXIV. A preliminary decree in a mortgage suit ought not to direct more than this, that if a plaintiff makes a default then the mortgagee should have a right to ask for a final decree either for foreclosure or sale as is provided by Or. XXXIV, r. 8.—*Kushaba Ranji v. Budhaji Sakaram*, 46 B. 348: 23 Bom. L. R. 1176.

A redemption decree provided that on payment of a certain sum of money within a certain time, possession of the land was to be given. *Held*, it was not a preliminary decree under Or. XXXIV, r. 7.—*Mahabir v. Kartar Singh*, 76 I. C. 144.

Old r. 7 (d) applied to the case of a mortgagee only and has no application to the case of a co-mortgagor who had redeemed the entire mortgage.—*Ali Akbar v. Sultan-ul-Muluk*, 69 I. C. 653: 1923 L. 129.

A mortgagor, who institutes a redemption suit, is entitled to put an alternative claim. He may aver that the mortgage money has been repaid, and, in the alternative, in the event of the Court finding any sum to be still due under the mortgage that he is prepared to pay such further sum.—*Butchanna v. Varahalu*, 24 M. 408.

Omission to draw up a decree in a proper form under S. 92 of the Transfer of Property Act does not deprive the mortgagee of the benefit of S. 93.—*Murlidhar v. Parsharam*, 25 B. 101.

Where the full amount fixed by the Court in a decree for redemption was paid into Court within the time limited by the decree, *held* that the plaintiff mortgagor did not lose his right to possession of the mortgaged property by the fact of his having attached and withdrawn from the Court a portion of the sum so paid in execution of his decree for costs in the suit.—*Parmanand v. Lokman*, 27 A. 392.

A trespasser who becomes the legal representative of the deceased debtor by intermeddling with the estate cannot represent the real heir and is not entitled to redeem.—*Kishan v. Yeshwant*, 28 N. L. R. 69.

Where the mortgaged property was sold for arrears of Government revenue.—*Held*, that if the sale took place owing to the mortgagee's default, it would not affect the mortgagor's right to redeem. The general rule that a sale for arrears of Government revenue gives a title against all the world, is subject to the exception that, if it is caused by the default of the mortgagee, it does not take away the mortgagor's right to redeem.—*Kalappa v. Shirvaya*, 20 B. 492. See also *Har Shankar Prasad v. Shew Gobind*, 26 C. 966: 4 C. W. N. 317; *Nazir Ali v. Ojoodhyaram*, 5 W. R. 83 (P. C.): 10 M. I. A. 540; *Bissessar Prasad v. Lala Sarnam Singh*, 6 C. L. J. 134, 140.

In a suit for redemption, if the mortgagee has already obtained a decree for rent in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant under the mortgagee and has allowed such decree

to be barred by limitation, the mortgagee is not entitled to claim such arrears of rent.—*Said Ahmad v. Raja Barkhandi*, 9 O. W. N. 253.

The owner of six villages mortgaged one of them to *D* and subsequently all of them to *X*. *D* brought a suit on his mortgage but did not in the first instance implead *X*, who assigned his interest to *P*. *X* was afterwards impleaded as a party to the suit, a decree was obtained and *D* purchased the property mortgaged to him. *P* brought a suit afterwards to redeem the prior mortgage of *D*. *Held*, that *P* was entitled to redeem the mortgage of *D* but *D* had no right to redeem against *P*, that the mortgage of *D* should be treated as still subsisting and that *P* could redeem only on payment of the amount due under his mortgage and not merely the amount which *D* paid for the property in the execution sale.—*Musst. Sheoratan v. Kamta Prasad*, 11 P. 415.

A decree for redemption if bars a subsequent suit for the same relief.—A mortgagor who has obtained a decree for redemption which does not contain a proviso as to payment within the date fixed by the Court, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained.—*Sita Ram v. Madho Lal*, 24 A. 44 (F. B.) (19 A. 202 overruled; 21 A. 251, 6 M. 119, 7 M. 423, 8 M. 478, 21 M. 18, 11 A. 386, 20 A. 375 and 446 referred to; 7 B. 467, 17 M. 96, 4 A. 481, 13 B. 567 not followed). But the Madras High Court, in the Full Bench case of *Vedapuratti v. Vallabha Valiya Raja*, 25 M. 300 (F. B.) have held that where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage (6 M. 119, 7 M. 423, 8 M. 478, 15 M. 366 overruled, 19 M. 40 (F. B.) explained; 21 M. 11 dissented from). See also *Lachman v. Madsudan*, 29 A. 481 4 A. L. J. 447, in which a similar view seems to have been taken. It would thus appear that all the cases on the point have been referred to, discussed and considered in the above two Full Bench rulings of the Allahabad and Madras High Courts.

When, under a compromise arrived at in a redemption suit, the parties did not agree that the plaintiff's right to redeem could be extinguished absolutely, he is not prevented from bringing a second suit for redemption. The mortgagee is still a mortgagee and does not become the absolute proprietor of the property — *Mohamdi Begam v. Tufail Hasan*, A. I. R. 1926 All. 20 (A. I. R. 1922 All. 377 and A. I. R. 1925 Lah. 31 *reft. to*).

A person who does not deposit the redemption money within the time allowed can redeem afterwards, before a final order is made under this rule.—*Bepin Behary v. Mokunda Lal*, 36 C. 122. 8 C. L. J. 547 (22 B. 771, 16 C. 246, 19 M. 40, 19 A. 180, 24 A. 479, 11 C. W. N. 679 and 25 M. 300 referred to). Referred to in *Krishna Chandra v. Jakheral Huq*, 10 C. L. J. 115.

The Bombay High Court has held that a mortgagor who has brought a suit for redemption and obtained a decree nisi which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of the decree is time-barred, bring a fresh suit for redemption, and that such

fresh suit is not barred by S. 11 or S. 47.—*Ramji v. Pandharinath*, 43 B. 334 (F. B.): 49 I. C. 894. The plaintiff filed a suit to redeem a mortgage but withdrew it with permission to institute a fresh suit within two years; eight years after the order he brought a new suit. *Held* that the order for withdrawal imposing a limitation of two years was erroneous and the plaintiff's right to redeem during the period allowed by the Limitation Act was not affected.—*Ram Chandra v. Hanmanta*, 44 B. 939: 53 I. C. 45.

**Payment into Court.**—After the preliminary decree no payment or adjustment of the mortgage money made out of Court can be pleaded, because the Code expressly lays down that the payment must be made into Court. In this respect there is no difference between a decree in a foreclosure suit and a decree in a redemption suit.—*Adari v. Nookamma*, 131 I. C. 487: 54 M. 708: A. I. R. 1931 Mad. 592.

If an allegation of payment out of Court is made, the Court will not recognize it, but if the parties settle the matter amongst themselves and make a report the Court will act on it.—*Viswanatha v. Chimmikutti*, (1931) M. W. N. 1141.

For other cases see notes under rr. 3 and 4, *ante*.

**Enlargement of time—Payment after expiry of time.**—Old r. 8 of Or. XXXIV applied to redemption suits only and time for payment fixed by a decree could not be extended under that rule when the decree was not one for redemption.—*Nand Kunwar v. Sujan Singh*, 43 A. 25: 18 A. L. J. 771.

In redemption suits the decree passed under r. 7 is only in the nature of a decree *nisi*, and the order passed under this rule is in the nature of a decree absolute. Under the proviso to this rule, an application to extend the time for redemption fixed by the preliminary decree may be made at any time before the decree absolute is made.—*Nandram v. Babaji*, 22 B. 771.

The proviso to Or. XXXIV, r. 8 governs not only sub-rule (4) of the said rule but also sub-rule (2) of that rule.—*Narsingh v. Partap*, 50 A. 592: 111 I. C. 242 A. I. R. 1929 All. 480.

Where a decree for redemption omitted to state what would be the consequence of the non-payment of the mortgage money within the time specified, it was held that such omission could not operate to extend the period available to the plaintiff, for payment beyond the maximum term provided by r. 7.—*Wazir v. Dhuman Khan*, 16 A. 65 (14 A. 529 referred to: 14 A. 350 dissented from).

The plaintiff who did not deposit the redemption money within the time allowed by the Court can redeem afterwards, before a final decree is made under r. 8, that is, before the decree is made absolute. If a deposit of the redemption money is accepted by the Court before the final decree, but after the date fixed for payment, it becomes an effectual deposit although no formal order extending the time was passed.—*Bepin Behary v. Mukanda Lal*, 8 C. L. J. 547: 36 C. 122 (22 B. 771 and 25 M. 300, pp. 306-7 referred to). Referred to in *Krishna Chandara v. Jakheral Huq*, 10 C. L. J. 115.

Where a decree gives a right of redemption within a certain specified period with a certain specified result to follow, if redemption is not made

within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such decree. . . . extends the period limited by the original . . . will be barred if not exercised within the . . .  
*v. Dharam Singh*, 18 A. 455 (18 A. 223 applied). See also *Manavikraman v. Unniappan*, 15 M. 170.

In a suit on a usufructuary mortgage, a decree for redemption was passed directing the plaintiff to pay a certain sum within six months. Against this decree there was an appeal, which was dismissed more than six months after the date fixed in the decree. *Held*, that as the mortgagee had never obtained an order for sale under S. 93 of the T. P. Act, and as the mortgagee's equity of redemption had not become extinct, he was entitled to redeem on tendering the amount mentioned in the decree.—*Kanara v. Govinda*, 16 M. 214.

The essential features of a usufructuary mortgage is that the mortgagee cannot sue for payment of his debt but is only entitled to remain in possession. If in such a case the mortgagee has a right of sale the mortgage is of an anomalous character. In the latter case a decree for sale may be made debarring the mortgagee from redeeming the land.—*Atma Ram v. Surjan*, 110 I. C. 81: A. I. R. 1923 Lah. 355

An application for enlarging the time granted by a decree for redemption may be made after the prescribed time has expired. An order refusing the time is appealable under S. 244, C. P. Code, 1882 (S. 47).—*Rango v. Bhomshetti*, 26 B. 121.

Failure to pay money on or before the date mentioned in the redemption decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property; since the Court may, under S. 93 of the T. P. Act, upon good cause shown, enlarge the time for payment upon such terms as it thinks fit. The plaintiff within three years of the date of the decree produced in Court the decretal amount and prayed for possession of the mortgaged property. *Held*, such an application could be treated as one for enlargement of time under S. 93 of the T. P. Act (IV of 1882).—*Ishwar Lingo v. Gopal Jivaji*, 28 B. 103 (26 B. 121 followed).

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute.—*Salig Ram v. Muradan*, 25 A. 231 (20 A. 446 and 27 C. 705 followed). See also *Almea v. Reshun Ali*, 3 C. L. J. 533 (27 C. 705, 16 C. 246, 22 M. 133 followed). See also *Maung Tun v. Ma Ywe*, 54 I. C. 507.

A decree in a suit for partition provided *inter alia* that the plaintiff could recover certain properties from the alienees on payment of a sum of money by a certain date, without any provision as to the effect of a non-payment. The plaintiff, however, paid the money on a subsequent date. *Held*, that the decree was in terms and effect one for redemption and that the Court had jurisdiction under Or. XXXIV, r. 8 to extend the time for payment.—*Idumbu v. Pethu Reddy*, 54 I. C. 451.

Although the Court of first instance is the proper Court for dealing with applications under this rule, the appellate Court has nevertheless jurisdiction.

to allow the enlargement of time in cases where there has been an appeal.—*Babu Parshad v. Khiali Ram*, 3 A. L. J. 828 : (1906) A. W. N. 203. See, however, *Sheonarain v. Chunni Lal*, 23 A. 88, where it has been held that such an application must be made to the Court of first instance and not to the appellate Court. See also *Venkata v. Thiagaraya*, 23 M. 521; *Oudh Behari v. Nageshar Lal*, 13 A. 278 (F. B.) ; *Ram Dhani v. Lalit Singh*, 31 A. 323 (23 A. 88 followed ; (1906) A. W. N. 203 dissented from) ; *Dharmaraja v. Srinivasa*, 39 M. 876 : 31 I. C. 240 : 29 M. L. J. 708 : 18 M. L. T. 486 ; *Beni Prasad v. Harnam Das*, 39 A. 396 : 39 I. C. 630.

" On application made by the plaintiff in this behalf."—There was no provision for this in the old rule and it was held under it that no application was necessary.—*Maru v. Gangabai*, 50 B. 730 : 98 I. C. 913 : A. I. R. 1927 Bom 32.

Notios.—Order XXXIV, r. 8 governing redemption suits does not require notice to be given of payment into Court.—*Ambi v. Valia*, 75 I. C. 566 : 45 M. L. J. 687.

For further notes see notes under heading " Power to enlarge time " under rr. 2 and 3, ante.

Appeal.—An order under r. 3 or r. 8 of Or. XXXIV, refusing to extend the time for the payment of the mortgage money is appealable. See Or. XLIII (c). But an appeal lies against an order extending the time so fixed—*Dharmaraja v. Sreenivasa*, noted above ; *Dattatraya v. Wasudeo Anant*, 47 B 956 . 25 Bom L R 990.

Clog or fetter on the equity of redemption.—A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of the debts or the discharge of some other obligation for which it is given. That is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment of the debt or performance of the obligation, for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore, void. It follows from this that once a mortgage always a mortgage ; but this principle does not involve the further proposition that the amount or nature of the further debt or the obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule. A lease which is to last as long as the pendency of the mortgage, is not bad as being for an indefinite period.—*Mahomad Cassum v. Joseph Ezekiel*, 7 Bom. L. R. 772.

Certain mortgagors, having taken a second mortgage of the same property, or that they should not be at liberty to redeem the first. Held, that this was a clog or fetter on the right of redemption.—*Muhammad Abdul v. Javay Mal*, 3 A. L. J. 768 : (1906) A. W. N. 267. See also *Bhartu v. Dalip*, 3 A. L. J. 672 : (1906) A. W. N. 278 ; and *Chatter Mal v. Baij Nath*, 29 A. 712 : 3 A. L. J. 634 (26 A. 559 distinguished).

After the execution of a usufructuary mortgage the mortgagor executed a bond, which in addition to the usual stipulation for repayment of the

money secured thereby, contained a condition to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid. *Held* that such a provision was a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore a provision not to be enforced—*Sheo Shankar v. Parma Mahton*, 26 A. 559 (4 A 85 not followed). See also *Rajmal Motiram v. Shivaji*, 27 B. 154 (9 B. 233, doubted); *Rugad Singh v. Sai Narain*, 27 A. 178 (26 A. 559 followed). In *Durga Pershad v. Dukhi Roy*, 9 C. W. N. 789, the meaning of the words "clog or fetter on the equity of redemption" have been explained (9 B 233, 12 B. 231, 20 B. 346, 18 M. 368 referred to).

For the meaning of the expression "once a mortgage always a mortgage," see 9 C. W. N. 789 and 27 B. 154, noted above.

A covenant to renew perpetually a *kanom* mortgage is a clog on the mortgagor's right to redeem and is inoperative, if it is entered into simultaneously with the mortgage. According to the rules of equity, any agreement entered into at the time of the mortgage, having the effect of clogging the right of redemption is inoperative—*Neelakundhan v. Ananthakrishna*, 30 M. 61: 16 M. L. J. 462.

The right of redemption and the right of foreclosure are always co-extensive and from the postponement of the former, the Court will infer an intention to postpone the latter in the absence of an express provision on the point; where there is an express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration. A Court of equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable. A mortgagor cannot by any contract entered into with the mortgagee at the time of the mortgage give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons.—*Abdul Hak v. Gulam Jilani*, 20 B. 677 (followed in *Sari v. Motiram*, 22 B 375). See also *Kanaran v. Kutooly*, 21 M. 110; *Bimal Jati v. Biranja Kuar*, 22 A. 238. But see *Krishnaji v. Mahesvar*, 20 B. 346.

In a suit by a usufructuary mortgagee for possession and in the alternative for the mortgage money, a compromise decree was passed one of the terms of which was that the mortgagor was to pay the mortgage money in three years and redeem and on default the mortgagee was to take possession in execution. *Held*, that though there was a decree it was no better than a contract and so the relationship of mortgagor and mortgagee had not ceased to exist and on the footing that it was a contract and so was void and unenforceable as a clog on the equity of redemption in that it reduced the time for redemption from 60 years to 3 years.—*Ambu Nair v. Kelu Nair*, 53 M. 805.

**Splitting up—partial redemption.**—The mortgage-debt being indivisible and the mortgaged property being held in its entirety as security for the debt and every part of it, the property can only be redeemed in its entirety on payment of the whole debt. The above principle has been enunciated in the last para. of S. 60 of the T. P. Act (IV of 1832).



The general rule is that a mortgage for an entire sum is from its very purpose indivisible and that character of indivisibility exists with reference not only to the mortgagee but also to the mortgagor and save by special arrangement between parties interested neither mortgagor nor mortgagee, nor any one acquiring a partial interest through either can obtain relief under the mortgage except in consonance with that principle of indivisibility.—*Per* Subramania Ayyar, J. in *Euthasanan v. Parameswaran*, 22 M. 209.

But there have been exceptions to this rule as will appear from the cases below.

Where the right of redemption is vested in several persons, one of them may redeem the whole mortgage on payment of the entire mortgage-debt.—*Naro Hari v. Vithalbhait*, 10 B. 648; *Mora v. Ramchandra*, 15 B. 24; *Narayan v. Ganpat*, 21 B. 619; *Kuppasami v. Papathi*, 21 M. 369.

Where the right of redemption is vested in several persons, one of them cannot, by offering to pay his share of the debt redeem a proportionate part of the property.—*Nilkant v. Suresh Chandra*, 12 C. 414 (P. C.) : 20 A. 23. See also *Girish Chunder v. Kedar Nath*, 33 C. 590: 10 C. W. N. 592 (21 M. 64, 19 A. 527, 26 A. 185 referred to). Followed in 11 C. W. N. 403.

But it was also held that where several owners of undivided shares in immoveable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors could sue to redeem the mortgage if there had been no partition of the property mortgaged among the several co-owners.—*Thillai v. Ramanatha*, 20 M. 295 (following *Mamu v. Kuttu*, 6 M. 61, and distinguishing *Naro Hari v. Vithalbhait*, 10 B. 648). But see *Hurdeo v. Gunesh Lall*, 1 Agra 36, where it has been held that any one of the mortgagors or his legal representatives, is, if the mortgage-debt has been repaid, entitled to sue for redemption, and to be put in possession of his own share of the estate, whatever his co-parceners may choose to do in the matter. Later decisions have favoured partial redemption, as splitting up of security was held permissible.

After a mortgage executed by three mortgagors there was a partition by the latter of their equity of redemption by which each became entitled to an undivided one-third in the same; two of the mortgagors then redeemed their two shares on the basis of paying two-thirds of the principal and interest due and two-thirds of a sum said to be due on account of excess assessment and took possession of their shares; and the other mortgagor was allowed to redeem his one-third share on the footing that one-third of the mortgage-debt was payable by him —*Lakshuman v. Madhav*, 15 B. 186.

Certain mortgagors co-sharers after the mortgage transaction effected a division among themselves and apportioned their liability under the mortgage-debt, according to their shares, with the acquiescence of the mortgagee, it was held that though the mortgagee was not bound to recognize the arrangement made by the mortgagors among themselves still as he appropriated the amounts paid by some of the mortgagors in paying off their respective shares of the mortgage-debt without there being a special direction to that effect from the mortgagors he was entitled to recover the remainder of that debt from the share of the mortgagor co-sharer by whom it was due.—*Mahadaji v. Ganpatshet*, 15 B. 257.

Where a division of a joint family is effected by consent an arrangement by some of the members with a mortgagee of the joint family property by which their shares were to be released on payment of their share of the debt is binding on members who are not parties to the arrangement, so long as they are not called upon to pay more than their share of the debt as settled by partition.—*Venkatachella v. Srinivasa*, 28 M. 555.

If a plaintiff mortgagee suing on the basis of his mortgage either for sale or foreclosure thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder, there is nothing in law to prevent his doing so. He is not bound to sue in respect of the whole of the mortgaged property. He may confine his suit to a portion of the property giving up his claim to the rest and implead only those interested in that portion. The only thing in such a case is to see that the burden of the mortgagors sued does not increase by the course adopted.—*Sheotahal v. Sheodan*, 28 A. 174 (F. B) : 2 A. L. J. 630.

Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors, may in each case redeem his own share only on payment of a proportionate part of the mortgage money —*Kallan Khan v. Mardan Khan*, 28 A. 155 (2 A. 565, 17 A. 63 referred to ; 15 B. 24 distinguished). See also 3 C. L. J. 377, and *Brij Kishore v. Madho Singh*, 28 A. 279.

Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee whether by purchase or by inheritance or otherwise, there is a merger of rights and the integrity of the mortgage is broken up.—*Hamida Bibi v. Ahmad Husain*, 31 A. 335 (17 A. 63 followed ; 28 A. 155, 29 A. 262 referred to).

Where subsequent to the date of a mortgage, different persons had become interested in different fragments of the equity of redemption, the owner of any portion of the equity of redemption is entitled to ask that not more than a rateable part of the mortgage-debt should be thrown upon the property in his hands. The mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises, because by reason of their own laches they have lost their remedy against the remainder (30 C. 755 : 2 C. L. J. 202, referred to). A mortgagee cannot release from his claim a portion of the mortgage security so as to prejudice the rights of others, who might have already acquired an interest in the released portion.—*Imam Ali v. Baij Nath*, 33 C. 613 : 10 C. W. N. 551. 3 C. L. J. 576 (2 C. L. J. 202 : 1 C. L. J. 337 followed, 18 W. R. 120, 25 A. 79 dissented from). See also *Debendra Nath v. Abdul Samed*, 10 C. L. J. 150.

Where in a suit upon a mortgage the purchaser of one of the mortgaged properties from the mortgagor was not made a party having been released by the plaintiff mortgagee. Held, that the suit could not be dismissed. The mortgage should be treated as having been split up and the release of one of the properties by the mortgagee should be held to have the same effect as if the mortgagee had himself bought it and the mortgage debt apportioned between that property and the other mortgaged property.—*Hari Kissen v. Feliat Hossein*, 30 C. 755 : 7 C. W. N. 723. See also *Surjiram v. Brahamdeo*,

1 C. L. J. 337; 2 C. L. J. 202; *Inu Khan v. Naimuddin*, 3 C. L. J. 377; *Imam Ali v. Baij Nath*, 33 C. 613; *Hakim v. Ram Lal*, 6 C. L. J. 46. See also *Budhmal v. Rama*, 44 B. 223; *Ponnusami v. Srinivasa*, 31 M. 333.

Where the mortgagee purchases a portion of the mortgaged property the determination of the question whether the whole of the mortgage-debt is chargeable on the remaining properties mortgaged, depends on whether the mortgagee purchased only the equity of redemption or the entire interest of the mortgagor and in the latter case no portion of the mortgage-debt is extinguished.—*Jasodha v. Kali Kumar*, 34 C. W. N. 673.

A purchaser of a part of the mortgaged property who was not made a party in a suit brought by the mortgagee for foreclosure is entitled to redeem that portion of the mortgaged property in which he has acquired an interest.—*Brij Kishore v. Madho Singh*, 28 A. 279; 3 A. L. J. 27. See *Ajmut Ali v. Jowahir Singh*, 14 W. R. 17 (P. C.); 13 M. L. A. 404; *Bekon Singh v. Deen Doyal*, 24 W. R. 47; *Hirdy Narain v. Allaoolah*, 4 C. 72; 2 C. L. R. 580, and *Debendra Nath v. Abdul Samed*, 10 C. L. J. 150.

On the question whether the mortgagee may release a portion of the security to the prejudice of the mortgagor there is some conflict of judicial opinion which has been pointed out in *Mir Eusuff Ali v. Panchanan*, 15 C. W. N. 800 thus:—

“To put the matter in another way as between the mortgagor and mortgagee the latter is entitled to release a portion of the hypothecated property and diminish his own security to that extent. It is not obligatory on him to proceed against all the properties rateably or to exhaust them for the satisfaction of his debt. This principle is recognized in the cases of *Roghu Nath v. Haralal*, 18 C. 320; *Hara Kumari v. Eastern Mortgage & Agency Co. Ltd.*, 7 C. L. J. 274 and *Krishna v. Muthukumarasawmi*, 29 M. 217. While therefore we adhere to the view taken in the cases of *Imam Ali v. Baijnath*, 33 C. 613 and *Hakim Lal v. Ram Lal*, 6 C. L. J. 46, namely, that a mortgagor who has a security upon two or more properties, which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected (*Kettlewell v. Watson*, 21 Ch. D. 686 at p. 714), we are of opinion that this doctrine has no application to the present case when the release took place at a time when the appellants had not purchased any interest in the mortgage premises, and the mortgagors alone were the persons affected by the release. We must not, however, be assumed to adopt the rule laid down by the learned Judges of the Allahabad High Court that such release may be granted even to the prejudice of persons who had previously acquired an interest in the mortgaged property. This view is clearly opposed to principles of justice, equity, and good conscience, even though recognized in *Sheo Prasad v. Behari Lal*, 25 A. 79; *Sheo Talal v. Sheodan*, 28 A. 174; *Ghafur Hasan v. Kifayatullah*, 28 A. 19 and *Pirbhu Narain v. Amir Singh*, 29 A. 369, and was not adopted in *Ram Ranjan v. Indra Narain*, 33 C. 890, and the case of *Krishna v. Muthukumarasawmi*, 29 M. 217, if it lays down a similar principle cannot to that extent be supported. The contrary view which accords with the rule adopted by this Court was followed in *Ponnusami v. Srinivasa*, 31 M. 333.”

r. 8.

The general rule appears to be that a mortgagee has a right to insist that his security shall not be split up (*Hurreehur v. Dabee*, 1864 W. R. 260; *Moulvie v. Jhubboo*, 1864 W. R. 75); but of course (1) when he does not insist on such a right (*Asansab v. Vamana*, 2 M. 223; *Ram Kristo v. Musst. Ameeroonissa*, 7 W. R. 314; *Mirza Ali v. Tarasoodere*, 2 W. R. 150; *Kesree v. Roshun Lal*, 2 N. W. P. 4), or (2) where the original contract recites that the mortgagors join together in mortgaging their separate shares or (3) where the mortgagee has himself split up the security (*Kuray Mnl v. Puran Mal*, 2 A. 565; *Marana v. Pendynla*, 3 M. 230; *Nawab Azimat Ali v. Jownhir Singh*, 13 M. I. A. 404; *Nathoo Sahoo v. Lalah Ameer*, 15 B. L. R. 303; *Mahtab Rai v. Sant Lal*, 5 A. 276) there can be no objection to rateably distribute the mortgage-debt.—*Narayan v. Ganpat*, 21 B. 619. See also *Nand Kishore v. Raja Hari Rai*, 20 A. 23 (F. B.) and the cases referred to therein.

There is nothing in the Transfer of Property Act to support the view that as between the mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged property. He may however be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable, though the properties in their hands have not been included in the suit.—*Krishna v. Muthukumaraswami*, 29 M. 217 (referring to *Timmappa v. Lakshamma*, 5 M. 385 and following *Jagat Narain v. Qutub Husain*, 2 A. 807; *Chagandas v. Gansing*, 20 B. 615).

On the question whether owners of the equity of redemption of only a share in the mortgaged estate can redeem their share only or whether their rights and obligations are to redeem the whole, it was held in *Huthasanan v. Paramswaram*, 22 M. 200, that a person entitled to a part only of the equity of redemption had the right to redeem the whole notwithstanding the mortgagee's objection that he should not be permitted to redeem more than his share of the equity. This decision has been followed in *Baikantha v. Mohesh*, 22 C. W. N. 123 and *Protap v. Peary Mohan*, 22 C. W. N. 800, in which there was no question of the other partial owner having been discharged. It has been adversely commented upon in *Rathna Mudali v. Perumal*, 38 M. 310. See in this connection *Ynd Ali Bej v. Tukaram*, 47 I. A. 207; 48 C. 22 (P. C.); 25 C. W. N. 241; 57 I. C. 535.

Where the integrity of a mortgage has once been destroyed, a mortgagor suing for redemption is not entitled to claim redemption of more than his share in the mortgaged property.—*Ahmad Husnin v. Muhammad Qasim*, 48 A. 171 (*Shiam Saran v. Banarsi Das*, 20 A. L. J. 258 not approved, and referring to *Kallan v. Mardan*, 28 A. 155; *Munshi v. Dault*, 29 A. 262 and *Zaibunissa v. Maharaja Parbhu Narain*, 39 A. 618).

**Contribution.**—The section of the Transfer of Property Act which deals with the right of contribution is S. 82, and it is in these terms:—"Where several properties, whether of one or of several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage." This section prescribes

the conditions in which contribution is payable as between owners of equities of redemption subject to a common mortgage, and it is not permissible to introduce into the matter any equitable or other extrinsic principle to modify the statutory provisions.—*Ganeshi Lal v. Thakur Charan*, 52 C. L. J. 117 (P. C.). See also *Faqir Chand v. Aziz Ahmad*, 36 C. W. N. 437 (P. C.) in which it has been held that when several properties are mortgaged to secure one debt and one of them, along with other properties, is subject to a prior mortgage, the proportion of assessing the contribution of such property towards the subsequent mortgage under S. 82 of the Transfer of Property Act, what is to be deducted from its value is not the total amount of the prior mortgage, but the rateable share which is to be attributed to this property under the prior mortgage.

**Effect of redemption of whole mortgage by a part owner of the equity of redemption.**—By redeeming a mortgage of ordinary kind under which possession did not pass to the mortgagee, one of the several mortgagors becomes entitled to a charge on the interests of the other mortgagors for the amount payable by the latter.—*Malik Ahmad v. Shamsi Jahan Begam*, 33 I. A. 81; 28 A. 482 (P. C.); 10 C. W. N. 626; 3 C. L. J. 481; 16 M. L. J. 269; 3 Bom. L. R. 397; 3 A. L. J. 360. See also *Asansab v. Vamana Rao*, 2 M. 223, *Vithal Nilkanth v. Vishvasrao Bin*, 8 B. 497.

**Sub-mortgagee's rights of redemption and in redemption suits.**—The owners of a mortgaged property executed a usufructuary mortgage in favour of certain persons; they then executed another mortgage in favour of other parties agreeing that the latter should get possession of the property after redeeming the former mortgage; the said other parties sub-mortgaged the property to the plaintiff and the latter was held entitled to redeem the earlier mortgage.—*Ram Subhag v. Nar Singh*, 27 A. 472 (distinguishing *Ganga Prasad v. Chuni Lal*, 18 A. 113).

In a suit for redemption of land which has been sub-mortgaged by the mortgagee in which the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee both shall convey to the mortgagor.—*Narayan v. Gitabai*, 15 B. 692.

In a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a necessary party, though he may be a proper party: The original mortgagee may redeem the derivative mortgagee and the latter may foreclose the original mortgagee without making the original mortgagor a party.—*Ganesh v. Vasudeo*, 68 I. C. 741; 24 Bom. L. R. 911; A. I. R. 1922 Bom. 424. A sub-mortgagee may be impleaded as a defendant in a suit for redemption by the mortgagor.—*Padgaya v. Baji*, 20 B. 549.

If a proper party in a mortgage suit has been omitted, his rights are not affected by that suit in the sense that he can still pursue his own remedy. So, if a sub-mortgagee has not been impleaded in a suit for redemption of the mortgage, his right to bring his own suit for sale of the property mortgaged to him is not affected, but this cannot, however, alter the legal effect of the redemption suit as between the mortgagor and mortgagee. So if, in

that suit, the mortgagor paid off the mortgagee, the mortgage is gone and the sub-mortgagee has nothing left to bring to sale. He cannot enforce his sub-mortgage and all he is entitled to is only a personal decree against his own mortgagors.—*Viswanatha v. Chimmikutu*. (1931) M. W. N. 1141; 34 L. W. 535.

For further notes see notes under rr. 2 and 3 and under rr. 4 and 5, ante.

**8-A.** Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance. [New.]

Recovery of balance due on mortgage in suit for redemption

### COMMENTARY.

**History.**—This rule is new and has been introduced by the Transfer of Property (Amendment) Supplementary Act, 1929. It provides for a personal decree in a suit for redemption on the lines of r. 6 which provides for a personal decree in a suit for sale.

**9.** Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if, so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property. [New.]

Decree where nothing is found due or where mortgagee has been overpaid.

### COMMENTARY.

**History.**—"This rule is new. It is a recognition of existing practice and remedies an obvious omission in the T. P. Act, 1892."—*See the Report of the Special Committee*.

It has been framed adopting the principles laid down in the following cases:—

In a suit for account and redemption, if the mortgagee on taking the accounts, is found to have been overpaid, the general practice is to order the payment by him, of the balance due to the mortgagor with interest from the date of the institution of the suit.—*Janoji v. Janoji*, 7 B. 185.

... has realised a sum of money in excess of equitable practice to allow to the mortgagee at the same rate at which interest has been allowed to the mortgages on his mortgage-debt.—*Dechoo Singh v. Rai Sheo Sahoy*, 1 N. W. P. H. O. R. 111.

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If upon taking an account between mortgagor and mortgagee it appears that the mortgage has been fully satisfied, the mortgagor is not only entitled to have the property back, but the Court is bound as a Court of equity and acting upon the principle that it is always the aim of a Court of equity to determine finally as far as possible all questions concerning the subject of the suit, to cause an account to be taken up to the time of the decree, the account so taken being considered binding, the parties not being at liberty except under peculiar circumstances to reopen it in any other suit.—*Kullyn Das v. Sheo Nundun*, 18 W. R. 65; *Roy Dinkur Doyal v. Sheo Golam*, 22 W. R. 172; *Lutafat Hossein v. Chowdhury Mahomed*, 22 W. R. 269.

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution proceedings when those accounts appear to be going against him.—*Doolee Chand v. Omda Khanum*, 6 C 377 · 7 C. L. R. 375.

Where it appears that there is nothing due to the mortgagee or that he has been overpaid, his suit will be dismissed with costs, and he should be also ordered to pay over the balance with interest from the date of the institution of the suit.—*Ram Chandra v. Janardan*, 14 B. 19 (7 B. 185 referred to).

**10.** In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

[New.]

### COMMENTARY.

**History.**—This rule has been substituted for the old r. 10 by the Transfer of Property (Amendment) Supplementary Act, 1929 which came into force on the 1st April 1930. The old rule is reproduced below:—

**10.** In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

[S. 94.]

The old rule corresponds to S. 94 of the T. P. Act, IV of 1882, with some additions and alterations, as will appear on a comparison of that rule with the old section which ran as follows:—

"In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to

*the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption, or sale, up to the time of actual payment."*

In the first part of the old section there was no reference to a foreclosure; it was evidently an omission which was supplied in the present rule by insertion of the word "*foreclosure*" before the words "or sale or redemption."

This rule provides for the payment of costs incurred by the mortgagee subsequently to the decree. Under S. 35, C. P. Code, the Court has full discretion to award and apportion costs incurred in a suit before the decree and that section will still regulate such costs. But costs incurred after decree will be regulated by this rule. Such costs must be the costs of carrying out the directions of the decree, e.g., costs of a reconveyance, etc.

**Present change.**—The words "and other costs, charges and expenses" are new and make it clear that they are to be included in the final adjustment.

Unless the conduct of the mortgagee has been such as to disentitle him to costs.—The discretion given under S. 220, C. P. Code, 1882 (S. 35), is one which is to be exercised with reference to general principles. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no jurisdiction and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of this kind, the rule is plain and well-settled as stated above. It is, for instance, no answer, where a plaintiff asserts a legal right, for a defendant to allege ignorance of such right and to say "if I had known of your right, I should not have infringed it."—*Kuppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341.

As a general rule, a mortgagee trying to enforce his rights upon the mortgage is entitled to costs in the absence of any misconduct or any other conduct which, in the opinion of the Court, disentitles him to the expenses—*Damodar Das v. Budh Kuar*, 10 A. 179; and *Rutnessur Sein v. Jusoda*, 14 C. 185.

"Such costs of suit as have been properly incurred."—The costs mentioned in this rule and costs which are properly incurred in the suit in carrying out the directions contained in the decree are liable to

be treated as quite distinct and independent from the suit itself. These costs the decree-holder can realize separately by execution against the judgment-debtor personally and is not bound to add to the mortgage-money.—*Het Ram v. Dat Prasad*, A. I. R. 1926 All. 63 (an Letters Patent appeal, 48 A. 682; 96 I. C. 592; A. I. R. 1926 All. 722).

**Costs—Mode of realisation.**—Whether the suit be one for foreclosure, sale or redemption, the mortgagee is entitled to all costs properly incurred



by him, including costs subsequent to the decree; *Maharaja Bahadur Singh v. Basiruddin*, 41 C. L. J. 607: A. I. R. 1925 Cal. 1135.

A mortgage-decree under S. 88 of the T. P. Act (r. 4), cannot impose personal liability for costs. It may contain a declaration of the personal liability of the defendant for principal or costs, but such a declaration is not part of the usual form of decree under the T. P. Act, and is enforceable only under r. 6—*Kamamma v. Komandur*, 30 M. 464: 17 M. L. J. 317. See also *Rajkumar v. Sheonarayan*, 35 C. 431: 8 C. L. J. 152: 12 C. W. N. 364; *Maqbul v. Lalta Prasad*, 20 A. 523 (F. B.).

In a mortgage suit it is open to a Court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction the costs are, as a matter of ordinary practice sanctioned by Or. XXXIV, rr. 2, 4 and 10 of the Code of Civil Procedure, added to the mortgage-money and are in the first instance recoverable from the mortgaged property after the decree is made final.—*Muhammad Iftikharullah v. Banke Lal*, 45 A. 630: 21 A. L. J. 617.

A decree-holder in executing a mortgage-decree must, for the purpose of recovering costs awarded by the decree, proceed in the first instance against the property mortgaged; and in the event of the same being found insufficient, he can proceed against properties other than the mortgaged property. The order for costs is a part of the mortgage-decree.—*Rajkumar v. Sheo Narayan*, 35 C. 431: 8 C. L. J. 152: 12 C. W. N. 364 (20 A. 523 followed; 10 A. 179; 14 C. 185 distinguished). See also *Sadiq Husain v. Umma-tul-Fatima*, 48 I. C. 329; *Dambar Singh v. Kalyan Singh*, 40 A. 109: 15 A. L. J. 914. Costs omitted in the preliminary decree cannot be included by the executing Court.—*Dambar Singh v. Kalyan Singh*, 40 A. 109: 15 A. L. J. 914; *Muhammad Iftikharullah v. Banke Lal*, 45 A. 630: 21 A. L. J. 617.

A decree for sale under S. 88, T. P. Act, IV of 1882 (r. 4), can only be executed for the amount decreed or found on an account being taken to be due, and the order for sale cannot, except with regard to any additional costs which may be provided for by an order under S. 94 of the T. P. Act, extend in any way the liability of the judgment-debtor or his property under the decree.—*Kashi Prasad v. Sheo Sahai*, 19 A. 186 (5 A. 493 distinguished).

The costs awarded by the decree directing the sale of the mortgaged property form part of the mortgage-decree, the payment of which can be enforced personally against the mortgagor under this rule, if the sale-proceeds are insufficient to satisfy the mortgagee's claim.—*Rajkumar v. Sheo Narayan*, 35 C. 431: 12 C. W. N. 364: 8 C. L. J. 152 (20 A. 523 followed; 14 C. 185, 10 A. 179 distinguished). See also *Kamamma v. Komandur*, 30 M. 464: 17 M. L. J. 317, and *Maqbul v. Lalta Prasad*, 20 A. 523 (F. B.).

A mortgagee who has obtained an order absolute for foreclosure may proceed against the mortgagor personally for the costs of the suit.—*Shaffar Khan v. Satyananda Das*, 13 C. W. N. 742 (14 C. 185; 10 A. 179 followed; 35 C. 431: 12 C. W. N. 364: 8 C. L. J. 152 and 20 A. 523 distinguished).

Unless there is an express condition in the mortgage as to payment of costs, in the absence of special circumstances those costs are merely added to the mortgage-security and are not payable by the mortgagor personally; but where the mortgagor has chosen to raise an untenable defence,

it is proper to direct him to pay the costs if the security is not sufficient. It makes no difference even if the mortgagor is dead and is represented by his legal representatives; *Fraylal v. Venkataswami*, 52 B 459: 30 Bom. L. R. 402: 108 I. C. 794 A. I. R. 1923 Bom. 123.

Costs incurred in connection with the suit up to the time of the payment of the decree whether before or after the final decree must be included in the sum which can be realised by sale of the mortgaged property.—*Kashif v. Sashadhar*, 122 I. C. 783 A. I. R. 1930 Oudh 328, 7 O. W. N. 398.

Ordinary costs must be included in the amount due on the mortgage and the property must be sold for the total amount and the decree for costs cannot be executed separately as a personal decree against the mortgagor.—*Kannu v. Bhagwan*, 129 I. C. 554: A. I. R. 1931 All. 124.

Unless there is in the judgment a specific direction that the costs should be recovered from the mortgagor personally, the presumption must be that the decree directed costs to be added to the mortgage amount.—*Kannu v. Bhagwan*, 129 I. C. 554: A. I. R. 1931 All. 124.

The question whether in a mortgage suit, the costs are to be paid by judgment-debtor personally must always be regarded as one of construction of the decree and the intention of the Court is to be gathered from the terms of the decree. If a decree on a proper construction should be held to have made the costs payable personally by the defendants, apart altogether from the securities or the sale of them, there is no and could not be any rule or principle of law saying that such a decree could not be executed according to its tenor. Where a Court after being informed of satisfaction having been entered up of the original decree, deliberately amended the decree and made an order against a party for the payment of costs without there being any reference whatever to the mortgage-securities. Held that the obvious intention of the Court was that the amount must be paid personally and a construction which would have the effect of importing into the decree a reference which was not there, to the mortgage-security or the sale of it, would be unreasonable.—*Ramaswami v. Chinnathayammal*, 109 I. C. 63: A. I. R. 1923 Mad. 604.

A mortgagee's suit for sale of the mortgaged properties was contested unsuccessfully by a puisne mortgagee who was impleaded as a party defendant, although the mortgagor admitted the claim of the mortgagee. The Court passed a preliminary decree for sale and made an order for costs on the uncontested scale against the mortgagor and on the contested scale against the puisne mortgagee. Execution sale was held but the sale-proceeds fell short of the mortgage-debt and a final personal money-decree was passed against the mortgagor. The mortgagee then applied for execution of the order for costs against the puisne mortgagee. Held, that the mortgagee had a right to execution against the puisne mortgagee personally in respect of such part of the costs although a final personal money-decree . . .  
C. A. M. K. Chettyar Firm v. P. I. . . .  
A. I. R. 1931 Rang. 181 (3).

Where a prior mortgagee sued the mortgagor and a puisne mortgagee and was given a decree for sale of the properties mortgaged to him and an

order for costs making the puisne mortgagee liable for them jointly with the mortgagor, the puisne mortgagee is, in the absence of a special order or special reasons to the contrary, personally liable for the costs, though of course, there is no right to a final personal money-decree against any party other than the mortgagor. The mortgagee is not bound to credit the sale-proceeds to costs before they are credited to the mortgage-debt and though the Code provides that costs payable by the mortgagor to the mortgagee shall be payable in the first instance out of the proceeds of the sale of the mortgaged property, there is no such provision postponing the recovery of costs awarded against parties other than the mortgagor; *Maung Po Mya v. M. A. S. Chettyar Firm*, 9 R. 186: 133 I. C. 225; A. I. R. 1931 Rang. 153.

A final personal money-decree for costs may be given against the mortgagor even in a case where the personal remedy of the mortgagee against the mortgagor for the mortgage-money and interest thereon is time-barred.—*Maung Po Mya v. M. A. S. Chettyar Firm*, 9 R. 186: 133 I. C. 225; A. I. R. 1931 Rang. 153.

**Other costs, charges and expenses.**—The mortgagee is entitled to preserve the mortgaged property from being lost for non-payment of rent; where rent is paid after the preliminary decree and before the final decree, the money so paid should be added.—*Allahabad Bank Ltd. v. Mati Lal*, 44 C. 448: 22 C. W. N. 374.

**[Old rule 11.** Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interest of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor. **[New].**

Right of mesne mortgagee to redeem and foreclose.

## COMMENTARY.

**History.**—"This clause was in the Transfer of Property Act Bill, but was omitted by the Select Committee from that Bill on the ground that it ought to find a place in the Civil Procedure Code."—*See the Report of the Special Committee*

It was inserted in the Code by the Act of 1908. The Committee inserted this rule in compliance with the suggestion of the Privy Council in *Gopi Narain v. Bansidhar*, 27 A. 325 (P. C.): 32 I. A. 123; 2 C. L. J. 173: 9 C. W. N. 577; 16 M. L. J. 191; 7 Bom. L. R. 427; 2 A. L. J. 336.

In the above Privy Council case the following rule had been laid down. A mortgage-decree directed, that, in the event of the decretal amount not being paid within a certain time, the defendant should be absolutely debarred of all right to redeem the mortgaged property. A puisne mortgagee who was a party to a suit by the first mortgagee for foreclosure, and who satisfies the decree made therein and thus prevents foreclosure, acquires under S. 74 of the T. P. Act, all the rights and the powers of the first mortgagee. He is not entitled, however, to ask the Court to work out under S. 244, C. P. Code, 1892 (S. 47), his rights as owner of the first mortgage and as second mortgagee, as against other incumbrancers who were parties to the suit. As soon as the money due under the foreclosure decree has been paid by the puisne mortgagee and withdrawn by the decree-holder it is discharged and satisfied and there-

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is nothing to be done in the execution department. A new doerco is required to work out the respective rights of the parties and S. 214, C. P. Code, 1882, (S. 47), is no bar to a separate suit, which is necessary to adjust the rights of the parties. Section 86 of the T. P. Act contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure but to be adapted to the particular circumstances of each case. To regulate the rights of puisne mortgagees, in mortgage decrees a form of order known in the Chancery Division of the High Court in England might be adopted in India.

The rule has now been transferred to the Transfer of Property Act by the Amending Act of 1929 and has been inserted in it as S. 94.

**Right of mesne mortgagee to redeem and foreclose.**—A puisne mortgagee is entitled to redeem from the prior mortgagee who obtains a foreclosure decree in a suit to which the puisne mortgagee is not made a party or from the purchaser in the foreclosure suit; and it is immaterial whether the puisne mortgage is or is not registered, or whether the prior mortgagee at the date of the suit had or had not notice of the puisne mortgage.—*Sankana Kalana v. Virupakshapa*, 7 B. 140.

A mortgagee created a sub-mortgage in favour of the plaintiff, of land mortgaged to him. The sub-mortgagor in express terms transferred his interest in the land to the sub-mortgagee. The sub-mortgagor also lent a portion of the consideration-money in the hands of the sub-mortgages for redemption of a prior mortgage. The prior mortgagee refused to accept the sum due to him and deliver up possession. *Held*, that the sub-mortgagee is entitled to redeem the prior mortgage.—*Ramsubhag v. Narsingh*, 27 A. 472: 2 A. L. J. 162.

A perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon a payment of the premium with a yearly fixed rental is entitled to redeem.—*Raghunandan v. Ambika Singh*, 29 A. 679: 4 A. L. J. 703.

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party, and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party: *Held*, that each party would be entitled to redeem the other; but the preferable right to redeem was with the puisne mortgagee.—*Kedar Prosanna v. Girindra Prosad*, 8 O. L. J. 173.]

**11.** In any decree passed in a suit for foreclosure, sale

or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in Clause (a) and of the interest thereon as calculated in accordance with that clause; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10. [New.]

### COMMENTARY.

**History and object.**—This rule is new and has been introduced by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April, 1930. Its object is to codify the case-law on the question of interest, removing certain conflict that existed in it.

In certain decisions it had been held that S. 34 of the Code did not apply to mortgage decrees—*Giriya Chettiar v. Sabapathy*, 29 M. 65; *Rajwanta Kuar v. Shiam Narain*, 36 A. 220; 12 A. L. J. 283. But see *Allahabad Bank Ltd. v. Suraj Kuar*, 26 I. C. 177; 1 O. L. J. 544, in which a contrary view was taken.

There having been no specific rule as to interest this rule has been enacted.

**Summary of the previous law.**—The Court was bound to award to the mortgagee, (a) interest on the principal sum prior to the date of the suit, at the rate provided by the mortgage unless the rate is penal, in which case the Court may award such interest as it thought proper; *Khaga Ram v. Ramsankar*, 42 C. 652; 27 I. C. 815; 19 C. W. N. 775; 21 C. L. J. 79; (b) interest on the principal sum from the date of the suit to the date fixed by the Court for payment of the mortgage-debt also at the rate provided by the mortgage unless the rate is penal, in which case the Court may award such interest as it thought proper; *Rameswar v. Mehdi Hossein*, 26 C. 39 (P. C.); 2 C. W. N. 633; 25 I. A. 179 (explained in *Sundar Koer v. Sham Krishen*, 34 C. 150 (P. C.)); 34 I. A. 9; 11 C. W. N. 249; 5 C. L. J. 106; *Surya v. Jogendra*, 20 C. 360; *Chaturbhai v. Harbhamji*, 20 B. 744; *Subbaraya v. Ponnusami*, 21 M. 364; *Tara Chand v. Brojo Gopal*, 17 C. W. N.

457); (c) interest on the aggregate amount of principal, interest and costs decreed, from the date fixed for the payment of the mortgage debt up to the date of realisation or actual payment as the Court thinks proper. Such interest might be allowed either at Court-rate, i.e., 6 per cent.; *Sundar Koer v. Sham Krishen*, 34 C. 150 (P. C.); 31 I. A. 9; *Venkatachalapathy v. Thavasi*, 42 M. 465; 51 I. C. 67; *Saminathan v. Swamiappa*, 29 M. 170; or at any other rate; *Lachmi Narain v. Uman Dat*, 29 A. 322, *Bhagat Singh v. Jai Ram*, 26 I. C. 402. Where the interest was excessive and the transaction was substantially unfair, the Court might reduce it under the Usurious Loans Act, 1918. This Act was amended in 1926 and it has been held that the effect of the amendment has been to make the Act applicable to suits for redemption of mortgages in respect of loans made before or after the commencement of the Act of 1918.—*Jnan Chandra v. Mahim Chandra*, 35 C. W. N. 654.

**Other cases on interest.**—Section 34 (1) does not control and negative the effect of rr. 2 and 4 of Or. XXXIV of the C. P. Code. The Court in a mortgage suit is bound to award interest on the principal sum prior to the date of the suit as well as from the date of the suit to the date fixed for redemption at the rate mentioned in the mortgage, unless the rate is penal; *Kali Prosonno v. Pratap*, 17 C. L. J. 221.

A puisne mortgagee seeking to redeem prior incumbrances must pay the interest at the rate agreed upon in the mortgage; there being no authority under S. 209, C. P. Code, 1882 (S. 34) to "reduce it to the Court-rate."—*Umes Chunder v. Zahur Fatima*, 18 C. 164 (P. O.); 17 I. A. 201.

There is no provision made rule of Or. XXXIV, for interest after the date fixed in the decree for payment, as there is in rule 4, which relates to a decree for sale. The reason is to be sought in the difference between a foreclosure and sale. In the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay and in many cases is subject to long delays.—*Maharaja of Bhartpur v. Kanno Dei*, 23 A. 181 (P. O.); 28 I. A. 35; 5 C. W. N. 137.

Where in a decree for foreclosure, interest subsequent to the decree was included in the amount made payable to the plaintiff, held, that such future interest supposing it could be properly payable, could not be treated as a charge upon the land.—*Bhawani Prasad v. Brij Lal*, 16 A. 269. See also *Rajkumar v. Bisheshar*, 16 A. 270.

Where by a consent decree in second appeal the time for redemption is extended from that fixed in the first Court, interest should be allowed up to the date of extension.—*Rafikunnissa Bibi v. Tarini Churn*, 20 C. 279.

The prevailing practice in mortgage cases is to allow interest at the contract rate up to the date fixed for payment by the decree nisi and thereafter interest at the usual Court-rate of six per cent. per annum. The words "the date of realization" in the decree mean the date fixed for payment by the decree, that is, a date within and not after the period of grace.—*Maha Pershad Singh v. Surendra Mohan*, 9 C. L. J. 288. See also *Sundar Koer v. Sham Krishen*, 34 C. 150 (P. C.); 34 I. A. 9; 11 C. W. N. 249; 5 C. L. J. 106; *Lachmi Narain v. Uman Dat*, 29 A. 322; 4 A. L. J. 209; *Gokuldas v. Ghasi-ram*, 35 C. 221 (P. C.); 12 C. W. N. 369; 7 C. L. J. 233. In *Meghraj Marwari v. Narsing Mohan*, 33 C. 846, meaning of the words "up to the date of realization" in the decree, explained. See also *Tekait Krishna Prasad v. Surendra Mohan*, 2 P. L. T. 78; 5 P. L. J. 598. On a preliminary

decree for foreclosure or sale under Or. XXXIV, rr. 2 and 4, a mortgagee is entitled to interest at the rate and with the rests stipulated in the mortgage down to the date fixed for redemption by the decree; and if the decree is varied on appeal, down to the date for redemption fixed by the appellate Court.—*Jagannath v. Surajmal*, 54 I. A. 1: 54 C. 161 (P. C.); 99 I. C. 686: A. I. R. 1927 P. C. 1 (following *Sundar Koer v. Sham Kishen*, 34 C. 150 (P. C.) and explaining *Raghunath v. Sarju Prasad*, 51 I. A. 101: 3 P. 279: 28 C. W. N. 834).

In a suit on a mortgage-bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.—*Futtehma Begum v. Mohamed Ausur*, 9 C. 309.

Interest on money lent was contracted to be payable, "even if a suit should be instituted," at the rate fixed for the period for which the money was lent. Held, the interest must be decreed at this rate, according to the contract, down to the institution of the suit.—*Balgobind Das v. Narain Lal*, 15 A. 339 (P. C.) (p. 352). 20 I. A. 116.

Interest after due date is in the discretion of Court, notwithstanding that a fixed rate of interest is mentioned as payable up to realization in the bond sued upon.—*Mangniram v. Dhowtal Roy*, 12 C. 569 (F. B.). See also *Deendoyal Lall v. Het Narain*, 2 C. 41: 25 W. R. 189. But see *Rama Chandra v. Devu*, 12 M. 485, and *Surya v. Jogendra*, 20 C. 360, in which it has been held that the terms of S. 86, Transfer of Property Act (IV of 1882), exclude the discretion conferred on the Court by S. 209, C. P. Code, 1882, in cases coming under the Transfer of Property Act, and that interest at the stipulated rate must be computed down to the date fixed for payment. In *Achalabala v. Surendra Nath*, 24 C. 766: 1 C. W. N. 550 (dissenting from *Amalak Ram v. Lachmi Narain*, 19 A. 174), it has been held that the Court has power under a decree in a mortgage-suit to allow interest subsequent to the date of decree, and the date fixed by the decree for payment, until realization. This case has been followed in *Bakar Sajjad v. Udit Narain*, 21 A. 361 (F. B.) (overruling 19 A. 174). See also *Subbaraya Ravuthaminda v. Ponnusami Nadar*, 21 M. 364 and *Jogendra Nath v. Melhana Abraham*, 6 C. W. N. 769; *Rameswar Prasad v. Rai Sham Kishen*, 29 C. 43. The same principle has been laid down in *Commercial Bank of India v. Ateendralayya*, 23 M. 637; *Saminathan v. Swamiappa*, 29 M. 170: 16 M. L. J. 133; *Rameswar v. Mehdi Hossein*, 26 C. 39 (P. C.); 2 C. W. N. 633 (P. C.); 25 I. A. 179; *Maharaja of Bhartpur v. Kanno Dei*, 5 C. W. N. 137 (P. C.); 23 A. 181 (P. C.); 23 I. A. 35; *Raja Balwant Singh v. Amolak Ram*, 23 A. 223 (P. C.); 3 C. L. J. 85; *Ganga Ram v. Jaiballav*, 30 C. 953; *Manoo Lal v. Durga Prasad*, 5 C. W. N. 653; *Prayag Kapri v. Shyam Lal*, 31 C. 188; *Jagannath v. Surajmal*, 54 I. A. 1: 54 C. 161: 99 I. C. 686: A. I. R. 1927 P. C. 1.

Where there is an express covenant to pay interest at a certain rate after the stipulated date of payment, the Court is bound to allow interest at that rate up to the date of decree.—*Chab Nath v. Kamta Prasad*, 7 A. 333 (1 A. 603 referred to).

When a mortgage-bond contains no stipulation for the payment of interest after due date, interest is payable by virtue of the Interest Act (XXXII of 1839).—*Mat Singh v. Ramo Hari*, 24 C. 699 (F. B.) (considered in *Ghantayya v. Papayya*, 23 M. 534).

Where a mortgage-bond does not provide for interest *post diem*, a mortgagee is entitled to receive such interest by way of damages.—*Ghajmal*

*Das v. Brij Bhukan*, 17 A. 511 (P. O.) : 22 I. A. 197; *Ghuznavi v. National Bank of India*, 20 C. W. N. 562 : 23 C. L. J. 256 (17 A. 511 (P. O.) referred to). See also *Jwala Prasad v. Khuman Singh*, 2 A. 617; *Bishen Dayal v. Udit Narain*, 8 A. 486; *Mansab Ali v. Gulab Chand*, 10 A. 85; *Bhagwant Singh v. Daryao Singh*, 11 A. 416 and *Sri Niwas Ram v. Udit Narain*, 13 A. 330. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties; *Budhu Ram v. Niamat Ali*, 4 L. 406 : 75 L. C. 375 : A. I. R. 1923 Lah. 632 (17 A. 511 (P. O.) referred to). See also *Badi Bibi v. Sami Pillai*, 18 M. 257; *Thayar Ammal v. Lakshmi Ammal*, 18 M. 331; *Nityananda v. Radha Charana*, 20 M. 371; *Pedda Subbaraya v. Ganga*, 20 M. 149; *Mahadeo v. Tikni*, 3 O. L. J. 390; *Malayappier v. Pichai Asari*, (1915) M. W. N. 203. But whether such *post diem* interest would constitute a charge on the mortgaged property or not, there is a difference of opinion. In *Bikramjit Tewari v. Durga Dyal*, 21 C. 274; *Rama Reddi v. Appaji Reddi*, 18 M. 249; and *Kristna Reddi v. Varadarajulu Reddi*, 18 M. 338-note, it has been held that such *post diem* interest would constitute a charge on the mortgaged property. But in *Narindra Bahadur v. Khadim Husain*, 17 A. 581 (F. B.) ; *Gudri Koer v. Bhubaneswari Coomar*, 19 C. 19; and *Rikhi Ram v. Sheo Parshan*, 18 A. 318, it has been held that such *post diem* interest does not constitute a charge on the mortgaged property. (See also *Balwant Singh v. Gayan Singh*, 35 A. 534 : 11 A. L. J. 829). These latter cases seem to have been disapproved by the Judicial Committee in *Mathura Das v. Narindra Bahadur*, 19 A. 39 (P. C.) : 23 I. A. 138 (followed in *Sarala Dasi v. Jogendra*, 25 C. 246). See also *Bundesri Nask v. Ganga Saran*, 20 A. 171 (P. C.) : 25 I. A. 9.

Where in a decree for foreclosure, interest subsequent to the decree was included in the amount made payable to the plaintiff—*held*, that such future interest, supposing it could be properly payable, could not be treated as a charge upon the land.—*Bhawani Prasad v. Birji Lal*, 16 A. 269. See also *Rajkumar v. Bisheshar*, 16 A. 270.

Where the decree *nisi* in a mortgage suit allowed no interest after the expiry of the period of grace, it is not open to the Court, upon the application of the decree-holder, to insert any provision for further interest which was not made in the decree *nisi*.—*Moha Prasad v. Ramani Mohun*, 13 C. W. N. 744. See also *Udit Narayan v. Jasoda*, 27 C. L. J. 576.

A usufructuary mortgagee who allows his mortgagor to retain possession of a part of the mortgaged property and makes no claim in respect of the stipulation in the mortgage-deed which provides for payment of interest, his claim for interest is barred by acquiescence.—*Jhunku Singh v. Chhotkan Singh*, 31 A. 325 (6 A. L. J. 54 referred to).

Mortgagors on redemption of the mortgaged property should be directed to pay the mortgagee's interest up to the date fixed for redemption by the Court.—*Bishenchand v. Bishen Devi*, 107 I. C. 393 : A. I. R. 1928 Lah. 96.

The mortgagee in possession who holds over after payment of everything due to him will be charged with subsequent receipts and interest from the date at which the mortgage-debt was paid with annual rests. Where the lower Court awarded interest at 9 per cent., which was the rate provided in the bond, *held*, that the High Court will not interfere with the exercise of



discretion by the lower Court.—*Krishnaji v. Motilal*, A. I. R. 1929 Bom. 337 : 31 Bom. L. R. 476.

The trial Court decreed a mortgage suit and awarded interest at the bond rate till the date of grace which was fixed six months after the date of decree. The appellate Court confirmed the judgment of the trial Court and allowed the mortgagor three months' further time to pay up the debt. *Held*, that it would be wrong to say that the three months' further time allowed by the appellate Court was not the time of grace as contemplated by r. 4. It was an enlargement of time fixed for payment by the appellate Court and hence interest according to bond rate must be calculated till the date thus fixed for payment by the appellate Court.—*Jamuna v. Chakradhar*, 126 I. C. 906 : A. I. R. 1930 Pat. 380.

Section 34 of the C. P. Code gives the Court no discretion to award interest in excess of *damdupat* for the period after the date on which the suit was filed, in the case of a decree based on a mortgage to the provisions of which the rule of *damdupat* applies.—*Ramkuar v. Ramrao*, 130 I. C. 159 : A. I. R. 1931 Nag. 88.

Section 34 does not give any jurisdiction to the Court with regard to interest after the date of the suit in cases to which Or. XXXIV, rr. 2 and 4 apply, and further since r. 11 makes full provision for payment of interest during the period while the matter rests within the domain of contract, the discretion under S. 34 cannot be exercised in mortgage suits where the law of *damdupat* prevents the inclusion of any interest *pendente lite* in the calculation.—*Marothirao v. Man Kunwarbai*, 27 N. L. R. 312 : 134 I. C. 274 : 14 N. L. J. 109 : A. I. R. 1931 Nag. 161.

Where the preliminary decree in a mortgage suit provides for interest up to date of realisation, the decree-holder is entitled to such interest even though the final decree does not give any express direction regarding the same. Nature of preliminary and final decree discussed ; *Dwarka v. Umrao*, 130 I. C. 337 : 7 O. W. N. 1205 : A. I. R. 1931 Oudh 47.

The awarding of future interest rests on the discretion of the trial Court which will not be interfered with by the appellate Court unless on the strongest grounds.—*Said Ahmad v. Raja Barkhandi*, 9 O. W. N. 253.

Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling the Court to do so. The statutory authority for allowing interest at the bond rate beyond the date of the preliminary decree appears to be in Or. XXXIV, r. 11 and even that only says "may order".—*Sripat Singh v. Naresh Chandra*, 13 P. L. T. 545.

The words "subsequent interest" in Or. XXXIV, r. 4 as it stood before the amendment of 1929 did not take away the discretion which the Court always has had in allowing interest on the mortgage amount subsequent to the date fixed for repayment in the decree ; such discretion is not confined only to the question of rate of interest, and the Court may in a proper case refuse interest altogether to the mortgagee after such date.—*Registered Jessore Loan Co. v. Shailajanath*, 59 C. 722.

**Rule of damdupat.**—It was held in *Mndras* that the rule of *damdupat* does not apply to a mortgage governed by the Transfer of Property Act.—*Madhwa v. Venkata*, 26 M. 662. This has been dissented from in Calcutta and Bombay.—See *Jeewanbai v. Manordas*, 35 B. 199: 13 Bom. L. R. 992; *Kunjilal v. Narsamber*, 42 C. 826: 20 C. W. N. 110.

In Calcutta it has been held that the rule of *damdupat* applies only when the contracting parties are Hindus.—*Wooma v. Sreehari*, 1 C. W. N. 178 (notes); *Nobin v. Romesh*, 14 C. 781. The rule exists only so long as the contractual relation of debtor and creditor exists and not when that relation ceases by reason of a decree.—*In re Harilal Mullick*, 33 C. 1269: 10 C. W. N. 884; *Dhondshet v. Rawji*, 22 B. 86. *Damdupat* does not apply to interest accruing after date fixed for redemption under a decree passed on a mortgage, when the relation between the parties has passed from the realm of contract into that of judgment.—*Nandalal v. Dharendra*, 40 C. 710.

In Bombay it has been held that a Mahomedan mortgagor cannot enforce the rule of *damdupat* against a Hindu creditor.—*Dawood v. Vullubhdas*, 18 B. 227. A Mahomedan debtor by transferring the mortgaged properties to a Hindu cannot prejudice his creditor or reduce the interest.—*Hari Lal v. Nagar*, 21 B. 38. So long as the mortgagor was a Hindu and the mortgagee a Mahomedan the rule was applied, but when the Hindu mortgagor transferred his interest to a Mahomedan the rule ceased to apply.—*Ali Saheb v. Shabji*, 21 B. 85. The rule does not forbid the interest being converted to principal by agreement between the parties.—*Sukalal v. Bapu Sakharam*, 24 B. 305. Ranade, J. summed up the following principles of the rule:—(1) The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts; (2) it does not however apply where the mortgagee has been placed in possession and is accountable for profits received by him as against the interest due; (3) but where the profits are by the terms of the bond received for only a portion of the interest on the mortgage-debt the general rule of *damdupat* will govern such mortgage accounts.—*Sundarabai v. Jayavant*, 24 B. 114. (See the cases referred to in this case).

For other cases see notes under 8. 34, *ante*.

**Present rule.**—The points to be noted in the present rule are the following:—

1. It applies to all suits on mortgages, *i.e.*, for foreclosure, sale and redemption.

2. It provides for cases 'where interest is legally recoverable'. This makes the rule subject to 8. 74 of the Contract Act, and 8. 3 of the Usurious Loans Act, 1918.

3. (a) Interest up to date fixed for payment by the preliminary decree is to be awarded

(i) On principal at the contract rate, if any, or else at a reasonable rate,

(ii) On costs awarded at a reasonable rate from the date of preliminary decree,

and (iii) On mortgagee's costs, charges and expenses incurred up to date of preliminary decree at contract rate if any, or if no contract rate therefore at rate payable on the principal, or failing both such rates at 9 p. c. per annum.

(b) Subsequent interest at a reasonable rate up to date of realization on the aggregate of (i), (ii) and (iii) of Cl. (a), and on such further costs, charges and expenses as may be payable on rule 10.

**12.** Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. [S. 96.]

### COMMENTARY.

**History.**—This rule corresponds to S. 96 of the T. P. Act (IV of 1882), with some alterations of a merely verbal character. The word "where" has been substituted for the word "if"; the words "this Order" have been substituted for the words "this Chapter," and the word "direct" has been substituted for the word "order," which occurred in the old section. These are the only modifications made in this rule.

**Scope.**—Compare this rule with Cl. (b) of S. 73 of this Code, which gives to the Court a similar power to that contained in this section. From the language of this rule and of S. 73, it is clear that property may be sold under a decree subject to a prior mortgage; but the Court may, with the consent of the prior mortgagee, direct the sale of the property free from his mortgage giving the prior mortgagee the same interest in the sale-proceeds as he had in the property sold. Without the consent of the prior mortgagee the Court cannot direct such a sale.

The implication of S. 96 of the Transfer of Property Act or Or. XXXIV, r. 12, C. P. Code is that without the consent of the prior mortgagee the property cannot be sold free from the prior encumbrance.—*Radha Kishun v. Khurshed Hossein*, 47 C. 662 (P. C.); 25 C. W. N. 417.

This rule cannot be construed as implying that whenever a property is not to be sold free from a prior mortgage, the decree should reserve the prior mortgagee's right in express terms even when such rights have to be admitted and are undisputed; and his rights therefore will be left unaffected by the omission to make a special reservation of them in the decree itself.—*Srinivasa v. Yamunabhai*, 29 M. 84; 16 M. L. J. 50 (*Lachmi Narain v. Jwala Nath*, 18 A. 344 referred to).

Section 96 of the T. P. Act, 1882, does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. The prior mortgagee may no doubt consent to a sale free of incumbrances, but it is not impossible that the section was intended to cover cases in which the prior mortgagee is not a party to the

suit but intervenes after the decree. Where the prior mortgagee sues for and obtains a decree for sale without making a second mortgagee a party and himself purchases the property, a purchaser of the property from him cannot claim the value of improvements from the second mortgagee under S. 51 of the T. P. Act in a suit by the second mortgagee to enforce the rights under his mortgage. A mortgagee of property has the right to bring to sale all buildings on such property whether erected before or subsequent to the mortgage.—*Cangayam v. Gompertz*, 31 M. 425 : 18 M. L. J. 298 (20 M. 120 followed).

The words "subject to a prior mortgage" in this rule, evidently refer to such mortgages under which the mortgaged property can be sold; they do not refer to usufructuary mortgages under which the mortgaged property cannot be sold—See *Bhaqandas v. Bhawani*, 26 A. 14. But see *Rengasami v. Subbaroya*, 30 M. 409 : 17 M. L. J. 403 (29 M. 424 followed; 26 A. 14 dissented from), noted under rule 13 below.

A executed successive mortgages in favour of B and C sold the equity of redemption to D. C sued impleading B, C and D as parties and though D had paid up B's mortgage he did not claim a prior charge in the suit and no such charge was specified in the preliminary decrees. Held that D was a prior mortgagee for the purposes of Or. XXXIV, r. 12 and the property could not be sold otherwise than subject to his claim.—*Gopal Singh v. Ladha Mal*, 130 I. C. 49 : A. I. R. 1930 Lah. 1063.

**13.** (1) Such proceeds shall be brought into Court and applied as follows:—

Application of  
proceeds.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by Section 57 of the Transfer of Property Act, 1882. [S. 97.]

### COMMENTARY.

**History.**—This rule corresponds to S. 97 of the T. P. Act (IV of 1882). Except the second clause, all the clauses of this rule are almost similar to the corresponding clauses of the old section. The second clause of the old section ran as follows: "*Secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage.*" On comparison of the second clause of this rule with the second clause of the old section, the changes will be clearly understood.

The other changes are of a mere verbal character. Compare this section with Cl. (c) of S. 73 of this Code, in which there is a saving clause in favour of Government, but there is no such saving clause here. It will be observed that the provisions of rr. 12 and 13 shall not be deemed to affect the powers conferred by S. 57 of the T. P. Act (IV of 1882), which under the terms of that section can be exercised by the High Court, District Court, or by any other Court specially authorized by the Local Government.

"Persons interested in the property sold" in the last clause of this rule would include the mortgagee or any subsequent mortgagees according to their respective priorities proved in the mortgage suit.

**Applicability.**—The provisions of this rule are in terms applicable only to cases where a sale is ordered under r. 12 free of the prior mortgage. But the principle of this rule is applicable to sales other than under r. 12. The duty of applying the proceeds is laid on the Court and not on the decree holder.—*Satapathi v. Chockalinga*, 25 M. L. J. 552.

**Sub-rule (2).**—The Transfer of Property Act not having been extended to the Santhāl Parganes, sub-rule (1) has no application there.—*Raghunandan v. Wajed Ali*, A. I. R. 1929 Pat. 439.

In the Punjab where the Transfer of Property Act is not in force a decree for sale is not a necessary preliminary to the sale of the equity of redemption at the instance of the mortgagee in all circumstances.—*Abdul Aziz v. Alliance Bank*, A. I. R. 1931 Lah. 483; 132 I. C. 215.

**Sale of property subject to prior mortgage and application of proceeds.**—From the language of rr. 12 and 13 it is clear that property may be sold under a decree subject to a prior mortgage. But in the Full Bench case of *Matadin v. Kazim Husain*, 13 A. 432, it was held that the right of redemption left in the mortgagor after the execution of the first mortgage is not specific immovable property and cannot be sold and that the Court cannot direct the sale of any property subject to a prior mortgage at the instance of the puisne mortgagee. A similar view was also taken in later decisions of that Court. (See notes under heading "Subject to the provisions of the Code" and "redemption security or in the right of view has been dissented from in *Madhub v. Sourendra*, 23 C. 795; J. 205, and also in *Ram Shankar v. Gonesh Parshad*, 29 A. 385 (F. B.); 4 A. L. J. 273.

A person holding two mortgages on the same property, the first usufructuary and the second simple, can bring the property to sale in a suit on the second mortgage free of the first mortgage. Sections 96 and 97 of the T. P. Act do not in terms exclude usufructuary mortgages and their provisions may be applied to such mortgages.—*Rengasami v. Subbaroya*, 30 M. 403; 17 M. L. J. 403 (29 M. 424 followed, 26 A. 14 not followed). In *Bhagwan Das v. Bhawani*, 26 A. 14, it has been held that where a mortgagee held several simple mortgages over properties A and B, and also a usufructuary mortgage of prior date over property B, he was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary (13 A. 432, 20 A. 322 referred to). See also *Dorasami v. Vekateshayaar*, 25 M. 108 (20 A. 322 referred to).

If a mortgagee receives any money out of the surplus sale-proceeds of a share of the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged, and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage-debt only in case he receives it by virtue of his security, and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.—*Gangaram v. Jaiballav Narain*, 30 C. 953.

An order for distribution ought not ordinarily to be made before the confirmation of the sale; although it may be open to the Court to distribute the sale-proceeds amongst the claimants before the sale has been confirmed, it is not obligatory on the Court to distribute it then nor is the sum distributable as a matter of course; in such distribution interest should be paid on the principle of S. 84 of the Transfer of Property Act up to the date of confirmation of the sale and not up to the date fixed for payment in the decree.—*Benode v. Harish*, 15 C. W. N. 783.

Where there exists a prior usufructuary mortgage, a subsequent mortgage of the same property cannot bring the mortgaged property to sale in virtue of his incumbrance until such time as the usufructuary mortgage becomes capable of redemption—*Akhara v. Suba Lal*, 18 A. 83 (13 A. 432 explained and followed).

Where a mortgagee, with two mortgages on the same property, obtained a decree for sale of the mortgaged property in satisfaction of the first mortgage, he is debarred from bringing a subsequent suit for sale on the second mortgage if no mention is made of it in the plaint in the former suit. But it may be open to him, when the decree in the first suit is executed, to enforce his claim on the second mortgage under S. 97 of the T. P. Act, by proceeding against any surplus that remains after satisfying the decree.—*Krishnamachariar v. Annangarachariar*, 30 M. 353; 17 M. L. J. 301 (34 A. 429 (P. C.) applied; 25 M. 103 referred to; 20 A. 322 dissented from). Where a prior mortgage is postponed to a subsequent mortgagee on the ground that his mortgage is not a registered one, he comes next in rank to the subsequent mortgagee; but he is an incumbrancer who takes precedence

over an attaching creditor under a money-decree against the mortgagor.—  
*Padmanabh v. Khemu Komar*, 18 B. 684.

See notes under S. 73, ante.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended. [S. 99.]

### COMMENTARY.

**Scope and object of the rule**—This rule corresponds to S. 99 of the T. P. Act (IV of 1882), with some additions, alterations and omissions, as will appear on a comparison of the present rule with the old section, which is reproduced here—“Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under S. 67, he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, S. 43.”

It would appear on comparison that the omission of the words “or not” which stood after the words ‘under the mortgage,’ in the old section is most significant, inasmuch as the present rule does not preclude the mortgagee from bringing to sale the mortgaged property in execution of a money-decree unconnected with the mortgage-debt; in other words, a mortgagee who has obtained a money-decree against the mortgagor in satisfaction of any claim not arising under the mortgage but quite unconnected with it, will be able to bring the mortgaged property to sale. But if he obtains a simple money-decree upon his mortgage, he will not be entitled to sell the property comprised in the mortgage in execution of that decree, without instituting another suit under S. 67 of the T. P. Act, and r. 2 of Or. II will not bar such a suit.

Under the old section the mortgagee was precluded from selling the mortgaged property in satisfaction of any claim, whether arising under the mortgage or unconnected with it, without instituting a suit under S. 67 of the T. P. Act.

The reasons for the amendment will appear from the following report of the Special Committee:—“We approve of the proposal to repeal the provisions of S. 99 of the T. P. Act. We think that those provisions have worked considerable hardship and are not really needed.” The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instituting a suit under S. 67 of the Act.

In so far as it precludes the mortgagor from selling the mortgaged property under a judgment unconnected with the mortgage debt it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Khairajmal v. Daim*, 32 C. 296 (P. C.): 1 C L J. 584; 9 C. W. N. 201; 7 Bom. L. R. 1; 2 A. L. J. 71; *Reeve v. Lisle*, (1902) A. C. 461)."

"In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage debt it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property; we, however, think that no such provision was needed, seeing that under the law as it stood prior to the Act, the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant. (*Syed Emam v. Raj Coomar*, 23 W. R. 187; *Khairajmal v. Daim*, 32 C. 296 (P. C.)."

It would appear from the above report of the Select Committee that at first it was proposed to repeal S. 99 of the T. P. Act altogether, and not to insert any similar provision in the present Code, and S. 99 was, therefore, altogether omitted from the Bill. But subsequently r. 14 has been inserted in the present Code in an amended form, whereby a mortgagee has been empowered to bring the mortgaged property to sale in execution of any other money-decree not arising on his mortgage and quite unconnected with and distinct from the same, without instituting a suit under S. 67 of the T. P. Act. He is, however, precluded under the present rule from bringing the mortgaged property to sale without instituting a suit under S. 67 of the T. P. Act, if he obtains a simple money-decree upon his mortgage without enforcing his mortgage security. In such a case, he is entitled to bring a second suit under S. 67 of the T. P. Act, for that purpose, and his second suit will not be barred by Or. II. r. 2.

The re-insertion of S. 99 of the T. P. Act in the Code in the amended form, has rendered para. 2 of the Select Committee's Report *obiter*.

The obvious intention of this rule is to prevent the mortgagee from executing a money-decree against the mortgaged property so as to deprive the mortgagor of his right of redemption conferred by law.

Meaning of the term "mortgagee" in this rule.—"Mortgagee" in Or. XXXIV, r. 14, was intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would-be purchaser of the mortgaged property. A mortgage which has become inoperative or time-barred should not be deemed to be a mortgage which should bar the sale of the property.—*Chedilal v. Sadatunnissa*, 39 A. 36; 14 A. L. J. 902.

Sale of mortgaged property in satisfaction of a claim not arising under the mortgage but unconnected with and distinct from it.—The words "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage" in



Order 2  
under the mortgage  
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A mortgage  
money-decree  
Section 99, T P  
provides that he  
than by institution.  
*Lall*, 31 C 34 S.  
Bom L R 350

Where the mortgage  
in lease to the mortgagor  
lease would be taken  
having been sold in  
by the mortgagee on  
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faction of a claim against  
*Krishna*, 17 C 377 (T P)  
(followed in *Ran narain*  
*Pastn v Mohon el Ali*, 17 A  
*das*, 22 Bom L R 670 S.  
I C 504 A I R 1925 M.

When a landlord has been  
debarred by S 49 of the T P  
execution of his rent decree or  
of the T P Act — *Rai Ramani* *Ind*

A usufructuary mortgagee who  
mortgagor could not, in execution,  
the mortgagor, attach and sell the mortgage  
under S 67 of the T. P. Act, IV of 1  
415 See also *Mahabir v Saira Bita*,  
*Chand*, 44 B 366 22 Bom L R. 113: 55.  
*v Daulat Ram*, 24 A 549

A usufructuary mortgages obtained,  
money-decree which had nothing to do with

thereby. The mortgagee transferred his money-decree to a third party. *Held*, that there is nothing to prevent the transferee from bringing to sale the mortgaged property.—*Banh Bal v. Manni Lal*, 27 A. 450 (22 C. 813 distinguished).—Dissented from in *Jivarathnam v. Srinivasa*, 31 M. 33: 17 M. L. J. 503.

A mortgagee of a usufructuary mortgage instituted a suit on the basis of the mortgage for recovery of the amount which had remained due to him after two-thirds of the mortgage had been redeemed, and obtained a simple money-decree which contained a provision that the mortgagor was to get the property back after the decree was passed. *Held* that the decree-holder was entitled to sell the mortgaged property in execution.—*Khan Chand v. Ghasita*, 131 I. C. 119: 29 A. L. J. 159: A. I. R. 1931 All. 350.

The claim of the plaintiff, under a money-decree which he sought by this suit to enforce, was one which arose independently of a usufructuary mortgage held by him and in respect of which he had attached the interest of the mortgagor. *Held*, that the suit under S. 67, T. P. Act, was the course to be adopted while there was a subsisting attachment of the mortgagor's interest entitling the plaintiff to sue thereunder, and having regard to the object of S. 99 of the T. P. Act, the decree to be made in such a suit should not be merely for the sale of the equity of redemption, but should be for the sale of the property free from the mortgage claim of the plaintiff and the sale-proceeds should be applied first to discharge the mortgages on the property in order of their priority, and the surplus towards the satisfaction of the plaintiff's claim under the attachment, so far as may be necessary.—*Govinda Bhatta v. Naraina Bhatta*, 29 M. 424: 16 M. L. J. 285.

A mortgagee brought a suit for sale on his mortgage, the suit resulted in a compromise and he took a money-decree in which however the property originally hypothecated to him was set out as being charged. *Held*, that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree, but if he wished to do so he should have to institute a suit under S. 67, T. P. Act, on the decree.—*Hem Ban v. Biharigir*, 28 A. 58: 2 A. L. J. 479 (22 C. 859 followed).

A landlord who holds a mortgage over his tenant's holding cannot in execution of a decree obtained by him against the tenant for rent bring the holding to sale, except by means of a suit under S. 67 of the T. P. Act.—*Basiruddi v. Kailas Kamini*, 33 C. 113 (26 C. 164 followed). See also *Sonu Singh v. Behari Singh*, 33 C. 283 (26 C. 164, 30 C. 463, 22 M. 347 referred to); *Mohamed Yakub v. Namar Ali*, 55 C. 104: 104 I. C. 353: A. I. R. 1927 Cal. 884. See, however, *Parmanand v. Daulat Ram*, 24 A. 549.

Section 99 of the T. P. Act does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage bond.—*Kasi Pershad v. Jamuna*, 31 C. 922.

**Sale of mortgaged property in satisfaction of a money-decree obtained upon the mortgage.**—A mortgaged property cannot be sold in accordance with the provisions of C. 813. But in *Lal Behari v. C. 473*; *Fazil Hawladar v. d* that a decree which is .

Or. XXXIV, r. 1, mean, that the decree should relate to the money in satisfaction of a claim arising under the mortgage, i.e. independent of the decree. It can have no application where the mortgage is created by the decree and where the discharge of the mortgage is in no sense in respect of a claim against the charge of the mortgage.—*Ambalal v. Narayan*, 43 B. 62; 698: 51 I. C. 929.

In order to escape the mischief aimed at by Or. X of the mortgage must be distinct from, that is to say : transaction. The words "a claim arising under the mortgage claim under the mortgage.—*Kadma Pasin v. Muhammad* 481: 50 I. C. 134.

Order XXXIV, r. 14 of the C. P. Code, is confined to claims under the mortgage and does not apply to a case where the sale takes place in execution of a decree for money upon a claim not arising out of the mortgage.—*Jagadish Chandra Deo Dhabal v. Bhuvaneshwar*, 27 C. W. N. 33.

A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99, T. P. Act, limits the right of a decree-holder in such a case and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under S. 67 of that Act.—*Jadib Lall v. Madhusudan Lall*, 21 C. 34 See also *Hanmant Timaji v. Raghavendra*, 44 B. 981: 2 Bom. L. R. 550.

Where the mortgagee being in possession gave the mortgaged property in lease to the mortgagor, it being stipulated that the rent payable under the lease would be taken in lieu of interest, and the equity of redemption having been sold in execution of a decree for arrears of rent obtained by the mortgagee on the basis of the lease and purchased by the mortgagee. Held, that the sale was not in execution of a decree for the satisfaction of a claim arising under the mortgage.—*Uttam Chandra v. R. Krishna*, 47 C. 377 (F. B.): 24 C. W. N. 229: 31 C. L. J. 98: 55 I. C. 12 (followed in *Ramnarayan v. Bishevanath*, (1920) P. 250). See also *Kadma Pasin v. Mohamed Ali*, 17 A. L. J. 481: 50 I. C. 134; *Bhai Chand v. Rancho* 22 Bom. L. R. 670: 58 I. C. 231; *Lakshmikutti v. Mariathamma*, 6 I. C. 504: A. I. R. 1925 Mad. 127. 47 M. L. J. 798.

When a landlord has taken a mortgage of the holding of a tenant he is debarred by S. 99 of the T. P. Act, from bringing the tenure to sale in execution of his rent decree otherwise than by instituting a suit under S. 67 of the T. P. Act.—*Rai Ramani Dasi v. Surendra Nath*, 1 C. W. N. 80.

A usufructuary mortgagee who had leased the mortgaged premises to the mortgagor could not, in execution of a simple money-decree for rent against the mortgagor, attach and sell the mortgaged premises, but must bring a suit under S. 67 of the T. P. Act, IV of 1892.—*Azimulla v. Najimunnissa*, 16 415. See also *Mahabir v. Saira Bibi*, 17 A. 520; *Ibrahim Goolam v. Nihal Chand*, 44 B. 366: 23 Bom. L. R. 113: 55 I. C. 536. See, however, *Parmanand v. Daulat Ram*, 24 A. 549.

A usufructuary mortgagee obtained, against his mortgagor, a simple money-decree which had nothing to do with the mortgage or the debt secured

r. 14.

thereby. The mortgagee transferred his money-decree to a third party. *Held*, that there is nothing to prevent the transferee from bringing to sale the mortgaged property.—*Banh Bal v. Manni Lal*, 27 A. 450 (22 C. 813 distinguished).—Dissented from in *Jitarathnam v. Srinivasa*, 31 M. 33: 17 M. L. J. 503.

A mortgagee of a usufructuary mortgage instituted a suit on the basis of the mortgage for recovery of the amount which had remained due to him after two-thirds of the mortgage had been redeemed, and obtained a simple money-decree which contained a provision that the mortgagor was to get the property back after the decree was passed. *Held* that the decree-holder was entitled to sell the mortgaged property in execution.—*Khan Chand v. Ghasita*, 131 I. C. 119: 29 A. L. J. 159: A. I. R. 1931 All. 350.

The claim of the plaintiff, under a money-decree which he sought by this suit to enforce, was one which arose independently of a usufructuary mortgage held by him and in respect of which he had attached the interest of the mortgagor. *Held*, that the suit under S. 67, T. P. Act, was the course to be adopted while there was a subsisting attachment of the mortgagor's interest entitling the plaintiff to sue thereunder, and having regard to the object of S. 99 of the T. P. Act, the decree to be made in such a suit should not be merely for the sale of the equity of redemption, but should be for the sale of the property free from the mortgage claim of the plaintiff and the sale-proceeds should be applied first to discharge the mortgages on the property in order of their priority, and the surplus towards the satisfaction of the plaintiff's claim under the attachment, so far as may be necessary.—*Govinda Bhatta v. Naraina Bhatta*, 29 M. 424: 16 M. L. J. 235

A mortgagee brought a suit for sale on his mortgage, the suit resulted in a compromise and he took a money-decree in which however the property originally hypothecated to him was set out as being charged. *Held*, that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree, but if he wished to do so he should have to institute a suit under S. 67, T. P. Act, on the decree.—*Hem Ban v. Biharijir*, 28 A. 53: 3 A. L. J. 479 (22 C. 859 followed).

A landlord who holds a mortgage over his tenant's holding cannot in execution of a decree obtained by him against the tenant for rent bring the holding to sale, except by means of a suit under S. 67 of the T. P. Act.—*Basiruddi v. Kailas Kamini*, 33 C. 113 (26 C. 164 followed). See also *Sonu Singh v. Behari Singh*, 33 C. 283 (26 C. 164, 30 C. 463, 22 M. 347 referred to); *Mohamed Yakub v. Namar Ali*, 55 C. 104: 104 I. C. 353: A. I. R. 1927 Cal. 884. See, however, *Parmanand v. Daulat Ram*, 24 A. 549.

Section 99 of the T. P. Act does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage bond.—*Kasi Pershad v. Jamuna*, 31 C. 922.

**Sale of mortgaged property in satisfaction of a money-decree obtained upon the mortgage.**—A mortgaged property cannot be sold in execution of a decree obtained not strictly in accordance with the provisions of the T. P. Act.—*Chandra Nath v. Burroda*, 22 C. 813. But in *Lal Behari v. Habibur*, 26 C. 166; *Jogemaya v. Thachomoni*, 24 C. 473; *Fazl Hawladar v. Krishna Bundhoo*, 25 C. 580, it has been held that a decree which is not

strictly in accordance with the provisions of the T. P. Act, but is a mortgage-decree, may be regarded as a mortgage-decree under the T. P. Act.

A mortgagee who has obtained a simple money-decree in satisfaction of a claim arising under his mortgage is competent to bring the mortgage property to sale in execution of his decree if the mortgage has ceased to be enforceable. Order XXXIV, r. 14 applies only where the decree obtained by the mortgagee is for the payment of money in satisfaction of the claim arising under the mortgage; but the mortgage must be a subsisting mortgage and not one which, by the reason of flow of time or any other like circumstance, has ceased to be enforceable by law.—*Tansukh Bai v. Sri Gopal*, 63 I. C. 445. See also *Arunugam Pillai v. Alagappa Chettiar*, 41 M. L. J. 160.

Where the mortgage has been declared to be a nullity and the mortgagee obtains a money-decree in lieu of what was originally considered to be a mortgage the rule has no application.—*Sheo Prasad v. Mufassal Bank Ltd.*, 27 A. L. J. 953; 118 I. C. 590; A. I. R. 1929 All. 580. So also where it was held that the title to the property was with a third person and so a money-decree was passed.—*Gowri Ambal v. Ramanathan*, 53 M. 670; 122 I. C. 366; A. I. R. 1930 Mad. 138.

Where a mortgagee held a money-bond from the mortgagor and transferred the money-bond to another, held, the transferee suing upon the money-bond can bring the mortgaged property to sale and his suit is not barred by S. 99, T. P. Act, as he did not take the bond subject to any liability or equity, to which his transferor, the mortgagor, was subject with regard to the mortgaged property.—*Narhar v. Shivram*, 7 Bom. L. R. 816 (32 C. 296 (P. C.)), p. 361 referred to).

The transferee of a money-decree obtained by a mortgagee is prohibited from selling the mortgaged property in execution of such decree, as by virtue of Ss. 232 and 233, C. P. Code, 1882 (S. 49), he takes the decree subject to the conditions prescribed by S. 99 of the T. P. Act. There is nothing in that section to prohibit the attachment of the mortgaged property.—*Jeeva-rathnam v. Srinivasa*, 31 M. 33; 17 M. L. J. 503 (27 A. 450 dissented from; 9 Bom. L. R. 728 approved; 22 C. 813 referred to). See also *Ohagan Guman v. Lakshman*, 31 B 462; 9 Bom. L. R. 728, and *Bank Bal v. Manni Lal*, 27 A. 450.

Even though the mortgagee abandons his right under the mortgage and asks for and obtains a simple money-decree, he is precluded by S. 99, T. P. Act, 1882, from bringing the mortgaged property to sale in execution of the simple money-decree.—*Kishan Lal v. Umrao Singh*, 30 A. 146; 5 A. L. J. 121. Relinquishment of the mortgage lien does not prevent the property from being mortgaged property and the mortgagor cannot be deprived of his right of redemption.—*Madho Prasad v. Baijnath*, 2 A. L. J. 356; (1905) A. W. N. 152.

A mortgagee is entitled to waive his right to proceed against the mortgaged property and to bring a suit only for a money-decree, but he cannot bring to sale the mortgaged property in execution of such decree without recourse to the provisions of S. 67 of the T. P. Act.—*Ram Keshab v. Sonatun Pal*, 2 C. W. N. 320. But see *Ramchandrudu v. Krishna-Reddi*, 115 I. C. 829.

Where a decree-holder holds both a decree for sale on a mortgage as well as on a simple money-decree against the same judgment-debtor, it was not unlawful for him to bring to sale the mortgaged property for the realization of the combined amounts of both the decrees.—*Behari Bharthi v. Bhagwangir*, 31 A. 114 (29 A. 196 referred to).

A mortgagor obtained a simple money-decree upon an instalment mortgage-bond and in execution brought to sale and purchased the mortgaged property. In a suit by the mortgagor to redeem, held, that the mortgagor having been a party to the decree and to the order of sale was not entitled to redeem.—*Dharamkota v. Budharazu*, 30 M. 362; 17 M. L. J. 325 (22 M. 372 followed, 22 B. 624 and 5 B. L. R. 450 dissented from).

The equitable right of the mortgagor to redeem property brought to sale in contravention of S. 99, T. P. Act by the mortgagee cannot arise when the auction-purchaser at such sale is not the mortgagee and is no party to the suit in which the property was sold.—*Muthu v. Karuppan*, 30 M. 313; 17 M. L. J. 163 (22 M. 347 distinguished).

The rule applies to charges.—It was so held under S. 89 of the Transfer of Property Act IV of 1882.—*Aubhoyessury v. Gouri Sankar*, 22 C. 859. Under the Code it has been so held.—*Venkata v. Setaiyya*, 43 M. 786; 57 I. C. 764 (in which the authorities are discussed); *Gobinda v. Kailas*, 45 C. 580; 25 C. L. J. 354; 41 I. C. 73; *Mohamed Yakub v. Namar Ali*, 55 C. 104; 104 I. C. 353; A. I. R. 1927 Cal. 884; *Raj Kumar v. Jai Karan*, 57 I. C. 653.

A maintenance decree declaring a charge on the family property comes within S. 99 of the T. P. Act, and the decree-holder cannot bring the properties charged to sale without instituting a fresh suit.—*Venkata Subbamma v. Venkanna*, 17 M. L. J. 217. *Contra*.—*Braja Sundar v. Sarat Kumari*, 2; P. L. J. 55; 38 I. C. 791, *Hari Sankar v. Musst. Topai*, 4 P. 693.

Sale held in contravention of the terms of this rule, if absolutely void or merely voidable.—The provisions of Or. XXXIV, r. 14, C. P. Code, are not so wide as those of S. 99 of the T. P. Act and deal only with a matter of procedure not of substantive law.

A sale held in contravention of the terms of S. 99, T. P. Act (IV of 1882) is not a nullity, but an irregular sale and is liable to be avoided by an application under S. 244, C. P. Code, 1882 (S. 47), before or after its confirmation on the ground that the provisions of S. 99 of the T. P. Act, have been contravened.—*Ashutosh v. Behari Lal*, 35 C. 61 (F. B.); 6 C. L. J. 320; 11 C. W. N. 1011; *Lal Bahadur Singh v. Abharan Singh*, 37 A. 165; 13 A. L. J. 138 (F. B.). See also *Bhai Ohand v. Ranchhodas*, 22 Bom. L. R. 670. The Full Bench case is based upon the Privy Council case of *Khairaj Mal v. Diam*, 32 C. 296; 1 C. L. J. 594; 9 C. W. N. 201; 7 Bom. L. R. 1; 2; A. L. J. 71, and in the Full Bench case the cases noted below have been referred to and discussed.

According to a long series of rulings, viz, *Sathuvayyan v. Muthusami*, 12 M. 325; *Durgayya v. Anantha*, 14 M. 74; *Shib Dass v. Kali Kumar*, 30 C. 463; 7 C. W. N. 532; *Vigneswara v. Bapayya*, 16 M. 436; *Sheodeni Tewari v. Ram Saran*, 26 C. 164; 3 C. W. N. 290; *Basiruddi v. Kailas Kamini*, 33 C. 113; *Sonu Singh v. Behari Singh*, 33 C. 283;

*Chundra Nath v. Burroda*, 22 C. 813; *Aubhoyessury v. Gouri Sankar*, 22 C. 859; *Matangini v. Chooneymoney*, 22 C. 903; *Lachmi Narain v. Nand Kishore*, 29 C. 537, 543; *Tokhan Singh v. Girwar Singh*, 32 C. 494; 9 C. W. N. 372; 1 C. L. J. 118; *Hemban v. Beharigir*, 28 A. 58, the principle has been laid down that a sale so held is null and void. In *Azimullah v. Nujmunnissa*, 16 A. 415; in *Mahabir v. Saira Bibi*, 17 A. 520; in *Gobinda Bhatta v. Naraina Bhatta*, 29 M. 424; 16 M. L. J. 235; *Matangini v. Chooneymoney*, 22 C. 903; and in *Lachmi Narain v. Nand Kishore*, 29 C. 537, it has been held that a suit under S. 67 of the T. P. Act is necessary to enforce the mortgage or charge before the holder thereof can sell the property and obtain satisfaction of a money-decree held by him.

It has been uniformly held that if a mortgagee, in execution of a money-decree, seeks to sell the mortgaged property in contravention of the provisions of S. 99 of the T. P. Act, and if an objection is taken before the sale by the holder of the equity of redemption, the objection must be allowed and the sale prevented. To this effect are the decisions in *Chandra Nath v. Burroda*, 22 C. 813; *Aubhoyessury v. Gouri Sankar*, 22 C. 859; *Rai Ramani v. Surendra*, 1 C. W. N. 80; *Tokhan Singh v. Girwar Singh*, 32 C. 494; *Hemban v. Beharigir*, 28 A. 58; *Madho Pershad v. Baij Nath*, 2 A. L. J. 356; *Kaveri v. Ananathayya*, 10 M. 129; *Kaji Inus v. Kaji Inus*, 8 Bom. L. R. 576.

In the following cases it has been held that a sale of the mortgaged property by a mortgagee in execution of a money-decree in contravention of the provisions of S. 99 of the T. P. Act, passes no title to the purchaser. In other words, the purchaser acquires no title under the sale.—12 M. 225; 14 M. 74; 26 C. 164; 30 C. 463; 33 C. 113 and 23 B. 119.

Where a mortgagee in contravention of S. 99 of the T. P. Act has attached the mortgaged property and brought it up to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside.—*Uttam Chandra v. Raj Krishna*, 47 C. 377 (F. B.); 24 C. W. N. 229; 31 C. L. J. 98; 55 I. C. 157.

In the following cases it has been held that sale in execution of a money-decree in contravention of S. 99, T. P. Act, is an illegal sale, which requires to be set aside in order that it may cease to be operative, viz., 16 M. 436, 22 M. 347, 22 M. 372, 10 M. L. J. 110, 18 A. 329, 27 A. 517, 33 C. 283 and 17 M. L. J. 217.

In the following cases it has been held that a sale held contrary to the provisions of S. 99, T. P. Act, is not a nullity and that though voidable, yet, if it is not formally annulled, it does not affect the right of redemption of the mortgagor, viz., 22 B. 624, 23 M. 377, 22 M. 347 and 29 M. 421. But if such a sale does in fact take place and is confirmed and a certificate granted to the purchaser, it cannot afterwards be impeached.—*Kishan Lal v. Umrao Singh*, 30 A. 146; 5 A. L. J. 121 (12 C. W. N. 1, 10 M. L. J. 110, 26 C. 727, 29 A. 612, 33 C. 283 referred to).

The principle laid down in the Full Bench case of the Calcutta High Court, *Ashutosh v. Behari*, *supra*, has also been adopted by the Madras High Court in *Muthu v. Karuppan*, 30 M. 313; 17 M. L. J. 163, where it

has been held that a sale in violation of S. 99 of the T. P. Act is voidable only and not void (22 M. 347, 22 B. 624, 23 M. 377 *referred to*). See also *Dharanikota v. Budharazu*, 30 M. 362; 17 M. L. J. 325, and the cases therein referred to; *Muhammad Abdul v. Dilsukh Rai*, 27 A. 517; *Bhaichand v. Ranchhodas*, 22 Bom. L. R. 670; 58 I. C. 231.

Order II, r. 2, C. P. Code, is no bar to a subsequent suit.—The effect of this rule is that if the mortgagee obtains a simple money-decree upon his mortgage he cannot sell the property comprised therein without instituting another suit under S. 67 of the T. P. Act and such suit is not barred by S. 43, C. P. Code, 1882 (Or. II, r. 2).—*Bhola Nath v. Muhammad Sadiq*, 26 A. 223 (16 A. 415 and 25 B. 161 *referred to*). See also *Surajnarain v. Jagbali*, 18 A. L. J. 677.

Section 43 of the C. P. Code, 1882 (Or. II, r. 2), is directed against two evils: the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it; if he omits one of his remedies, he cannot afterwards pursue it; so that if a mortgagee sues on his personal security alone he cannot afterwards sue on his real security. Section 99 of the T. P. Act is aimed at another distinct evil: the hardship inflicted on the mortgagor by mortgagees proceeding to realize their claim by execution of money-decrees passed in respect of the mortgagor's personal liability. Consequently, that section provides that the mortgaged property shall not be sold in execution of a decree otherwise than by an ordinary mortgagee's suit. It will be seen, therefore, that the primary purpose of S. 99 is not to increase, but to curtail a mortgagee's powers; and to secure that end, and for that purpose alone, the bar imposed by S. 43, C. P. Code, 1882, has to be relaxed.—*Govind v. Parashram*, 25 B. 161 (167).

Suit by mortgagee for personal decree in one Court—Subsequent suit against mortgaged property in another Court—Latter suit not within jurisdiction of former Court. *Held*, that the latter suit was not barred by reason of the former suit either under S. 13 or under S. 43 of the C. P. Code, 1882.—*Narasinga v. Venkata Narayana*, 16 M. 481.

Procedure for setting aside the sale.—The question was considered by Mookerjee, J. in *Ashutosh v. Behari Lal*, 35 C. 61 (F. B.); 11 C. W. N. 1011; 6 C. L. J. 320, and it was observed:—When a sale has been held in contravention of the provisions of S. 99 of the Transfer of Property Act, the sale is not a nullity: it is an illegal and voidable sale; it may be set aside by an application under S. 244 of the Civil Procedure Code at any time before it has been confirmed; it may also be set aside by a similar application after confirmation, if the applicant proves that he had no notice of the sale or of the confirmation by reason of fraud or otherwise; the only element which is necessary for reversal of the sale is that S. 99 has been contravened. The second question, namely, whether the right of redemption of the mortgagor is or is not affected by such a sale need not be answered, as it arises only in a suit for redemption and not in the present proceedings for reversal of the sale. See also *Kishan Lal v. Umrao Singh*, 30 A. 146; *Muthu v. Karuppan*, 30 M. 313; *Bhai Chand v. Ranchhodas*, 22 Bom. L. R. 670; 58 I. C. 231.

It has been held, however, that if the equity of redemption is sold in execution of a decree and the sale is confirmed such equity being purchased either by the mortgagee with the leave of the Court or by a third party, it is



suit in which the decree of money was obtained.—*Muthuraman v. Ettappasami*, 22 M. 372.

A third person purchasing mortgaged property *bona fide* at a sale in execution of a money-decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.—*Husein v. Shankargiri*, 23 B. 119 (22 B. 694 distinguished).

Section 99, T. P. Act, 1882 is as binding on a revenue Court as it is on a Civil Court.—*Tara Chand v. Indad Husain*, 18 A. 325.

Where in a mortgage suit brought by the mortgagee against several co-mortgagors, one of them alone redeemed the mortgaged property by paying the mortgage debt and then brought a suit for contribution under S. 95 of the T. P. Act, got a decree which imposed not only a personal obligation upon the said co-mortgagors but also a proportionate charge upon the properties liable to contribution; held that that it was not necessary for him to bring a fresh suit under rr. 14 and 15, but the decree could be enforced by sale in the present suit.—*Kumar Birendra Nath v. Tarini*, 47 C. L. J. 107.

**15.** All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Mortgages by the deposit of title-deeds and charges,

## COMMENTARY.

**History.**—This rule has been substituted for the old r. 15 by the Transfer of Property (Amendment) Supplementary Act, 1929. The old rule ran as follows:—

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of S. 100 of the Transfer of Property Act, 1882. [PART of S. 100.]

This rule has been framed by taking a portion of S. 100 of the T. P. Act. The following words of S. 100 of the T. P. Act, viz., "And all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property," have been repealed by the Fifth Schedule of the O. P. Code of 1908. Section 100 of the T. P. Act, in which the word "charge" has been defined, is reproduced below:—

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Ss. 61 and 62 \* \* \* shall, so far as may be, apply to the person having such charge."

**Present changes.**—In the case of *Uttam Ishlok v. Phulman Rai*, 2 A. L. J. 379, Banerji, J., expressed the view that the holder of a charge, is like a mortgagee suing for sale, entitled to ask for and obtain a decree under S. 90 of the Transfer of Property Act, and unless he be a person who is not entitled to a personal remedy against the person whose property is subject to the charge, he was entitled to obtain such remedy in view of the wide words of that section. He was of opinion that the words "all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property and the provisions of Ss. 81 and 82 and all provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property" shall so far as may be, apply to the person having the charge although they referred to the rights of a mortgagee instituting a suit for the sale of the mortgaged property and did not in terms refer to any other right wide enough to include the right to obtain a personal decree in accordance with S. 90 of the Act. Richards, J., was of opinion that the words referred to only those provisions which dealt with a sale of the mortgaged property. In the same case when it went up on appeal under the Letters Patent, 23 A. 365, the question was not decided but the view of Banerji, J., was approved. In 1908 the words of S. 100 were set down. The words "all provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property" were deleted and the matter was reproduced in Or. XXXIV, r. 15 as set out above. The words of that rule in their ordinary significance would limit the applicability of only these provisions in the Order which relate to the sale or redemption of mortgaged property to property which is subject to a charge. The remedy by way of a personal decree, was not provided for in the rule. It was, however, held in some cases that the personal remedy was open to the holder of a charge.—See *Lala Kalwar v. Amir Haider*, 123 I. C. 215; A. I. R. 1930 Oudh 10. Where the compromise in which the liability under the promissory note in suit became merged created a mortgage or charge, and the decree that was passed on the compromise related to the satisfaction of the claim arising under the mortgage or charge, held, that Or. XXXIV, r. 14 applied even if it be assumed that the mortgage or charge must precede the decree.—*Posti Mal v. Radha Kishan*, 54 A. 763; 138 I. C. 603; 30 A. L. J. 486; A. I. R. 1932 All. 439. The present change has removed the difficulty by providing that all the provisions contained in the Order which apply to the case of a simple mortgage will be applicable to the case of a charge within the meaning of S. 100 of the Transfer of Property Act.

Moreover, though mortgage by deposit of title deeds was not a form of mortgage under the Indian Law before the amendments of 1929, the Judicial Committee held that the charge created by a deposit of title deeds enabled the charge-holder to have a personal remedy.—*Jeena Bahu v. Parmeshwar*, 46 I. A. 294; 47 C. 370 (P. C.); 23 C. W. N. 490; 29 C. L. J. 443. By the present change this has received legislative sanction, mortgage by deposit of title deeds being placed on the same footing as simple mortgages.

**Distinction between mortgage and charge.**—The main distinction between a charge and a simple mortgage is, that by a charge the creditor becomes entitled to have his claim satisfied out of a particular property, but that property is not transferred to him. By mortgage the interest of

the mortgagor in specific immoveable property is transferred to the mortgagee. (See S. 58 of the T. P. Act). But a charge does not involve a transfer of an interest in specific immoveable property. (See S. 100 of the T. P. Act).

By sale, all the rights of the vendor in the property are transferred to the purchaser. By mortgage an interest of the mortgagor in the mortgaged property is only transferred whereby he is entitled to bring the mortgaged property to sale. By charge neither any right nor any interest in the property is transferred but the creditor is entitled to have his claim satisfied out of the particular property, but neither that property nor any interest in it is transferred to him.

A simple mortgage is in the nature of an equitable lien, it does not vest any estate in the mortgagee, but only creates a lien as incident to the debt—*Nadir Hossein v. Pearoo Thovildarinee*, 19 W. R. 255; 14 B. L. R. 425-note. The mortgagor remains the owner of the property and may deal with it in any manner he pleases subject only to the conditions of the mortgage. For the distinction between simple mortgage and charge, see *Rangasami v. Muttukumaraappa*, 10 M. 509. In *Royzuddi Sheikh v. Kall Nath*, 38 C. 985; 4 C. L. J. 219, the distinction between a charge and mortgage has been clearly pointed out by Mookerjee, J.: "There is considerable difficulty, as is well known, in drawing a sharp line of demarcation between a mortgage and a charge; but there is this well marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property. (*Narayana v. Venkataramana*, 25 M. 220, p. 237). A charge differs altogether from a mortgage: by a charge the title is not transferred, but the person creating the charge merely says that out of the particular fund he will discharge particular debt." A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against a transferee, only if it is shown that he has taken with notice of the charge. (*Kishan Lal v. Ganga Ram*, 13 A. 23, p. 44). A charge-holder cannot follow the property in the hands of an innocent purchaser for value without notice of the charge. If a charge is created by operation of law, and the charge does not amount to a mortgage, any subsequent mortgage or sale of the property to a bona fide purchaser or mortgagor for value without notice will not be affected by the prior charge. A charge-holder can, of course, follow the property if it remains in the hands of the person creating the charge (*Cooling v. Saravana*, 12 M. 69).

A charge under this rule is created as soon as the document is executed. A document which is not creating any charge at the time of its execution but is to operate only as a charge upon the principal money at a future date, does not create a charge.—*Meaning of this rule.—Madho Misser Harjas Rai v. Naurang*, 3 A. L. J. 220: an unregistered agreement stating that as a security for the loan, a mortgage deed will be executed whenever required by the plaintiff, and also depositing some title-deeds, does not create any charge.—*Konchadi v. Shiva Rao*, 23 M. 54.

**Creation of charge by act of parties.**—A Hindu executed a document attested by witnesses, whereby he agreed to pay to his sister and after

her death to her daughter Rs. 10 per annum, from the produce of an estate inherited by him from his maternal grand-mother. *Held*, that a corrody or charge on the profits of the estate was created, which bound the estate in the hands of the widow of the grantor.—*Chaiti v. Pandrangi*, 7 M. 23. See also *Ramnad Zemindar v. Dorasami*, 7 M. 341, and *Collector of Thanav. Krishnanath*, 5 B. 322.

A man by his will may charge his debts on his property either by express words to that effect or by giving in his executors, being the devisees of his estate, a direction to pay his debts. As against a purchaser from the executor such a charge cannot be made good unless it is shown that he had notice of the debts and of the intention to defeat them.—*Greender Chunder v. Mackintosh*, 4 C. 897: 4 C. L. R. 193; *Kherole Money v. Doorgamoney*, 4 C. 455; *Anundmoye v. Girish Chunder*, 7 C. 772; *Hemangini v. Nabin Chand*, 8 C. 789: 11 C. L. R. 370.

A charge may be created for religious purposes, and in such cases notwithstanding the religious declaration, the property descends beneficially to heirs subject to a trust or charge for the purposes of religion.—*Ashutosh Dutt v. Doorga Churn*, 5 C. 433 (P. C.): 6 I. A. 182 (approved in *Jagatindra Nath v. Hemanta Kumari*, 31 I. A. 203: 32 C. 129 (P. C.): 8 C. W. N. 803: 7 Bom. L. R. 765). See also *Sonatur Bysack v. Juggut Soondree*, 8 M. I. A. 66.

Where having regard to all the circumstances of a transaction, there remains no doubt that a document shows an intention to make the land security for the payment of the money mentioned therein, the document does create a charge.—*Janardana v. Anant*, 32 B. 386: 10 Bom. L. R. 575.

In a suit for declaration of right, for partition and account, a consent-decree was made which provided that a certain sum of money should be paid by the defendant to the plaintiff within a specified time, that the same should form a charge on certain property mentioned, and that in case of default the property should be sold for the realization of the money. *Held*, that the decree was similar to a mortgage-decree nisi directing a property to be sold on non-payment of amount due within a specified time, that such a decree was not a final one, that the plaintiff had to apply in the same suit for a sale order, and that the suit was a pending one.—*Kissory Lal v. Sewbux Bogla*, 13 C. W. N. 787 (22 C. 859 distinguished and 9 C. W. N. 17 followed).

**Creation of charge by operation of law**—Under S. 95 of the T. P. Act, 1882, a redeeming co-mortgagor has a charge on the share of each of the other co-mortgagors.—*Vasudev v. Balaji*, 26 B. 500, p. 503.

By redeeming a mortgage of the ordinary kind under which possession did not pass to the mortgagee, one of the several mortgagors becomes entitled to a charge on the interest of the other mortgagors for the amount payable by the latter.—*Ahmad Wali Khan v. Shamshi Jahan Begam*, 28 A. 482 (P. C.): 10 C. W. N. 626: 3 C. L. J. 481: 3 A. L. J. 360: 16 M. L. J. 269: 8 Bom. L. R. 397.

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue, in order to save and so does save the estate from liability to be sold by Government for

realizing the arrear of revenue, he is by operation of law entitled to a charge upon the share of each of the co-sharers for the realization of the latter's share of the revenue, as between the co-sharers.—*Rajah of Vizianagram v. Rajah Setrucherla*, 26 M. 686 (F. B.). But this case is opposed to the Full Bench case of the Calcutta High Court (*Kinu Ram v. Mozaffer Hosain*, 14 C. 809), and of the Allahabad High Court (*Sethchitor Mal v. Shib Lal*, 14 A. 273), and also of the Bombay High Court (*Achut Ram Chandra v. Hari Kamti*, 11 B. 313). In the Madras Full Bench case all the rulings on the point have been referred to and discussed. See also *Ibn Hasan v. Brihbukan*, 26 A. 407 (F. B.) and the cases therein referred to.

A mortgagor who discharges the whole mortgage-debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage-debt for which he is proportionately liable: and that such charge takes priority over a subsequent mortgage on the same property created by one of the other co-mortgagors.—*Har Prasad v. Raghunandan*, 31 A. 166 (4 A. 58 referred to). See also *Bhagwan Das v. Har Dei*, 26 A. 227 (11 M. 416 referred to).

A person who is entitled to contribution also acquires, in the case of a mortgage, a charge upon the property of his co-mortgagors.—*Ibn Hasan v. Brihbukan*, 26 A. 407 (F. B.) where all the cases of the several High Courts have been referred to and discussed. See also *Raushan Ali v. Kali Mohan*, 4 C. L. J. 79.

A mortgagee having obtained a decree on his mortgage, the decretal amount was paid off by one of several representatives of the deceased mortgagor. Held, that the latter did not thereby acquire a charge on the mortgaged property within the meaning of S. 100 of the T. P. Act (IV of 1882).—*Jahan Ara Begam v. Mirza Shujauddin*, 9 C. W. N. 865 (26 A. 227 disapproved; 26 B. 379 distinguished; 25 C. 565 referred to).

Charge created by a decree.—A charge created by a decree does not convert the suit into a mortgage suit and make the provisions of Or. XXXIV applicable. There can be no question of a preliminary or a final decree in such a case.—*Ramaswami v. Subbaraya*, 49 M. L. J. 490.

Charge under the Rent Act.—The charge referred to in S. 65 of the B. T. Act, VIII of 1885, is not such a charge as that defined in S. 100 of the T. P. Act, 1882, and does not require to be enforced in the same manner; the only consequence which follows from the provisions that rent is a first charge upon an under-tenure, is, that a sale held in execution of a decree for arrears of rent, produces the effect described in Ch. XVI of the Bengal Tenancy Act.—*Sourendra v. Surnomoyi*, 26 C. 103; *Royzuddi Sheikh v. Kali Nath*, 33 C. 985; 4 C. L. J. 219; *Fotick Chunder v. Foley*, 15 C. 492; *Tarini v. Narayan Kumari*, 17 C. 301. Neither is a charge for rent created by S. 5 of the Madras Estates Land Act (I of 1908) a charge within the meaning of S. 100 of the T. P. Act.—*Suramma v. Suriyanarayana*, 42 M. 114; 48 I. C. 794; but see *Venkata v. Seelayya*, 43 M. 786; 57 I. C. 764.

Where the plaintiffs and the defendants are co-tenants of certain *jotes* which were sold in execution of a rent-decree and the plaintiffs by paying the decretal amount under S. 174 of the B. T. Act, had the sale set aside, they did not by such payment acquire any charge on the shares of their defaulting co-tenants.—*Gopi Nath v. Ishur Chundra*, 22 C. 800:.

r. 15.

*Kinuram v. Mozaffur Hessein*, 14 C. 809 (F. B.); *Upendra Lal v. Girindra Nath*, 25 C. 565; 2 C. W. N. 425. But see *Manindra Chandra v. Jamabir Kumari*, 32 C. 643 (1 C. W. N. 453, 6 C. W. N. 794 followed). The principle laid down in this latter case is not reconcilable with the principles laid down in the former cases.

**Rent-decree and mortgage-decree—Priority.**—A purchaser in execution of a rent-decree has priority over the purchaser in execution of a mortgage-decree.—*Gopinath v. Kashinath*, 9 C. L. J. 234; 13 C. W. N. 412; *Meherunnessa v. Sham Sundar*, 6 C. W. N. 834.

A vendor has a charge on the property sold for his unpaid purchase-money. See S. 55 (4) (b) of the T. P. Act, 1882.

The charge which a vendor obtains under S. 55 of the T. P. Act, is different in its origin and nature from the vendor's lien given by the English Courts of Equity to an unpaid vendor. The English cases as to a vendor's lien for unpaid purchase-money though useful for the purpose of illustration are not authoritative in the interpretation of law on the subject as laid down in S. 55 of the T. P. Act.—*Webb v. Macpherson*, 30 I. A. 238; 31 C. 57 (P. C.); 8 C. W. N. 41 (P. C.) (followed in *Rama Krishna v. Subrahmania*, 29 M. 305). In this case it has been also held (overruling 21 M. 141, 24 M. 233 and 27 M. 28) that Art. 132 of the Limitation Act, 1877, is applicable to a suit to enforce such a charge and not Art. 111.

The lien of the unpaid vendor, under S. 55 (4) (b) of the T. P. Act, is non-possessory. He has only a right to retain the title-deeds and to a charge for the unpaid purchase-money, but he cannot retain possession of the property sold against the vendee.—*Velayutha Chetty v. Govindaswami*, 30 M. 524.

**Mortgage being invalid, whether it creates any charge.**—An instrument which cannot operate as a mortgage by reason of its not fulfilling the requirements of S. 59 of the T. P. Act, 1882, does not operate to create a charge under S. 100 of the T. P. Act, IV of 1882.—*Tofaluddi v. Mahar Ali*, 26 C. 78 (approved in *Prannath v. Jadunath*, 32 C. 729; 9 C. W. N. 697). See also *Rani Kumari v. Srinath*, 1 C. W. N. 81; *Royzuddi Sheik v. Kali Nath*, 33 C. 985; 4 C. L. J. 219 (26 C. 78 and 246, 7 Bom. L. R. 934, followed; 10 M. 509, 24 M. 397 disapproved); *Samoo Patter v. Abdul Sammad*, 31 M. 337 (33 C. 985 and 7 Bom. L. R. 934 followed; 17 M. L. J. 39 and 24 M. 397 not followed); and *Nabin Chand v. Raj Coomar*, 9 C. W. N. 1001.

**Hindu widow's right of maintenance whether creates a charge upon her husband's property.**—See the cases on maintenance decrees noted under r. 15. "Applies to charges".—See *Gajadhar v. Nagendrabala*, 8 C. L. J. 489; 1 (hy Cox, J.) that a Hindu widow's right of maintenance is a charge on her husband's estate in the hands of heirs and of the purchasers colluding with heirs to defeat the widow's rights, although it may not be so in the hands of persons who have purchased it honestly, without notice and without any attempt to defraud the widow of her rights.

**Mahomedan widow's claim for dower, if charge upon her husband's property.**—A widow's claim for dower under Mahomedan law is not a lien on her husband's property, such as is obtained by a mortgage, but ranks on a par with ordinary debts.—*Ameer Ammal v. Sankaranarayanan*, 25 M. 658. See also *Wahidunnissa v. Shubratlun*, 6 B. L. R. 54. In *Bholanath v. Magbulunnissa*, 26 A. 28, it has been held that a widow's claim for dower though not a charge upon her husband's property, a decree for dower is entitled to priority over the decree against the heir for the heir's personal debt.

**Charge on the surplus proceeds of sale for arrears of revenue or rent.**—The proceeds of a sale for arrears of revenue or rent, being substituted for the mortgaged property, become subject to the lien to which that property was subject. This principle is recognized in S. 73 of the T. P. Act (IV of 1882).

The surplus sale-proceeds whether in the hands of the Collector or of creditors of the mortgagor are available to satisfy the mortgagee's claim. See *Heera Lall v. Janokeenath*, 16 W. R. 222; *Kristodas v. Ram Kant*, 6 C. 142, *Gosto Behary v. Shub Nath*, 20 C. 241; *Raja Gopalachari v. Subbaraya*, 7 M. 31 (5 M. 371 overruled); *Subramanya v. Rajaram*, 8 M. 573; *Prem Chand v. Purnima Dasi*, 15 C. 546 (referred to in *Beni Prosad v. Rewat Lall*, 24 C. 746). See also *Jogeshur v. Ghanasham*, 5 C. W. N. 356; *Berhamdeo v. Tara Chand*, 33 C. 92; 9 C. W. N. 989; *Umatare v. Uma Charan*, 3 C. L. J. 52; in these cases it has been held, that a mortgagee is entitled to a charge on the surplus sale-proceeds after the payment of the arrears of revenue, and that the limitation for a suit to enforce the charge is 12 years under Art. 132 of the Limitation Act, and the period of limitation begins to run from the due date of the mortgage-bond and not from date of sale. See also *Chowdhry Jogessur v. Khetter Mohun*, 17 C. 148 and *Kamala Kant v. Habibulla*, 27 C. 180.

On a sale of mortgaged property for arrears of rent, the mortgagee has a charge on the surplus sale-proceeds and can enforce his charge.—*Gobind Sahai v. Sibdu Ram*, 33 C. 878. See *Hem Chandra v. Tafazzel Hossain*, 8 C. W. N. 332. But where the sale is occasioned by the mortgagee's own default, he is debarred from recovering the surplus sale-proceeds.—*Chitkali Koer v. Mathura Lal*, 3 C. L. J. 220.

**Sale of the mortgaged property for arrears of revenue.**—Purchase of the surplus sale-proceeds by the mortgagee is entitled to have the property sold by the mortgagee's successors in title for realization of the balance.—*Ganga Sahai v. Tulshiram*, 25 A. 371 (23 C. 397 referred to).

# ORDER XXXV.

## INTERPLEADER.

1. In every suit of interpleader the plaintiff shall, in addition to other statements necessary for complaints, state—

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;
- (b) the claims made by the defendants severally; and
- (c) that there is no collusion between the plaintiff and any of the defendants. [S. 471.]

## COMMENTARY.

Alterations.—This rule corresponds to S. 471 of the C. P. Code, 1882 with some modifications.

In para. 1, the word "shall" has been substituted for the word "must," which occurred in the old section.

The language of Cl. (a) has been materially changed. Clause (a) of the old section ran as follows: "*That the plaintiff has no interest in the thing claimed otherwise than as a mere stake-holder.*"

Clauses (b) and (c) are exactly similar to the corresponding clauses of the old section.

See S. 88 and notes thereto, where all the cases relating to interpleader-suits are collected.

2. Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit. [S. 472.]

## COMMENTARY.

See S. 472 of the C. P. Code, 1882, with alterations for the word "to so pay," for the old section.

See notes under S. 88.



### 3. Where any of the defendants in an interpleader-suit

Procedure where  
defendant is suing  
plaintiff.

is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit. [S. 476.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 476, C. P. Code, 1882, with some additions and alterations. The word "*where*" has been substituted for the word "*if*" in the beginning; the word "*plaintiff*" has been substituted for the word "*stake-holder*" which occurred in the old section. The words "*on being informed by the Court in which the interpleader-suit has been instituted*," have been substituted for the words "*on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stake-holder that such decree has been passed*," which occurred in the old section. The above change is material, because under the old section the proceedings in other Court could be stayed only after the passing of decree in the interpleader-suit; but under the present rule, the proceedings in another Court can be stayed after the institution of the interpleader-suit. The object of the change is clearly explained in the following report of the Special Committee:—

"The Committee think that the institution of the interpleader-suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified S. 476 so as to give effect to this view."—*See the Report of the Special Committee.*

**Appeal.**—Under Or. XLIII, r. 1, Cl. (p), an appeal lies from an order under this rule.

### 4. (1) At the first hearing the Court may—

Procedure at first hearing. (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

[S. 473.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 473, C. P. Code, 1882, with several additions and alterations. The old section is reproduced below to observe the changes introduced in the present rule:—

*"At the first hearing, the Court may—*

*"(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award his costs, and dismiss him from the suit,*

*"or, if it thinks that justice or convenience so require,*

*"(b) retain all parties until the final disposal of the suit;*

*and, if it finds that the admissions of the parties or other evidence enable it,*

*"(c) adjudicate the title to the thing claimed; or else it may*

*"(d) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims."*

**Procedure where defendant does not appear.**—The plaintiffs who were in possession of a sum of money filed an interpleader suit against the two rival claimant-defendants. The proper order would be to direct the defendants in respect of the money and dismiss them from the suit, and to direct them to pay the balance into the Court to the credit of the suit after getting their taxed rates.—*Khemchand Isardas v. Khairuddin Ranglahi*, 53 I. C. 365; 21 Bom. L. R. 948.

**Appeal.**—Under Or. XLIII, r. 1, Cl. (p), an appeal lies from an order under this rule.

The adjudication upon the claims of the defendants in an interpleader-suit is a decree, and stands on the same footing as a decree in a suit. The old section 473 of the C. P. Code, 1882 (S. 598 of the new Code) provided that an appeal lay from an order under this rule. The new Code has amended this provision so that an appeal lies from a decree or order under this rule. The amendment is contained in S. 598 of the new Code.

**3.** Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit. [S. 476.]

Procedure where  
defendant is suing  
plaintiff.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 476, C. P. Code, 1882, with some additions and alterations. The word "*where*" has been substituted for the word "*if*" in the beginning; the word "*plaintiff*" has been substituted for the word "*estate-holder*" which occurred in the old section. The words "*on being informed by the Court in which the interpleader-suit has been instituted,*" have been substituted for the words "*on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the estate-holder that such decree has been passed,*" which occurred in the old section. The above change is material, because under the old section the proceedings in other Court could be stayed only after the passing of decree in the interpleader-suit; but under the present rule, the proceedings in another Court can be stayed after the institution of the interpleader-suit. The object of the change is clearly explained in the following report of the Special Committee:—

"The Committee think that the institution of the interpleader-suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified S. 476 so as to give effect to this view."—*See the Report of the Special Committee.*

**Appeal.**—Under Or. XLIII, r. 1, Cl. (p), an appeal lies from an order under this rule.

**4.** (1) At the first hearing the Court may—

• Procedure at  
first hearing. (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

[S. 473.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 473, C. P. Code, 1882, with several additions and alterations. The old section is reproduced below to observe the changes introduced in the present rule:—

*"At the first hearing, the Court may—*

*"(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award his costs, and dismiss him from the suit,*

*"or, if it thinks that justice or convenience so require,*

*"(b) retain all parties until the final disposal of the suit;  
and, if it finds that the admissions of the parties or other evidence enable it,*

*"(c) adjudicate the title to the thing claimed; or else it may*

*"(d) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims."*

**Procedure.**—*"If the Court is satisfied that the defendants were in possession of the property in dispute, and that there are two rival claimants, it may, if it thinks fit, direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims."*

defendants in respect of the money and dismiss them from the suit, and to direct them to pay the balance into the Court to the credit of the suit after getting their taxed rates.—*Khemchand Isardas v. Khairuddin Ranglahi*, 53 I. C. 365; 21 Bom. L. R. 948

**Appeal.**—Under Or. XLIII, r. 1, Cl. (p), an appeal lies from an order under this rule.

The adjudication upon the claims of the defendants in an interpleader suit is a decree, and stands on the same footing as an adjudication of any kind under the provisions of S. 540, C. P. Code, to interpleading is an order appealable under *Singh v. Chittar Mal*, 30 A. 22; 4 A. L. J.

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords. [S. 474.]

Agents and tenants may not institute interpleader-suits

### Illustrations.

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from him- self to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

### COMMENTARY.

Alterations.—This rule corresponds to S. 474, C. P. Code, 1882, with some modifications. The words "*nothing in this order shall be deemed*" have been substituted for the words "*nothing in this chapter shall be taken,*" which occurred in the old section. No other change has been made.

Interpleader-suit by tenants.—Plaintiff giving *habuliyats* to two sets of landlords cannot bring an interpleader-suit against the latter to settle the nature and extent of their right in the land.—*Shelley Bonnerjee v. Raj Chandra*, 37 C 552: 11 C. L. J. 577: 14 C. W. N. 784.

A tenant can maintain an interpleader-suit against a landlord and another person when the latter alleges that the landlord only acted as trustee in granting such lease.—*Orr v. Chidambaram*, 33 M. 220.

A tenant has a right to bring a suit to have it determined which of the two defendants, both of whom obtained rent-decrees against him, is his landlord.—*Gopal Das v. Hari Charan*, 5 C. L. J. 34-π. See also *Kasim Saib v. Luis*, 17 M. 82. But see *Koylash v. Goluk*, 2 C. W. N. 61, noted under S. 88.

Interpleader-suit by a Railway Company.—A Railway Company can file an interpleader-suit against the consignor and a third party claiming adversely to the consignor, as the company is not an agent of the consignor within the meaning of Or. XXXV, r. 5.—*Chhaganlal v. B. B. C. I. Railway*, 23 I. C. 948.

6. Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way. [S. 475.]

Charge for plaintiff's costs.

## COMMENTARY.

**Alterations.**—This section corresponds to S. 475, O. P. Code, 1882, with some changes of a verbal character.

**Appeal.**—An appeal lies from an order under this rule. See Or. XLIII, r. 1, Cl. (p).

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# ORDER XXXVI.

## SPECIAL CASE.

1. (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court's opinion.

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby. [S. 527.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 527, C. P. Code, 1882, with a verbal change, viz., the words "*specify such*" have been added before the word "*documents*" in sub-rule (2). No other change has been made.

**Conditions to be satisfied.**—This rule lays down the necessary conditions to be satisfied for a case stated for the Court's opinion.—*Trustees of the Port of Bombay v. Municipal Corporation of the City of Bombay*, 54 B. 825: 125 I. C. 897: A. I. R. 1930 Bom. 232: 32 Bom. L. R. 416.

**No appeal lies when Court decides under this rule.**—The parties to a suit for possession came to an agreement that they should ask the Court to decide the question of title on the basis of the *thak-bust* map only and the plaintiff agreed to abide by that decision. The Court decided accordingly. *Held*, that in deciding the question on the basis of the *thak-bust* map, in accordance with the agreement of the parties, the Court acted as arbitrator and hence no appeal lay from that decision.—*Kumar Saradindu Roy v. Bhagobati Debya*, 10 C. W. N. 835.

rr. 2-4.

2. Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement. [S. 528.]

## COMMENTARY.

Alterations.—This rule corresponds to S. 528, C. P. Code, with this modification that the word "where" has been substituted for the word "when" in the beginning.

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented. [S. 529.]

## COMMENTARY.

Applicability.—This rule exactly corresponds to S. 529, C. P. Code, 1882.

The filing of a proper agreement as mentioned in r. 1, is a necessary condition to be satisfied; and where the provisions (a), (b) and (c) are not satisfied and the case began by stating that the parties have concurred in stating the question of law arising therein in accordance with the Code for the opinion of the Court and it ended by setting out the question, and stating in effect that judgment with costs is to be entered for the plaintiff or the defendant according as whether the question is answered in the affirmative or the negative but it did not contain the agreement, it was held that the case did not comply with the Code.—*Trustees of the Port of Bombay v. Municipal Corporation of the City of Bombay*, 54 B. 825: 125 I. C. 897: A. I. R. 1930 Bom. 232: 32 Bom. L. R. 416.

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein. [S. 530.]

## COMMENTARY.

Alterations.—This rule corresponds to S. 530, C. P. Code, 1882, with this modification that the word "where" has been substituted for the word "when" in the beginning.



**5.** (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

Hearing and disposal of case.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow. [S. 531.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 531, C. P. Code, 1882, with some alterations and omissions.

In para. 1, the words "*in the ordinary manner*" have been substituted for the words "under Chapter V" which occurred in the old Code.

The sentence, "*and shall be enforced in the manner provided in this Code for the execution of decrees,*" which stood after the words, "a decree shall follow," in the last para. of the old section, has been omitted, probably, as unnecessary. The other changes are merely verbal.

**Court.**—Where the legislature has constituted a special tribunal with special and effective powers for determining a dispute, the Civil Court ought not to interfere by giving some partial decision which it cannot make effective and which accordingly will not, necessarily end the dispute.—*Trustees of the Port of Bombay v. Municipal Corporation of the City of Bombay*, noted *ante* under r. 3..

**Fit to be decided.**—Where a Court can give merely a declaration without any substantial relief and such substantial relief was reserved to entirely different tribunals under the statute, thereby barring a fresh suit founded on the declaration, the case cannot be one "fit to be decided" within the meaning of this rule.—*Trustees of the Port of Bombay v. Municipal Corporation of the City of Bombay*, noted *ante* under r. 3.

**Appeal.**—Where both the parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by the decision, and the Court passed a decree awarding a certain sum to the plaintiff; held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitration award.—*Sayad Zain v. Kalahbai*, 23 B. 752.

**Court-fee.**—The written agreement must be on a court-fee of Rs. 10 [Sch. II, Art. 19, Court-Fees Act (VII of 1870)].

# ORDER XXXVII.

## SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of  
Order

1. This order shall apply only to—

- (a) the High Courts of Judicature at Fort William, Madras and Bombay;
- (b) the Chief Court of Lower Burma;
- (c) the Court of the Judicial Commissioner of Sind; and
- (d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied. [S. 538.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 538, C. P. Code, 1882, with some alterations and omissions.

Clause (e) and the last three paras. of the old section, relating to the power of Local Government to extend these rules to any other Court, have been omitted, and several alterations have been made in the wording and language of Cls. (a), (b), (c) and (d), as will appear on comparison.

**Small Cause Courts.**—"As Chapter XXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (c) of S. 538, as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882."—*See the Report of the Special Committee.*

Paragraph (c) of the old section ran as follows: "(c) the Courts of Small Causes in Calcutta, Madras and Bombay."

The sections have been applied to the following other Courts in—

(1) Burma—

- (a) Court of the Judge of Moulmein, and
- (b) Court of the Deputy Commissioner of Akyab;

*see, Burma Rules Manual, Ed. 1897, p. 116.*

(2) the Madras Presidency—

- (a) District and Subordinate Judges' Courts, and
- (b) District Munsifs' Courts;

*see, Madras List of Local Rules and Orders, Ed. 1898, Vol. I, p. 196.*

A Subordinate Judge who is a presiding officer of an ordinary Sub-Court and not a Court of Small Causes has not, when exercising Small Cause Court powers, authority to act under this Order, but when acting as a Court of Ordinary

*Perivanayaga, 51 M. 491: 100*

*M. L. J. 114.*

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as herein-after provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—

(a) *for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and*

(b) *for such subsequent interest, if any, as the Court may order under section 34 of this Code; and*

(c) *for such sum for costs as may be prescribed:*

*Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.*

(3) *A decree passed under this rule may be executed forthwith.* [S. 532.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 532 of the old Code except in the following particulars:—

(1) The Explanation to S. 532 has been omitted and in lieu thereof the words "the allegations in the plaint shall be deemed to be admitted" have been added to sub-rule (2).

(2) The fourth paragraph of S. 532 has been omitted.

(3) The italicized words in Cls. (a), (b) and (c) of sub-rule (2) and in sub-rule (3) have been substituted by S. 4 of the Negotiable Instruments

(Interest) Act, 1926 (XXX of 1926) for the words beginning with the words "for any sum not exceeding" and ending with the words "executed forthwith" of the old rule.

**Object and scope of the rule.**—"The explanation to S. 632 was inserted to negative the effect of the decision in 1 C. 130, but its meaning, as it stands, is obscure. The committee have therefore deleted the explanation, and added words in the body of the rule which will remove the doubts at which the explanation was aimed."—*See the Report of the Special Committee. See also Bhupati Ram v. Sourendra*, 30 C. 446; 7 C. W. N. 412.

By the addition of the words "*the allegations in the plaint shall be deemed to be admitted*," it has now been made clear that in default of defendants obtaining leave to appear and defend, the allegations in the plaint shall be deemed to be admitted. The provisions of this rule are, therefore, not limited to those simple cases in which the bill itself together with mere lapse of time is sufficient to establish for the plaintiff a *prima facie* case to recover, as pointed in *Remfrey v. Shillingsford*, 1 C. 130; but they are applicable to suits on promissory notes in which there is no express stipulation to pay interest or there is provision for payment by instalments, as the allegations of those facts in the plaint will be deemed to be admission of the defendant, and no further evidence would be required to prove them.

**Negotiable instrument, bill of exchange, promissory note.**—The term "Negotiable Instrument" has been defined in S. 13 and the terms "Promissory Note" and "Bill of Exchange" in Ss. 4 and 5, respectively of the Negotiable Instruments Act (XXVI of 1881). *See also* S. 2, Cls. (2), (8) and (22) of the Indian Stamp Act (II of 1899).

As to "negotiable instrument," *see also Jetha Parkha v. Ram Chandra*, 16 B. 689; and *Bharata Pisharodi v. Vasudevan*, 27 M. 1 (F. B.) (16 M. 283 overruled; 23 M. 156-n. and 13 B. 669 approved).

An instrument signed bearing one-anna stamp, was in the following terms, viz: "On deposit of title-deeds named therein below for value received by me, I promise to pay three months after date, Rs. 160 to A. B. or order"; then followed the details of the title-deeds. *Held*, that the instrument was a negotiable instrument.—*Ramachandra v. Sesha*, 17 M. 85.

**Practice and procedure in suits under this order.**—A summary suit under this chapter differs from a suit instituted in the ordinary manner on negotiable instruments in the following respects: (1) A summary suit can only be instituted in the Courts mentioned in r. 1; (2) It must be brought within one year from the date on which the debt becomes due and payable, under Art. 5 of Sch. I of the Limitation Act, 1908, as amended by Act XXX of 1925; (3) The defendant in a summary suit is not, as in a suit brought in the ordinary manner, entitled as of right to put in a defence. He must in a summary suit apply for leave to defend and such application under Sch. I, Art. 159 of the Limitation Act must be made within 10 days from the service of summons on him. If no leave is granted, the plaintiff is entitled to get a decree, and the Court is not entitled to pass at the instance of such a defendant an order for the payment of the decretal amount by instalments under Or. XX, r. 11 (1).—*Pestonji v. Jamsedji*, 50 B. 262; 94 I. C. 9; A. I. R. 1926 Bom. 250.

**Suit for amount due on a hundi or for compensation in the alternative.**—A suit for the amount due on a hundi or in the alternative for compensation under Ss. 32 and 117 (c) is maintainable under this summary chapter.—*Naraindas v. Chandiram*, 107 I. C. 218: A. I. R. 1928 Sind 86: 22 S. L. R. 305.

**Interest.**—In a suit instituted under this Chapter, the plaintiff is not entitled to recover any interest unless such interest is specified in the note itself, or to give evidence regarding any agreement to interest.—*Bhupati Ram v. Sourendra*, 30 C. 446: 7 C. W. N. 412 (1 C. 130 referred to).

In a suit on a promissory note instituted under Chapter 37 of the C. P. Code, where no leave had been obtained to defend the suit, the plaintiff is not entitled to a decree for interest at 18 per cent. on the strength of an oral agreement alleged in the plaint. The plaintiff can only get interest at 6 per cent.—*Kader Buksh v. Shaik Serajuddin*, 49 C. 716: 70 I. C. 130: A. I. R. 1922 Cal. 513. Section 80 of the Negotiable Instruments Act, as amended by Act XXX of 1926, provides that when no rate of interest is specified in the instrument, the interest on the amount due thereon shall be calculated at the rate of 6 p. c. per annum from the date at which the same ought to have been paid by the parties charged, notwithstanding any agreement relating to the interest between any parties to the instrument.

**Costs.**—If a suit on a promissory note which is cognizable by the Small Cause Court is instituted in the High Court under Or. XXXVII of the Code, the provisions of S. 22 of the Presidency Small Cause Courts Act apply and no costs can be allowed to the plaintiff unless the trying Judge certifies that the suit was a fit one to be brought in the High Court.—*Manmotha v. Abu Jafer*, 56 C. 484: 33 C. W. N. 95: 116 I. C. 736: A. I. R. 1929 Cal. 560.

"The allegations in the plaint shall be deemed to be admitted."—The effect of these words which have been substituted for the Explanation to S. 532 of the old Code is to enable the plaintiff to succeed on his own allegations, though the allegations may be of such a nature that if the defendant appeared and denied them, they would have to be proved by the plaintiff. The fundamental principle of law is that the plaintiff, when he comes to Court, must prove his case and he must prove it to the satisfaction of the Court. Under the C. P. Code such proof can be dispensed with and the allegations in the plaint considered as admitted only in undefended cases of Bills of Exchange, Promissory Notes and Hundis as contemplated in Or. XXXVII, r. 2 of the Code.—*J. B. Ross & Co. v. O. R. Scriven*, 43 C. 1001: 20 C. W. N. 1192.

**Decree.**—A plaintiff suing on a bill of exchange the drawer, acceptor and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all the defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer or acceptor is therefore illegal.—*Bank of Bengal v. Kartick Chunder*, 16 C. 804. After the usual return of service and the expiration of the period mentioned in the summons, an order of Court for a decree should be obtained.—*Schiller v. Marker*, 1 Ind. Jur. N. S. 283.

**Summons.**—In a suit under this Chapter, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend

has expired, to extend the time.—*Quazie Mahmudar Rohman v. Sarat Chandra*, 5 C. W. N. 259 (3 B. L. R. O. S. 83, and 3 C. 539 distinguished).

In a suit under the Chapter, the defendant is bound to make his application for leave to defend the suit within 10 days, from the date of service of summonses as shown in the Sheriff's return. He cannot be allowed extension of time on the ground of his absence from the dwelling house when the service is alleged to have been effected.—*Madhub Lall v. Woopendra Narain*, 23 C. 573.

The plaintiff is entitled to claim by his summons whatever sum, principal or interest, is, on the legal construction of the instrument, demandable, though as to interest beyond the scope of the instrument, the question is a different one and out of the scope of the Act.—*De Souza v. Ranganian*, 6 M. H. C. R. 257.

One who takes a promissory note in his own name *benami* for another is the only party entitled to sue thereon and that the true owner is precluded from maintaining an action in his own name for the amount thereof.—*Ramanuja Ayyangar v. Sadagopa*, 23 M. 205; *Subba Narayana v. Ramaswami*, 23 M. 244, where it has been further held that the defendant is precluded from pleading that the plaintiff is not the true owner of the note. See also *Subba Narayana v. Ramaswami*, 30 M. 88 (21 M. 391 overruled). An assignee of a negotiable instrument otherwise than by endorsement may sue.—*Muthar Sahib v. Kadir Sahib*, 23 M. 544.

No person can claim a title to a negotiable instrument through a forged endorsement. Such an endorsement is a nullity and must be taken as if no endorsement was on the instrument (33 C. 799, 815 not followed; 24 B. 65, 67 followed). Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.—*Banku Behari v. Secretary of State*, 36 C. 239.

"Leave to defend."—See notes to next rule.

**Limitation.**—It is optional with the plaintiff to bring a suit under this order, or in the ordinary way. If he sues under this order then the period of limitation is 6 months from the date when the money becomes payable. See Art 5 of the Limitation Act, IX of 1903. But when the plaintiff sues in the ordinary way then the limitation is 3 years. See Arts. 69 to 80 of the Limitation Act (IX of 1903).

**Appeal.**—The effect of this rule is that if the Judge refuses leave to defend or gives leave on terms which the defendant is not able to comply with, the plaintiff is taken to be admitted and the plaintiff becomes automatically entitled to a decree . . . . . within the meaning of Cl. 15 of the Letters . . . . . in it.—*Ramanlal v. Chunilal*, 34 Bom. L. R.

**3. (1)** The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the

Defendant showing defence on merits to have leave to appear.

application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit. [S. 533.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 533, C. P. Code, with some additions, alterations and omissions.

The words "*upon the defendant paying into Court the sum mentioned in the summons,*" which occurred in the old section after the words 'to defend the suit' have been omitted; and in sub-rule (2), the words "*Leave to defend may be given unconditionally or subject to such terms as to payment into Court*" have been added. Under sub-rule (2) discretion has been given to Courts to allow the defendant to defend the suit unconditionally or subject to such terms as to payment into Court, as the Court thinks fit. Under the old section it was obligatory upon the Court to grant leave.

**"Upon affidavits."**—An affidavit in support of an application for leave to defend as required by Or. XXXVII, r. 3 (1) of the C. P. Code, must disclose facts sufficient to support the application.—*Kooverbhan Sukanand v. Madandas Siroomal*, 49 I. C. 193: 12 S. L. R. 70.

**"Leave to defend."**—The Court will give leave to a defendant to appear and defend a suit, where he shows a defence apparently real; but where there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered or security directed to be given.—*Ponlitzky v. Narayan Sing*, 6 B. L. R. App. 64.

As a rule, leave to defend should be given unconditionally if the defendant shows a *prima facie* case or raises a triable issue. Leave should be made conditional if the Court doubts the *bona fides* of the defendant or thinks the defence is only put in to gain time.—*Peria Miyana v. Subramania*, 78 I. C. 505: 46 M. L. J. 255: A. I. R. 1924 Mad. 612. See *Madanlal v. Kedarnath*, noted under the heading "Appeal," post.

In a suit under Act V of 1866 the summons should be returned in the usual way; and after the expiration of the required time, an order of the Court or a decree should be obtained.—*Schiller v. Marker*, 1 Ind. Jur. N. S. 283.

The High Court has power to extend the time within which a defendant in a suit brought under this Chapter, can come in and obtain leave to defend; therefore in a suit in which it appeared that a defendant resided at Peshawar, the time for the defendant to obtain leave from the Court to appear and defend was extended to 23 days.—*Groom v. Wilson*, 3 C. 539 (*distinguished* in *Quazie Mahmudur Rohman v. Sarat Chandra*, 5 C. W. N. 259, where it has been held that the Court has no power to extend the time).

In a summary suit, if a defendant has been arrested before judgment and claims compensation for each arrest under S. 491, C. P. Code, 1882, he is entitled on the ground to apply for leave to defend the suit, and if a *prima facie* case is made out, leave to defend should be given.—*Roulet v. Fatterle*, 18 B. 717.

In a summary suit on a bill of exchange under Or. XXXVII, the defendant cannot be allowed to counter-claim for the damages caused by the alleged failure of the plaintiff to supply goods of the right sort.—*Weiss Bihellet and Brooks Ltd. v. Habibbhoj Ganggs*, 120 I. C. 528.

A defendant entering appearance under protest denying that he was a partner, in a suit filed under this order is not entitled to ask for trial of an issue whether he was a partner. The plaintiff may disregard the appearance under protest and proceed again in his endeavours to serve the summons under the provisions of Or. XXX, r. 3.—*Ramanujachary v. Pohoomal*, 50 B. 665; 99 I. C. 495; A. I. R. 1926 Bom. 535.

"Subject to such terms as to payment into Court."—Where a decree in a suit under the summary procedure described by Or. XXXVII is set aside on the defendant depositing into Court the amount sued for, the amount deposited becomes charged with the decretal amount and is available for the satisfaction of any other decree passed. It is not competent to the Court passing the decree to enquire into the question whether the amount deposited was or was not the defendant's own money.—*Gopalaiyar v. Tiruvengadam Pillai*, 32 M. L. J. 503; 5 L. W. 407.

Where in a suit on a promissory note filed under Or. XXXVII, the defendant by his affidavits shows that he has a real defence to the suit, but the sincerity of which may be open to doubt the proper course is to give the defendant leave to defend on his bringing the suit money into Court.—*G Chakrapany Oeltiar v. Kamalvalli Ammal*, 12 L. W. 712.

**Limitation.**—Application for leave to appear and defend must under Art. 159 of the Limitation Act be made within 10 days from the date of service of summons on the defendant. In determining any question as to limitation arising on an application under this rule, the date shown in the sheriff's return as the date of service should only be referred to.—*Madhub Lall v. Woopendra Narain*, 23 C. 573.

**Appeal.**—An order under this rule is not appealable. See *Sukhlal v. Eastern Bank Ltd*, 42 C. 735. But where the Judge first passed an order giving conditional leave to the defendants to defend the suit or depositing certain amount in Court before a certain date and subsequently passed an *ex parte* decree the security not having been furnished, the latter order is appealable and the defendants can challenge therein the previous order also which in effect deprived them of their right to defend.—*Madanlal v. Kedarnath*, 125 I. C. 438; A. I. R. 1930 Bom. 364; 32 Bom. L. R. 660.

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit. [S. 534.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 534, C. P. Code, 1882, with the addition of the words "to the defendant" after the words "may give leave." No other changes have been made.



**Special circumstances.**—This rule gives the defendant a right under special circumstances to set aside the decree, and, if necessary, to stay or set aside execution; and where a defendant fails to obtain leave to defend on the ground of the expiration of 10 days from the date of service of summons his remedy is under this rule.—*Quazie Mahmudar Rohman v. Sarat Chandra*, 5 C. W. N. 259.

A defendant who has obtained no leave to defend a summary suit, cannot be allowed to appear while the hearing is proceeding. Order XXXVII contemplates that a decree should be passed in such a case in accordance with the plaint. Thereafter the defendant can apply under Or. XX, r. 11 (2), for payment of the decretal amount by instalments or to grant him any of the reliefs in Or. XXXVII, r. 4.—*Pestonji v. Jamsedji*, 50 B. 262: 94 I. C. 9: A. I. R. 1926 Bom. 250.

An appeal lies from an order made under this rule, refusing to set aside an *ex parte* decree.—*Luckmidas v. Ebrahim*, 2 B. 644.

**5.** In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof. [S. 535.]

Power to order bill, etc., to be deposited with officer of Court

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 535, C. P. Code, 1882, with some verbal alterations.

**6.** The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note. [S. 536.]

Recovery of cost of noting non-acceptance of dishonoured bill or note.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 536, C. P. Code, 1882, with some verbal changes only.

**7.** Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner. [S. 537.]

Procedure in suits.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 537, C. P. Code, 1882, with some verbal changes only.

# ORDER XXXVIII.

## ARREST AND ATTACHMENT BEFORE JUDGMENT.

### ARREST BEFORE JUDGMENT.

1. When at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise—

Where defendant may be called upon to furnish security for appearance.

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, [S. 477.]

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance: [S. 478.]

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court. [New.]

### COMMENTARY.

Alterations and their effect.—This rule corresponds to Ss. 477 and 478, C. P. Code, 1882 with several alterations and omissions.

**Special circumstances.**—This rule gives the defendant a right under special circumstances to set aside the decree, and, if necessary, to stay or set aside execution; and where a defendant fails to obtain leave to defend on the ground of the expiration of 10 days from the date of service of summons his remedy is under this rule.—*Quazie Mahmudar Rohman v. Sarat Chandra*, 5 C. W. N. 259.

A defendant who has obtained no leave to defend a summary suit, can not be allowed to appear while the hearing is proceeding. Order XXXVII contemplates that a decree should be passed in such a case in accordance with the plaint. Thereafter the defendant can apply under Or. XX, r. 11 (2), for payment of the decretal amount by instalments or to grant him any of the reliefs in Or. XXXVII, r. 4.—*Pestonji v. Jamsedji*, 50 B. 262: 94 I. C. 9: A. I. R. 1926 Bom. 250.

An appeal lies from an order made under this rule, refusing to set aside an *ex parte* decree.—*Luckmidas v. Ebrahim*, 2 B. 644.

**5.** In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof. [S. 535.]

Power to order bill, etc., to be deposited with officer of Court

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 535, C. P. Code, 1882, with some verbal alterations.

**6.** The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note. [S. 536.]

Recovery of cost of noting non-acceptance of dishonoured bill or note.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 536, C. P. Code, 1882, with some verbal changes only.

**7.** Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner. [S. 537.]

Procedure in suits.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 537, C. P. Code, 1882, with some verbal changes only.

rr. 1, 2.

him.—*Goutiere v. Charriol*, 2. N. W. P. H. C. R. 91. See also *Seth Chand Mul v. Purushotham*, 50 M. 27. 94 I. C. 512 : A. I. R. 1926 Mad. 584 : 50 M. L. J. 348.

It is not necessary for the plaintiff to show that the defendant intends to obstruct or delay the plaintiff in execution of his decree in order to justify an application to the Court for his arrest before judgment; it is enough if his going away will have that effect.—*Agra and Masterman's Bank v. Minto*, 1 Ind. Jur. N. S. 265.

A defendant failing to show good cause will be ordered to find security for the amount of the claim and the costs of the suit, and "good cause" must be either (1) that he is not going to leave India, or not for so long a time as will obstruct, or he likely to obstruct the plaintiff, should he succeed; (2) that the suit is not a *bona fide* one; or (3) that even if it is, the litigation of it has been vexatiously delayed till the defendant is about to depart from India, in order to embarrass or coerce him.—*Spencer's Hotel Company v. Anderson*, 1 Ind. Jur. N. S. 294-note.

Where an officer proceeding from Burma to England on leave, resided w days in Madras on the way; *held*, that such residence was sufficient the purposes of S. 648, C. P. Code, 1892, to render him liable to arrest re. judgment—*Everett v. Frere*, 8 M. 205.

Where a person has to leave his place of residence for attendance in a Civil Court, his departure is not with a view to delay the plaintiff or to obstruct the process of Court or to obstruct or delay execution and an order under Or. XXVIII, r. 1, is not justifiable.—*Daulat Ram v. Kirpa Ram*, 4 J. 423.

The mere fact that an appeal is pending against a decree is no reason for enforcing execution by arrest when the execution has not been held.—*Mehr Chand v. Ram Lal*, 73 I. C. 766.

A writ was instituted against the master of a vessel for repairs done to the vessel and for hire of a dock in which the vessel had been. The master, about to leave the jurisdiction of the Court, the plaintiffs applied to S. 477, C. P. Code, 1882 (Or. XXXVII), for an order that the defendant should give security for the repairs and hire of the dock. The Court granted the writ, and the defendant should give security for the repairs and hire of the dock. 695.

**Narrant.**—For Form of Warrant of arrest under this rule, see Appendix No. 1.

**Consequence of obtaining arrest on insufficient grounds.—See S. 95.**

2. (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to cover the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending until satisfaction of any decree that may be passed in the suit, or make such order as it thinks fit in the circumstances.

The provisions of Ss. 477 and 478 have been amalgamated in this rule. Some of the words and phrases of S. 477 have been changed and replaced by more appropriate words and phrases; and the last para. of S. 477, which runs as follows: "*The plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit,*" has been omitted probably as unnecessary.

The last para. only of S. 478 has been embodied in this rule, and the other portions of the section, which contained provisions almost similar to S. 477, have been omitted, probably as redundant. Section 478, C. P. Code, is reproduced below for the purpose of comparison and to observe the changes introduced by the present rule:—

"If the Court after examining the applicant, and making such further investigation as it thinks fit, is satisfied—

"that the defendants, with any such intent as aforesaid—

"(a) has absconded or left the jurisdiction of the Court, or

"(b) is about to abscond or to leave the jurisdiction of the Court, or

"(c) has disposed of, or removed from the jurisdiction of the Court, his property or any part thereof, or

"that the defendant is about to leave British India under the circumstances last aforesaid,

"the Court may issue a warrant to arrest the defendant, and bring him before the Court to show cause why he should not give security for his appearance."

On comparison it would appear that the first para. of S. 478, which contained provisions for the examination of the applicant and for making further investigation before issuing warrant for arrest has been omitted; the last para. of the section has been retained and embodied in this rule, and the other portions of the section, the provisions of which were almost similar to S. 477, have been omitted as redundant.

Clauses (a) to (d) of S. 16 refer to the following classes of suits: (a) for the recovery of immoveable property, (b) for partition of immoveable property, (c) suits for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property, (d) for the determination of any other right to or interest in immoveable property. All these suits are excluded from the operation of this rule.

The proviso is now, and it is similar to r. 38 of Or. XXI.

Under the present rule no further examination of the applicant or investigation, except the affidavit, is needed to take action under this rule. Under the old S. 478 it was necessary to examine the applicant and to make further enquiry before taking action under Ss. 477 and 478. The present rule has simplified the procedure to a certain extent.

"The Court is satisfied by affidavit or otherwise."—A creditor is not entitled, merely because he has a just demand against his debtor, to move the Court to put in force the extraordinary processes of arrest or attachment; he must also have good reason to believe that his debtor is about to leave the jurisdiction of the Court, or to deal with his property in such a manner that it will be unavailable for satisfaction of the claim against

r. 1, 2.

him.—*Goutiere v. Charriol*, 2 N. W. P. H. C. R. 91. See also *Seth Chand Mul v. Purushotham*, 50 M. 27 : 94 I. C. 512 : A. I. R. 1926 Mad. 594 : 50 M. L. J. 348.

It is not necessary for the plaintiff to show that the defendant intends to obstruct or delay the plaintiff in execution of his decree in order to justify an application to the Court for his arrest before judgment; it is enough if his going away will have that effect.—*Agra and Masterman's Bank v. Minto*, 1 Ind. Jur. N. S. 265.

A defendant failing to show good cause will be ordered to find security for the amount of the claim and the costs of the suit, and "good cause" must be either (1) that he is not going to leave India, or not for so long a time as will obstruct, or be likely to obstruct the plaintiff, should he succeed; or (2) that the suit is not a bona fide one; or (3) that even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India, in order to embarrass or coerce him.—*Spencer's Hotel Company v. Anderson*, 1 Ind. Jur. N. S. 294-note.

Where an officer proceeding from Burma to England on leave, resided a few days in Madras on the way; held, that such residence was sufficient for the purposes of S. 643, C. P. Code, 1892, to render him liable to arrest before judgment.—*Everett v. Frere*, 8 M. 205.

Where a person has to leave his place of residence for attendance in a criminal Court, his departure is not with a view to delay the plaintiff or avoid the process of Court or to obstruct or delay execution and an order under Or. XXXVIII, r. 1, is not justifiable.—*Daulat Ram v. Kirpa Ram*, 4 L. L. J. 423.

The mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed.—*Mehr Chand v. Ram Lal*, 73 I. C. 766.

A suit was instituted against the master of a vessel for repairs done to his vessel and for hire of a dock in which the vessel had been. The master being about to leave the jurisdiction of the Court, the plaintiffs applied under S. 477, C. P. Code, 1892 (Or. XXXVII), for an order that the defendant should give security for his appearance.—Held, that the case fell within S. 477, C. P. Code, 1892 (Or. XXXVII), and that the defendant should furnish security for his appearance.—*Probode Chunder v. Doweey*, 14 C. 695.

Warrant.—For Form of Warrant of arrest under this rule, see Appendix F, No. 1.

Consequence of obtaining arrest on insufficient grounds.—See S. 95.

2. (1) Where the defendant fails to show such cause the

Security.

Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in

regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule. [S. 479.]

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 479, C. P. Code, 1882, with some alterations and additions.

In sub-rule (1), the words "*or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule,*" have been added. The addition has been made on account of the addition of proviso to r. 1.

Sub-rule (2) corresponds to para. 2 of the section with change of some words only; no change has been made in the meaning.

**Deposit in Court.**—Where after deposit in Court, other decree-holders of the defendant attach the money so deposited, or the defendant becomes an insolvent, the plaintiff on obtaining his decree is entitled to priority over the claims of the other attaching decree-holders and the Official Receiver.—*Ramiah v. Gopalier*, 41 M. 1053.

**Security.**—The object of a security bond executed under Or. XXXVIII is merely to secure the rights of judgment-creditor. The Court has no power to declare forfeiture of the bond in favour of Government. The bond should be enforced only on the application of the judgment-creditor and only to the extent of the sums found payable under the decree.—*Hussein Ali v. Secretary of State*, 28 I. C. 92. The amount of security to be furnished under this rule should be limited to the sum mentioned in the warrant under r. 1; *Elie Goldberg v. Sarojini*, 56 C. 700; A. I. R. 1929 Cal. 732.

A surety bond which provides that the liability of the surety extends to paying the amount claimed in the suit in the event of a decree being passed is not illegal.—*Srinivasa v. Ghouse Sahib*, 115 I. C. 244.

**Payment by surety.**—Money paid by a surety after decree, is liable to rateable distribution.—*Ghisu Lal v. Todarmull*, 26 O. W. N. 169; 70 I. C. 539 A. I. R. 1922 Cal. 19.

**Notice to surety** should be given when execution is sought against him for failure to produce judgment-debtor.—Although a notice is issued to a surety to produce the judgment-debtor, it is necessary when he fails to do so, to issue a further notice to him to show cause why execution of the decree should not issue against him.—*Mahomed Sultan v. Nagoji*, A. I. R. 1931 Mad. 828 (1931) M. W. N. 963.

**Extent of liability of surety.**—Where a person stands surety under Or. XXXVIII, r. 2, C. P. Code for another arrested before judgment, the surety is not discharged from liability unless at the time when the judgment-debtor is produced, he can be called upon to pay up the decretal

amount or suffer imprisonment in default. The mere production of the debtor with a production order does not absolve the surety.—*Subrahmanya Iyer v. Abdul Rahman*, 1 Bur. L. J. 196.

Appeal.—An order under this rule is appealable, *see* Or. XLIII, r. 1 (q).

**3.** (1) A surety for the appearance of defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security. [S. 480.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 480, C. P. Code, 1882, with some verbal changes only.

"Voluntary surrender."—A defendant who appears in Court to defend his suit is exempt from personal arrest under S. 185 of the C. P. Code. A surety for the appearance of the defendant cannot therefore claim to initiate proceedings under this rule with a view to obtain his discharge when the defendant appears in Court to defend his suit. Nor does the appearance of the defendant on that occasion amount to a voluntary surrender within the meaning of Or. XXXVIII, r. 3.—*Odaya Mangalath v. Issak Mackadam*, 37 M. L. J. 435.

Discharge of surety.—The adjudication of a judgment-debtor as an insolvent does not release a surety who has undertaken to produce him whenever required until the decree is satisfied from his liability to produce the debtor.—*A. Sowdagar v. B. Shi*, 6 R. 241: 111 I. C. 15: A. I. R. 1923 Rang. 184; and where a surety who had undertaken to produce a judgment-debtor whenever required applied under this rule to be discharged from his suretyship and produced the judgment-debtor but the decree-holder did not appear and the surety then withdrew his application for discharge, it was held that the surety was not discharged by the appearance of the judgment-debtor.—(*Ibid*).

Duty of the Court when surety is discharged.—After discharging the surety under this rule the Court should give some time to the defendant

such a case.—*Goyal v. Emperor*, 116 I. C. 709: A. I. R. 1929 Lah. 163.



**Appeal.**—An order under this rule is appealable, *see* Or. XLIII, r. 1 (g).

**Form.**—For Form of Summons to defendant, *see* App. F, Form No. 3.

**4.** Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit, or where a decree is passed against the defendant, until the decree has been satisfied :

*Procedure where defendant fails to furnish security or find fresh security.*

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order. [S. 481.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 481, C. P. Code, with some alterations and additions.

In the concluding part of para. 1, the words "or where a decree is passed against the defendant, until the decree has been satisfied," have been substituted for the words "or if judgment be given against the defendant, until the execution of the decree," which occurred in the old section. The other changes are of a verbal character only.

Section 482, C. P. Code, 1882, which contained provisions for payment of subsistence allowance to defendants arrested under this Order, has been omitted, on account of insertion of the new S. 134, in the body of the Code, which is applicable to all persons arrested under this Code.

**Failure to furnish security**—A Judge of Small Cause Court is the Maffasil could direct the jailor to bring up before the Court, at the hearing of the suit, a defendant committed to custody under this rule, without having recourse to the procedure under Act XV of 1869.—*Kilaram Maji v. Narayan Das*, 5 B. L. R. 245: 13 W. R. 278.

**Held**, that imprisonment under this rule becomes, after decree, imprisonment in execution of the decree, and the imprisonment suffered after that date must consequently be taken into consideration in calculating the period of 6 months, which by S. 53 of the Code is the limit allowed for an imprisonment in execution of a decree.—*Ghanasham Das v. Joharimull*, 7 B. 431.

**Appeal.**—An order under this rule for the arrest of the defendant is appealable under S. 104 (h).—*Syed Hossain v. Chelliar Firm*, 2 R. 362: 84 I. C. 270: A. I. R. 1924 Rang. 361.

## ATTACHMENT BEFORE JUDGMENT.

5. (1) Where, at any stage of suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

Where defendant may be called upon to furnish security for production of property.

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. [Ss. 483 and 484.]

## COMMENTARY

**Alterations.**—The provisions of Ss. 483 and 484, C. P. Code, 1882, have been amalgamated in this rule with several additions, alterations and omissions.

The reason for amalgamation seems to be that it has been considered unnecessary to retain two separate sections containing almost similar provisions—Hence the provisions of the two sections have been embodied in one rule.

The provisions contained in Cl. (a) of S. 483, and similar provisions contained in S. 484, have been inserted in this rule by making two separate Cls. (a) and (b); and the provisions contained in Cl. (b) of S. 483, and similar provisions contained in S. 484, which ran as follows: "*(b) has quitted the jurisdiction of the Court, leaving therein property belonging to him*"; and the first part of S. 484, C. P. Code, 1882, which ran as follows, "*if the Court after examining the applicant and making any further investigation which it thinks fit,*" have been altogether omitted from the present rule.

Under the present rule it is neither necessary to examine the applicant nor to make any further investigation before taking any action under the provisions of Or. XXXVIII, r. 5 but under S. 484 of the old Code, it was

necessary to examine the applicant and to make further investigation before proceeding under those sections.

The other changes introduced in this rule do not seem to be material. Those changes are merely verbal.

**Scope and object of the rule.**—The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually passed, from the defendant's property.—*Ganu Singh v. Jangilal*, 26 C. 531. An attachment before judgment is not an attachment for the enforcement of the decree but it is a step taken merely for the purpose of preventing the defendant from obstructing or delaying such enforcement when the decree subsequently passed against him in the suit is sought to be executed.—*Sri Ram Manik v. Tincowri*, 4 B. L. R. 63, 67, 68 (F. B.); *Basiram v. Kattiyani*, 38 C. 448: 15 C. W. N. 795. The scope and object of this and the following rules are merely to safeguard the plaintiff against any loss which may arise if the defendant disposes of or removes his property pending the disposal of the suit; *Sri Ram Manik v. Tincowri*, 4 B. L. R. 63, 68 and 74 (F. B.)

"The Court is satisfied by affidavit or otherwise."—In an application under this rule the Court must be satisfied that a removal of goods is being made or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal.—*Ram Narain v. Levy*, 2 Hyde 183.

Before proceeding under this rule to attach property, the Court should be thoroughly satisfied that the defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him.—*Soshee Sekhorewar v. Harogobind*, 13 C. L. R. 356; *Chandrika Prasad v. Hira Lal*, 73 I. C. 721; *Khoka Marwari v. Ramachander*, 44 I. C. 240; *Badri Prasad v. Chokhe Lal*, 48 A. 510: 95 I. C. 829: A. I. R. 1926 All. 406: 24 A. L. J. 561. Mere vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court are not sufficient.—*Senaji Kapur Chand v. Pannaji Devi Chand*, 46 B. 431: 64 I. C. 530: A. I. R. 1922 Bom. 276.

Where a mortgagee asks for attachment before judgment of the other properties of the mortgagor it is not enough for him to show that the mortgagor has allowed sales *in invitum* or sales for arrears of revenue in respect of other properties by gross neglect, but he must show that the mortgagor has been deliberately and fraudulently effecting sales or mortgages of his other properties with the object of defeating any personal decree that may be passed against him.—*Shikharjanath v. Raja Janakinath*, 36 C. W. N. 746.

Where the plaintiff applied for attachment before judgment on the ground that the defendants were trying to alienate the properties and the defendant undertook to file a petition undertaking not to alienate the properties pending the suit but did not file such a petition, the Court has no power to pass an order of attachment at once unless it was satisfied that the plaintiff had made out a sufficient case according to law in order to enable the Court to pass such an order.—*Ram Khelawan v. Singhaswar Prasad*, 106 I. C. 532: A. I. R. 1928 Pat. 172.

Where a mortgage decree for sale of the mortgaged property provides that if the sale proceeds be insufficient to satisfy the decree, the decree-holder shall be at liberty to proceed against the person of the judgment-debtor the Court can order attachment of his other property under Or. XXXVIII, r. 5 even before the sale of the property mortgaged takes place if it is *prima-facie* satisfied that the mortgaged property is likely to prove insufficient to satisfy the decree and there is danger of the judgment-debtor disposing of his other property to evade satisfaction of the decree.—*Muhammad Din v. Devi Das*, 118 I. C. 446 : A. I. R. 1929 Lah. 402.

"Is about to dispose of the whole or any part of his property."—This rule contemplates attachment of property which the defendant is about to dispose of or remove from the jurisdiction of the Court and not of the property already disposed of.—*Hari Bakhsh v. Babu Lal*, 112 I. C. 295 : A. I. R. 1928 Lah. 772.

The Court is not restricted to attempts at alienation made after the commencement of the action. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also surrounding circumstances.—*J. D. Mac Gregor v. Cawnpore Sugar Works, Ltd.*, 9 C. L. J. 86 n.

An order directing the issue of a notice upon the defendant to show cause why attachment should not issue before judgment and at the same time directing the defendant not to part with the property in any way is not an order in accordance with this rule.—*Mahendra v. Gurudas*, 23 C. L. J. 392.

It does not apply to the joint property of a partnership, of which the judgment-debtor is a member. In cases of this kind the proper order to make is the appointment of a receiver.—*Damodar v. Panna Lal*, 9 Bom. L. R. 540. See *Hari Bakhsh v. Babu Lal*, 112 I. C. 295 : A. I. R. 1928 Lah. 772.

Where a plaintiff has applied for leave to sue *in forma pauperis* an order under this rule cannot be passed before the leave is granted.—*Purna v. Tara*, 21 C. W. N. 870 : 25 C. L. J. 159.

The plaintiff in a mortgage suit who applies for attachment of certain other properties of the defendant on the ground of insufficiency of the mortgaged security has a right to get an attachment before judgment under Or. XXXVIII, r. 5 of the C. P. Code.—*Jogemaya v. Baidyanath*, 46 C. 245.

Meaning of property, whether property outside the jurisdiction of the Court can be attached.—The term "property" as used in this rule is wide enough to include property of every description, moveable or immovable, whether in the actual possession of the defendant or some other person on his behalf.—*Chedi Lal v. Kuarji Dicit*, 17 A. 82 ; *Bishambar Sahai v. Sukhdevi*, 16 A. 186.

The Court can attach before judgment property outside the local limits of its jurisdiction and, further, it can entertain an application for removal of such attachment and remove the attachment.—*M. S. M. M. Chettyar Firm v. Maung Sein*, 9 R. 561 : A. I. R. 1931 Rang. 279 ; *Gajanan v. Bhaskar*, 28 Bom. L. R. 380 : 94 I. C. 116 : A. I. R. 1926 Bom. 278 ; *Kanhayi Ram v.*

*Dina Nath*, 93 I. C. 361 : A. I. R. 1926 Lah. 330 : 8 L. L. J. 125 : 27 P. L. R. 144. See notes under heading "Property Specified" in the next rule.

A Court constituted by Order in Council under the Foreign Jurisdiction Act is not competent to attach before judgment moveable property of a defendant British subject which is in a foreign state.—*Mela Mal v. Bishen Das*, 13 L. 206 : 134 I. C. 822 : A. I. R. 1931 Lah. 723 : 32 P. L. R. 645.

"With intent to obstruct or delay, the execution of any decree that may be passed against him."—Pending a suit against him for a money claim, the defendant agreed to sell a small portion of his considerable property. The trial Judge thereupon ordered, under Or. XXXVIII, r. 5 attachment before judgment of the defendant's property. Held, setting aside the order, that merely because the defendant attempted to sell some of his immoveable property whilst proceedings against him were pending, it did not follow that he was disposing of the property with intent to obstruct or delay the execution of any decree that might be passed in the suit; *Nowroji Pudamji v. The Deccan Bank Ltd.*, 63 I. C. 958 : 45 B. 1256.

The fact that the defendant is running into debts or attempting to secure debts already incurred by executing a mortgage in respect of them does not necessarily indicate an intention to obstruct or delay the execution of a decree to be passed when the value of the properties far exceeds the amount of such debts as well as the claim in the suit.—*Sourendranath v. Tarubala*, 31 C. W. N. 432 : A. I. R. 1927 Cal. 854 : 101 I. C. 9.

Where groceries are being sold in the ordinary course of business and not with a view to obstruct or delay the execution of any decree that may be passed, attachment before judgment is not justified.—*Kanhayi Ram v. Dina Nath*, 93 I. C. 361 : A. I. R. 1926 Lah. 330 : 8 L. L. J. 125 : 27 P. L. R. 144.

To justify an order of attachment before judgment, the Court must be satisfied that the defendant has a present intention of disposing of property with intent to delay or obstruct execution. The mere fact that in the past he mortgaged his property or otherwise disposed of it, would not be a sufficient ground for passing an order under r. 6.—*Manmatha v. Nagendra*, 94 I. C. 880 : A. I. R. 1926 Cal. 855.

Divorce proceedings.—An order for attachment before judgment will not be made in divorce proceedings under the Indian Divorce Act (IV of 1869).—*Philips v. Philips*, 37 C. 613.

Effect of attachment before judgment.—See Notes to r. 10.

"Court may direct to furnish security."—The defendants were called upon under this rule to furnish security or to show cause why security should not be furnished. The Court also directed the defendants to show cause why the property should not be attached. The defendants, in order to show cause why security should not be furnished, and then showed cause; but the Sub-Judge, in order to show cause why the property should not be attached, and then showed cause; but the Sub-Judge was wrong; the security so given was not sufficient; the Court provided for under this rule and did not preclude the defendants from showing cause why no security should be furnished.—*Lallikar v. Lallikar*, 6 B. 613.

Section 145 applies to sureties under this rule.—*Babooram v. Hurkhoo Sing*, 7 W. R. 329.

The words "produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court.—*Chedi Lal v. Kuarji Dichit*, 17 A. 82.

The property to be attached and its value should be specified. An application under this rule should specify the property to be attached and the estimated value thereof and security can only be taken for producing and placing at the disposal of the Court such property or the value of the same or such portion thereof as may be sufficient to satisfy the decree.—*Hari Baksh v. Babu Lal*, 112 I. C. 295: A. I. R. 1923 Lah. 772.

Whether Court can extend time for the furnishing of the security.—Under its general powers the Court may, if necessary, extend the time for the furnishing of the security.—*Haji Mohamuddin & Co. v. The Eastern Japan Trading Co.*, 50 C. 215.

Extent of surety's liability after the decree of first Court is appealed against.—Where two persons stood sureties for production of property attached before judgment by the Court of first instance, the liability of the sureties is fully incurred by each of them jointly and severally as soon as the first Court passes a decree in favour of the plaintiff for a certain sum of money; and if the defendant after filing an appeal against that decree obtains a stay order on furnishing fresh security, and subsequently the appellate Court passed a decree for a large sum against the defendant, the sureties cannot contend that the decree of the first Court having been merged in the appellate decree they were not liable at all under the bond, or that they were responsible only for so much of the decree as was adjudged against the defendant by the first Court, or that their original liability had been extinguished by reason of execution having been stayed without their assent by the appellate Court on defendant's furnishing fresh security.—*Shek Suleman v. Shivram*, 12 B. 71. As to the liability of the surety when the suit is dismissed and appeal is made against the order of dismissal, see rule 9 *post* and notes thereunder.

Death of defendant does not operate as a discharge of the surety.—Where the defendant dies, pending the suit, and the cause of action . . . . . they are brought on the record, . . . . . as a discharge of the surety.— . . . . . 83: 19 Bom. L. R. 112.

Whether consent decree operates as a discharge of the surety.—A surety would be bound by a compromise decree if it be consistent with the obligation which the surety had undertaken to discharge; but where the plaintiff in a suit obtained attachment before judgment and a person stood surety under this rule and executed a security bond in Form 6 to Appendix F of the Code, and the plaintiff subsequently compromised with the defendants and agreed to receive the amount sued for in monthly instalments and a compromise decree was passed on those terms, the surety was discharged, because the compromise which was embodied in the decree was, not in the contemplation of the plaintiff and the surety when the latter became a surety.—*Mahomedalli v. Lazmibai*, 54 B. 118: 124 I. C. 227: A. I. R. 1930



Section 145 applies to sureties under this rule.—*Babooram v. Hurkhoo Sing*, 7 W. R. 329.

The words "produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court.—*Chedi Lal v. Kuarji Dicht*, 17 A. 82.

The property to be attached and its value should be specified. An application under this rule should specify the property to be attached and the estimated value thereof and security can only be taken for producing and placing at the disposal of the Court such property or the value of the same or such portion thereof as may be sufficient to satisfy the decree.—*Hari Bakhsh v. Babu Lal*, 112 I. C. 295 : A. I. R. 1928 Lah. 772.

Whether Court can extend time for the furnishing of the security.—Under its general powers the Court may, if necessary, extend the time for the furnishing of the security.—*Haji Mohamuddin & Co. v. The Eastern Japan Trading Co.*, 50 C. 215.

Extent of surety's liability after the decree of first Court is appealed against.—Where two persons stood sureties for production of property attached before judgment by the Court of first instance, the liability of the sureties is fully incurred by each of them jointly and severally as soon as the first Court passes a decree in favour of the plaintiff for a certain sum of money; and if the defendant after filing an appeal against that decree obtains a stay order on furnishing fresh security, and subsequently the appellate Court passed a decree for a large sum against the defendant, the sureties cannot contend that the decree of the first Court having been merged in the appellate decree they were not liable at all under the bond, or that they were responsible only for so much of the decree as was adjudged against the defendant by the first Court, or that their original liability had been extinguished by reason of execution having been stayed without their assent by the appellate Court on defendant's furnishing fresh security.—*Shek Suleman v. Shvram*, 12 B. 71. As to the liability of the surety when the suit is dismissed and appeal is made against the order of dismissal, see rule 9 post and notes thereunder.

Death of defendant does not operate as a discharge of the surety.—Where the defendant dies, pending the suit, and the cause of action survives against his legal representatives, and they are brought on the record, the death of the defendant does not operate as a discharge of the surety.—*Chandulal v. Jeshangbhai*, 41 B. 402 : 39 I. C. 83 : 19 Bom. L. R. 112.

Whether compromise decree operates as a discharge of the surety.—A surety would be bound by a compromise decree if it be consistent with the obligation which the surety had undertaken to discharge; but where the plaintiff in a suit obtained attachment before judgment and a person stood surety under this rule and executed a security bond in Form 6 to Appendix F of the Code, and the plaintiff subsequently compromised with the defendants and agreed to receive the amount due for in monthly instalments and a compromise decree was passed on those terms, the surety was discharged, because the compromise which was embodied in the decree was, not in the contemplation of the plaintiff and the surety when the latter became a surety.—*Mahomedali v. Laxmibai*, 54 B. 118 : 124 I. C. 227 : A. I. R. 1930



Bom. 122 : 31 Bom. L. R. 1442 (the word "may adjudge" as used in Form 6, App. F explained).

**Power of Small Causes Court to attach before judgment.**—See r. 13 below.

**Attachment before judgment in mortgage suit.**—An attachment before judgment may be granted in a suit on a mortgage.—*Jogmaya v. Baidyanath*, 46 C. 245 : 50 I. C. 924 ; *Rani Jotirmoyee v. Raghunath*, 3 P. 966 : (1925) Pat. 63 : 85 I. C. 94 : A. I. R. 1925 Pat. 291 ; *Mahammad Din v. Devi Dass*, 118 I. C. 446 : A. I. R. 1929 Lab. 402 ; *Shridhar v. Lakshman*, A. I. R. 1931 Bom. 329 : 33 Bom. L. R. 514.

**Attachment before judgment during pendency of application for leave to sue in forma pauperis.**—Where a plaintiff has applied for leave to sue in *forma pauperis*, a Court has no jurisdiction to pass an order of attachment before judgment under Or. XXXVIII, r. 5, C. P. Code, without determining whether the leave of the Court should be granted to the plaintiff to sue in *forma pauperis*.—*Purna v. Tara*, 21 C. W. N. 870 : 25 C. L. J. 159.

**Attachment before judgment during pendency of application for appointment of guardian.**—Pending the disposal of an application for the appointment of a guardian of a minor defendant in a suit, a conditional order, which simply prevents the minor's property from being alienated, cannot be said to be invalid merely because the proposed guardian subsequently comes and states that he is unwilling to act.—*Batchu Perraji v. Bachu Venkataratnam*, 106 I. C. 142 : A. I. R. 1928 Mad. 1.

**Clause (3).**—It is not competent to a Court to make an *ad interim* order for attachment under Cl. (3) of r. 5 of Or. XXXVIII, C. P. Code, of a debt payable to the defendant outside its jurisdiction by a person not resident within its jurisdiction.—*Surendra Nath v. Bansi Badan*, 22 C. W. N. 160 : 24 C. L. J. 533.

There is nothing in the language of S. 95, C. P. Code, which excludes conditional attachments of the class contemplated by Or. XXXVIII, r. 5 (3) and in such cases Courts may award compensation; and therefore even where no final order of attachment before judgment was passed but there was only a conditional order of attachment which was withdrawn under Or. XXXVIII, r. 6(2), the Court after the disposal of the suit may pass an order for compensation to the defendant under S. 95, C. P. Code, if the suit be dismissed.

**Forms.**—For form of attachment before judgment with order to call for surety, see App. F, Form No. 5. For form of surety for production of property; see App. F, Form No. 6.

**6. (1)** Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

**Attachment where cause not shown or security not furnished.**

r. 6.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit. [S. 485.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 485, C. P. Code, with some additions and alterations.

In sub-rule (2) the words "or make such other order as it thinks fit" have been added after the word "withdrawn." The other changes are merely verbal.

**"Property specified."**—This means the property specified by the plaintiff as required by r. 5 (2). Such property may be within or beyond the local limits of the jurisdiction of the Court. The words "*property within the jurisdiction of the Court*" which occurred in the penultimate para. of S. 483 of the old Code, have been omitted. The reason for the omission has been clearly explained in the following report of the Special Committee. "The Committee have omitted the words "*property within the jurisdiction of the Court*," as they have caused a conflict of decisions; and they think, as a matter of policy, there should not be the restriction these words suggest." The conflicting rulings referred to are —*Krishnasami v. Engel*, 8 M. 20; *Kedar Nath v. Seeva Veyana*, 1 C. L. R. 336; *Balaram v. Solano*, 8 B. L. R. 335; *Haji Jwa Nur Muhammad v. Abu Bakar*, 8 B. H. C. R. 29; in all these cases it was held that the property of the defendant which is not within the jurisdiction of the Court could not be attached before judgment. *Contra* in *Amara Veerayya v. Annamala Chetty*, 31 M. 502; *Ram Pertab v. Madho Rai*, 7 C. W. N. 216 and *In re Abraham*, 6 B. H. C. R. 170, where it has been held that the property of the defendant which is not within the jurisdiction of the Court can be attached before judgment. The Legislature adopting the views expressed in the latter cases has omitted the words above referred to, and has removed the restriction which existed under the old Code, in attaching property situate beyond the jurisdiction of the Court in which the suit is instituted.—See *Kanshiram v. Hindustan National Bank Ltd.*, 106 I. C. 809; A. I. R. 1928 Lah. 376. See also notes under r. 48 of Or. XXI.

**Conditional order of attachment before judgment.**—It is absolutely necessary that the Courts in attaching property of the defendant before judgment should strictly adhere to the procedure prescribed by the Code; and therefore before an order of attachment before judgment is passed, the Courts should issue an order for security, and it is only when the defendant has furnished security that the Court is satisfied that the defendant can pass an order for attachment; but a mere allegation that the defendant is likely to dispose of his property is vague and indefinite and wholly insufficient to justify the proceedings being taken.—*Kanshi Ram v. Hindustan National Bank Ltd.*, 106 I. C. 809; A. I. R. 1928 Lah. 376.

A conditional order of attachment before judgment under Or. XXXVIII, r. 6 of the C. P. Code cannot be passed until after the defendant has either failed to show cause why he should not furnish security or has failed to furnish security. A conditional order of attachment before judgment under Or. XXXVIII, r. 5 (3) cannot be made without an accompanying order under Cl. (1) directing the defendant to furnish security or to show cause.—*Abdul Karim v. Nur Mohammed*, 57 I. C. 907. Order XXXVIII, r. 6, Cl. (1) contemplates an order of attachment. Order XXXVIII, r. 6, Cl. (2) contemplates a conditional attachment made in terms of r. 5, Cl. (3). Where the Court issued notices upon the defendants to show cause why an attachment before judgment should not be made and at the same time directed the defendants not to part with the properties in any way: *held*, that the order was not in accordance with Or. XXXVIII, r. 5; *Mahendra Narain v. Gurudas*, 23 C. L. J. 392.

An attachment before judgment under this rule issued by a Court at the instance of a third party, prohibited the creditor from recovering, and the debtor from paying, the debt. *Held*, that an order in those terms was not an order staying the institution of a suit within the meaning of S. 15 of the Limitation Act.—*Beti Maharani v. Collector of Etawah*, 22 I. A. 31: 17 A. 198 (P. C.) (affirming 14 A. 162).

"The Court may order.....be attached."—Where an order is passed to furnish security or to show cause why security should not be furnished within a date fixed, and no security is furnished, the Court would have first to determine judicially that there had been a failure before drawing up a writ of attachment.—*Sourendra v. Tarubala*, 31 C. W. N. 432: 101 I. C. 9: A. I. R. 1927 Cal. 354; and an unconditional attachment can only be ordered when the defendant fails to comply with an order made under rule 5.—*Jai Dev v. Jai Singh*, 107 I. C. 276: A. I. R. 1928 Lah. 445.

Application to vacate *ex parte* order for attachment before judgment not pressed.—Whether a subsequent suit for damages lies in such a case.—An application was made to vacate an *ex parte* order for attachment before judgment but it was not prosecuted and no such order was obtained. On the other hand monies deposited under the order of attachment were taken by the plaintiffs in execution of the decree which they obtained. In a suit brought by the defendant for damages for malicious attachment, *held*, that the righteousness or otherwise of the order of attachment could not be gone into in the present suit, and so long as the order itself stood, there was no cause of action for the said suit.—*Satis Chandra v. Lala Munilal*, 36 C. W. N. 447.

Appeal.—Under Or. XLIII, r. 1 (g), an appeal lies from an order under this rule.—*Jhanday Lal v. Sarman Lal*, 21 A. 291. See also *Mir Ali v. Behari Lal*, 21 B. 273; *Haji Mohamuddin & Co. v. The Eastern Japan Trading Co.*, 50 O. 215: A. I. R. 1923 Cal. 639.

When in response to a notice issued under r. 5, the defendant appears and shows cause and the Court accepts his contention, the order passed is under r. 6 (2) and from such an order an appeal lies under Or. XLIII, r. 1.—*Chokhey Lal v. Sri Kishen*, 30 A. L. J. 223: A. I. R. 1932 All. 269. Where in an application for attachment the Court ordered notice and after enquiring an order for attachment or security was not passed but the defendant

gave an undertaking not to alienate certain immoveable properties and the petition was closed, it was held that there was an order under Or. XXXVIII, r. 6 and the same was appealable and no revision would lie from such an order.—*Seetharama v. Sellathammal*, (1929) M. W. N. 125.

Form.—For form of attachment before judgment, see App. F, Form No. 7.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. [S. 486.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 486, C. P. Code, 1882, with the addition of the words "*save as otherwise expressly provided*" in the beginning.

Procedure for levying attachment when the property is outside the local limits of the Court.—If the property of the defendant sought to be attached is outside the local limits of the jurisdiction of a High Court, the proper course for the Court to follow is to transmit the order for attachment before judgment to the Court in whose jurisdiction the property is situated, with a request that that Court should levy the attachment. It should not appoint the plaintiff's solicitor's clerk a special bailiff for the purpose of levying attachment.—*Gajanan v. Bhaskar*, 28 Bom. L. R. 380 : 94 I. C. 116 : A. I. R. 1926 Bom. 278.

Presumption as to whether an attachment has been legally effected.—When there is no positive evidence that the attachment is not effected in accordance with law, the presumption that attaches to official acts as regards their regularity cannot be ignored.—*O. L. Kiernander v. Benmadhab*, 58 C. 598 : 134 I. C. 561 : A. I. R. 1931 Cal. 763.

An order prohibiting a person from withdrawing a sum of money from Court on the application of a creditor who has filed a suit against him may amount to an attachment before judgment even though it is worded in the form of an injunction.—*Maung Ba Kin v. Ma Pwa Thin*, 116 I. C. 473 : A. I. R. 1929 Rang. 94.

Attachment of debt.—A Court attaching a debt, either before judgment or in execution, has no power to enquire into the truth of the existence of the alleged debt.—*Aliwar v. Subramania*, 61 M. L. J. 863 : 34 L. W. 906.

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money. [S. 487.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 487, C. P. Code, 1882, with the change of the word "where" for "if," and the addition of the words "payment of" before the word "money."

Section 281, C. P. Code, 1882 (Or. XXI. r. 61), has not been applied to claims to property attached before judgment for this rule which prescribes the manner of investigation is silent as to the result.—*Turner v. Pestonji*, 20 B. 403, *Mir Ali v. Behari Lal*, 21 B. 273.

**Claim to property attached before judgment.**—An assignee of a decree which is attached before judgment in another Court may prefer a claim to the latter for withdrawal of the attachment and the Court ought to withdraw it.—*Sadagopachariar v. Raghunatha*, 33 M. 62.

Order XXI, r. 63, C. P. Code, applies to orders on claims preferred to property attached before judgment.—*Mallikharjuna v. Mattiapalli*, 41 M. 849. (F. B.) 35 M. L. J. 231 (41 M. 23 overruled). 6 L. W. 518; *M. S. M. M. Ghettyar Firm v. Maung Sein*, 9 R. 561; A. I. R. 1931 Rang. 279.

Order XXXVIII, r. 8 simply provides for the manner of investigation into claims to properties sought to be attached before judgment. An order passed is not final subject to a suit as provided in Or. XXI, r. 63, and a party against whom an order under this rule is passed in a claim case is not precluded from asserting his right to the property in any other proceedings.—*Ramanamma v. Bathula*, 5 L. W. 704 39 I. C. 863 (37 A. 575, *dissented from*).

**Investigation of the claim.**—The question of possession is the only question to be considered by the Court in an enquiry under this rule; but where it is impossible to determine the question of possession without going into the question of title, the Court has jurisdiction to go into the question of title also.—*Sunder Koer v. Janki Das*, 119 I. C. 555; A. I. R. 1929 Pat. 747.

The procedure to be followed in investigation of claims under Or. XXXVIII, is the same as the procedure to be followed under Or. XXI, r. 53 and the subsequent sections of the Code. Order XXI, r. 59 of the Code indicates the scope of the enquiry under r. 53 and it limits the enquiry to this, that the claimant must show that at the date of the attachment he had some interest in or was possessed of the properties attached.—*Sashi Dulal v. Nanda Lal*, 48 C. L. J. 594; 115 I. C. 268; A. I. R. 1929 Cal. 162.

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed. [S. 488.]

Removal of attachment when security furnished or suit dismissed

## COMMENTARY.

This rule corresponds to S. 488, C. P. Code, 1882, with some verbal alterations only. The words "is made" have been substituted for the words "is passed"; and the words "to be withdrawn" for the words "shall remove."

**Termination of attachment when suit is dismissed.**—The liability of the surety ceases as soon as the suit is dismissed and it is obligatory upon

the Court to withdraw the attachment before judgment upon the dismissal of the suit and the reversal of the judgment of dismissal on appeal does not operate to revive the attachment which had been cancelled under this rule; and so a decree-holder is not entitled to bring the properties to sale without a fresh attachment.—*Sasirama v. Meherban*, 13 C. L. J. 243: 9 I. C. 918; *D. Manackjee v. R. M. N. Chettyar Firm*, 5 R. 492: 105 I. C. 540: A. I. R. 1927 Rang. 310; *Sailesh v. Joy Chandra*, 87 I. C. 756: A. I. R. 1925 Cal. 1147. See *Maung Ba Kin v. Ma Pwa Thin*, 116 I. C. 473: A. I. R. 1929 Rang. 94. See also *Seetha Ammal v. Narayana Ayyangar*, 113 I. C. 63: A. I. R. 1928 Mad. 976: (1928) M. W. N. 70.

But the words in the section requiring the Court to remove the attachment is not intended to be more than directory, or in other words, not so imperative as to render before judgment a perpetual attachment in the absence of an order removing the same; and so, even where an attachment before judgment was not withdrawn after the dismissal of the suit by the trial Court and the suit being subsequently decreed on appeal, the decree-holder applied for the sale of the judgment-debtor's property without fresh attachment and the property was sold under Court's order, and thereafter the judgment-debtor objected to the confirmation of the sale, it was held that there was no regularly perfected attachment which was an essential preliminary to the sale, and as such the sale was *de facto* void.—*Ram Chand v. Pitam Mal*, 10 A. 506: (1888) A. W. N. 195. In *Abdul Rahman v. Amin Sharif*, 45 C. 780, 22 C. W. N. 927: 44 I. C. 229, it has been held that a Court should when dismissing a suit at the same time make the order directing the attachment before judgment to be withdrawn, but even if the order is not made, on the dismissal of the suit the attachment before judgment falls to the ground, whether an appeal is filed or not. See also *Chindha v. Chhaganlal*, 115 I. C. 414: A. I. R. 1928 Bom. 545: 30 Bom. L. R. 1488, in which it has been held that an attachment obtained before judgment must be considered to have been withdrawn when the suit is dismissed. The Madras High Court at first dissented from this view in *Namaqiri v. Muthu Vellappa*, 111 I. C. 887: A. I. R. 1928 Mad. 940: (1928) M. W. N. 122.

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on the dismissal of a suit for default, no formal order had been passed withdrawing the attachment before judgment and the dismissal of the suit was subsequently set aside and the suit restored after a considerable interval, the order of attachment continued in force. But later on a Full Bench of the same High Court overruled this decision and held that no formal order withdrawing the attachment is necessary when a suit is dismissed because

does not revive *ipso*

—*Balaraju Chettiar*

A. I. R. 1930 Mad.

514: 58 M. L. J. 675 It has also been held in this case that this rule does not throw any burden upon the defendant whose property is attached, to apply to the Court to withdraw the attachment order and the duty is one thrown directly on the Court and no application from the party is necessary. See also *Pindi v. U Thaw Ma*, 9 R. 472: 134 I. C. 748: A. I. R. 1931 Rang. 231.

**Effect of abatement of suit.**—Where a suit abates and comes to an end, the attachment before judgment dies with it; and in this respect, there is

no difference between dismissal of a suit and abatement of a suit; and the restoration of the suit after setting aside the abatement does not revive the attachment before judgment.—*Jyotish v. Har Chandra*, 47 C. L. J. 282 : 109 I. C. 164 : A. I. R. 1928 Cal. 234.

Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. [S. 489.]

### COMMENTARY.

This rule exactly corresponds to S. 489, C. P. Code.

**Effect of attachment.**—The effect of an attachment of a property under the C. P. Code, whether made before or after decree is the same; and any alienation of property attached before judgment, is therefore void.—*Raj Chunder v. Isser Chunder*, Bourke, O. C. 139. See also *Ganu Singh v. Jangi Lal*, 26 C. 531, and *Sewadit Roy v. Sree Canto*, 33 C. 639 : 10 C. W. N. 634, where it has been held that the object and effect of attachment before judgment is simply to safeguard the property attached so as to enable the plaintiff to realize the amount of his decree if he should get one. A plaintiff decree-holder who has attached before judgment has not by reason of such attachment or process identical thereto, any right to be treated preferentially to other judgment-creditors. There must be a realization in execution to give rights of priority.

An attachment before judgment does not by itself create any interest in the property attached.—*Madhusudan v. Rash Mohan*, 21 C. L. J. 614 : *Jogendra v. Monmota*, 16 C. L. J. 566; nor does it operate as an injunction.—*Munsar v. Abhoya*, 21 C. W. N. 1147.

By the attachment before judgment the attaching creditor does not obtain any lien or charge on the attached property and acquires no interest in the equity of redemption and therefore *a fortiori* he cannot hand over any such charge to the purchaser at the auction, nor can he retain in himself the right to redeem by purchasing the property himself at such auction.—*O. L. Kierander v. Bentmadhab*, 58 C. 598 : 134 I. C. 561 : A. I. R. 1931 Cal. 763.

Where a defendant furnished security by paying money into Court in obedience to an order under Or. XXXVIII, r 5, such payment will not create a charge in favour of the plaintiff.—*Errikulapa v. Official Assignee of Madras*, 39 M. 903. But see *Janaki v. Ramaswami*, 11 L. W. 5.

An attachment before judgment has no effect against the Official Assignee, who holds the property of the judgment-debtor under a vesting order of Court made before the order for attachment was passed.—*Miller v. Mon Mohan*, 7 C. 213 : 8 C. L. R. 213. See also *Bank of Bengal v. Newton*, 12 B. L. R. App. 1; *Jaya Ramji v. Jadooji Natha*, 1 B. H. C. R. 234, and *Lata Ramjee v. Jadooji Nather*, 2 B. H. C. R. 150.

When a vesting order has been made, after attachment and before decree, the title of Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by sale.—*Sadayappa v. Ponnappa*, 8 M. 554; *Shib Kristo v. Miller*, 10 O. 150 (F. B.); 13 O. L. R. 433; *Turner v. Pestonji*, 20 B. 403; *Kristnaswamy v. Official Assignee of Madras*, 26 M. 673, where all the cases on the point have been referred to, discussed and explained. See *Damodar Das v. Official Receiver*, 117 I. C. 145. See also notes under S. 64.

In attachment before judgment, the Court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming at the time of pronouncing of the decree to abide whatever order it shall make about it.—*Java Ramji v. Jadhavji Natha*, 1 B. H. C. R. 224; *Lava Ramjee v. Jadooiji Nather*, 2 B. H. C. R. 150.

Where in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution.—*Ramanayya v. Rangappayya*, 17 M. 144.

Attachment before judgment not to affect rights of persons not parties to the suit.—Property transferred to a stranger a few days before the actual attachment before judgment in a suit, would not be affected by the attachment, and such a transfer cannot be said to be contrary to such attachment.—*Ohindha v. Chhaganlal*, 115 I. C. 414; A. I. R. 1928 Bom. 545; 30 Bom. L. R. 1488. There is no reason to hold that the provision in this rule is limited to rights *in rem*; and where an agreement to sell had been executed before the attachment before judgment, the purchaser has a right to have the contract to sell specifically performed and under Or. XXXVIII, r. 10 that right is not affected by the attachment.—*Madan v. Rebati*, 23 C. L. J. 115. See *Deokinandan v. Jawad Hussain*, 106 I. C. 356; A. I. R. 1928 Pat. 199. But in *Taraknath v. Sanat Kumar*, 33 C. W. N. 805; A. I. R. 1929 Cal. 494, it has been held that a contract for sale entered into before attachment would not create any interest or charge on the property which would prevail over the attachment. In this case different views were taken by Cumming, J. and Pearson, J. as to the basis of the decision in *Madan v. Rebati*, noted *ante*.

Where a judgment-debtor's interest in the joint family property is attached before judgment, and after such attachment and decree he dies, his co-parcenary interest in the property passes by survivorship to the other members of the family, the decree-holder is not entitled to have his share sold in execution of the decree.—*Subrao v. Mahadevi*, 38 B. 105; 21 I. C. 330; 15 Bom. L. R. 848; *Sunderlal v. Raghunandan*, 3 P. 250; A. I. R. 1924 Pat. 465; 83 I. C. 413. But a contrary view was taken by the Madras High Court in *Sankaralinga v. Official Receiver*, 49 M. L. J. 616; A. I. R. 1926 Mad. 72; 92 I. C. 504, where it was held (following 5 C. 148 (P. C.) and 26 M. L. J. 517) that an attachment before judgment has the effect of preventing the interest of the deceased judgment-debtor from passing by survivorship in a case where the judgment-debtor dies after decree; though in case the



judgment-debtor dies before decree, his interest passes by survivorship to other members of the family.—*Muthaya Chettiar v. Lakshmanan*, (1931) M. W. N. 1015.

Where a person to whom a decree has been mortgaged has been appointed as a Receiver in a suit upon the mortgage, his right to execute his decree as a Receiver is not affected by the fact that the decree has, subsequent to his appointment as a Receiver, been attached before judgment by another creditor of the mortgagor.—*Nadirshaw v. Purshottam Das*, 118 I. C. 694; A. I. R. 1929 Bom. 279; 31 Bom. L. R. 320. An attachment before judgment does not affect the rights of a mortgagee of immovables—*Ebrahim Haji v. Noor Mahomed*, 8 B. 494; 128 I. C. 839; A. I. R. 1931 Rang. 49.

Attachment before judgment not to bar rights of other decree holders.—Attachment before judgment does not prevent the property from being attached and sold in execution of any other decree against the same judgment-debtor.—*Bishesar Das v. Ambika*, 37 A. 575; *Sewdnt v. Sree Ganto*, 33 C. 639, 643; 10 C. W. N. 634; *Madhusudan v. Rash Mohan*, 21 C. L. J. 614; *Harnandan v. Pran Nath*, (1921) Pat. 205; 61 I. C. 922; *Fishnu Dhonddev v. Rampratap*, 45 B. 360; 22 Bom. L. R. 1407; *Cassim v. Abdul Kader*, 91 I. C. 93; A. I. R. 1926 Rang. 85.

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree.

[S. 490.]

## COMMENTARY.

Alterations and their effect.—This rule corresponds to S. 490, C. P. Code, 1882, with some additions and alterations. The words "a decree is subsequently passed" have been substituted for the words "a decree is given"; and the words "upon an application for execution of such decree to apply for a re-attachment of the property," have been substituted for the words, "to re-attach the property in execution of such decree," which occurred in the old section. By the addition of the words "upon an application" it has now been made clear, that after obtaining a decree, the plaintiff must apply for execution like any other creditor under S. 236, C. P. Code, 1882 (Or. XXI, r. 11 (2)). The above amendment has been made adopting the law as laid down in 12 B. 400 and 33 C. 639; 10 C. W. N. 634, noted below.

Order XXXVIII, r. 9 applies only to what happens before decree; and what happens after the decree is dealt with by this rule.—*Shrinivas v. Hari Sabaji*, 53 B. 543; 119 I. C. 769; A. I. R. 1929 Bom. 321; 31 Bom. L. R. 652.

Reattachment.—It is only when a decree is subsequently given in favour of the plaintiff that reattachment in execution of that decree becomes unnecessary. But when the suit is dismissed, attachment before judgment terminates with the dismissal of the suit; and if the suit is subsequently

decreed on appeal, a fresh attachment is necessary for the validity of the sale in execution of that decree.—*Ram Chand v. Pitam Mal*, 10 A. 506.

When property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment which continues in force.—*Heramba Nath v. Sourendra Nath*, (1919) Pat. 465: 53 I. C. 20. See *Shivlal v. Taniram*, 113 I. C. 353: A. I. R. 1928 Bom. 444, and when there has been a decree followed by an execution petition the property attached before judgment is treated as "property attached in execution" within the meaning of Or. XXI, r. 57, and hence upon the dismissal of such an application for execution on account of the decree-holder's default in taking steps to enable the Court to proceed further with the execution, the attachment ceases.—*Meyyappa Chettiar v. Chidambaram*, 47 M. 483 (F. B.): A. I. R. 1924 Mad. 494: 79 I. C. 144: 46 M. L. J. 415: 34 M. L. T. 118 (1924) M. W. N. 392. (For other cases on this point see notes to Or. XXI, r. 57, *ante*).

Where the decree-holder applies for execution by bringing the attached property before the Court, the attachment is not dismissed for default the attachment comes to an end under the provisions of Or. XXI, r. 57, and the decree-holder merely endeavours to execute the decree by sale of moveable property only and not of the immovable property attached, the attachment before judgment will not come to an end by the dismissal of the application for execution; and further, the decree-holder's request that he may be given a rateable share in the proceeds of the execution of a decree got by another decree-holder, does not amount to an application by the decree-holder for sale of the attached property.—*Shrinivas v. Hari Sabaji*, 53 B. 543: 119 I. C. 769: A. I. R. 1929 Bom. 321: 31 Bom. L. R. 652.

Under S. 490 (r. 11), read with S. 273 (Or. XXI, r. 53), where the property of a judgment-debtor attached before judgment is brought into Court by stress of the attachment, and the creditor will be entitled, without application, to a rateable share in the proceeds of the sale of such property under S. 295, C. P. Code, 1882 (S. 73).—*Amara Veerayya v. Annamala Chetty*, 31 M. 502: 4 M. L. T. 348.

A decree-holder who has attached before judgment is not entitled under S. 295, C. P. Code, 1882 (S. 73), to a rateable distribution of the assets unless, subsequently to his decree, he has applied for execution under S. 235, C. P. Code, 1882, Or. XXI, r. 11 (2). Section 490, C. P. Code, 1882 (r. 11), does not by implication confer upon a decree-holder who has attached before judgment, the right to come in under S. 295 (S. 73) and share in the distribution of the sale-proceeds of the property which he has attached.—*Pallanji Sharpurji v. Jordan*, 12 B. 400 (referred to in *Sawdut Roy v. Sree Canto*, 33 C. 639: 10 C. W. N. 634). See also *Arunachellam v. Hajee Sheik Meera*, 34 M. 25.

An attachment before judgment, though it gives a security, does not create any charge on the property attached, which remains that of the defendant. Nor does a decree following such attachment place *ipso facto* in a better position the creditor, who must apply for execution from which

he is not exempted by S. 490, C. P. Code, 1882 (r. 11). On such application for execution, the attachment before judgment enures and becomes an attachment in execution. But neither attachment before judgment nor process incidental thereto, such as sale of goods attached prior to decree under S. 269, C. P. Code (Or. XXI, r. 43), gives a decree-holder applying for execution any right to preferential treatment over another judgment-creditor who has also before the date of such application himself taken execution of his decree.—*Sewdut Roy v. Sree Ganto*, 33 C. 639 : 10 C. W. N. 634.

Where another creditor attached and brought to sale the property attached before judgment, and the judgment-debtor paid the amount of the second decree and the sale was set aside, it was held that the attachment before judgment revived and the first decree-holder could bring the property to sale in execution without a fresh attachment.—*Firm named Chaitanya v. Jagat Chandra*, 44 C. L. J. 553 : 99 I. C. 895 : A. I. R. 1927 Cal. 240.

The effect of this rule is to put a person attaching before judgment in the same position as if he had attached after decree, if a decree is passed in his favour after attachment before judgment.—*Ramaswamy v. Chakrapany*, 17 M. L. J. 489 : *Ram Piari Lall v. Nathu Ram*, 2 P. L. T. 719 : 6 P. L. J. 332.

An attachment applied for before judgment but actually effected after decree has still the force of an attachment before judgment under Or. XXXVIII, and the provisions of Or. XXXVIII do not lay down imperatively that the attachment should be actually effected before judgment.—*Venkatasubbiah v. Venkata Seshaiya*, 42 M. 1 : 48 I. C. 232 : 35 M. L. J. 397.

Objection by defendant that property attached before judgment is not saleable.—The fact that a defendant did not raise any objection under S. 60 on the ground that the property is not saleable when it was attached before judgment does not preclude him from raising that objection when application for execution of the decree is made after a decree is subsequently passed in the suit.—*Basiram v. Kattyayani*, 38 C. 443.

Reattachment does not operate as waiver of the attachment before judgment.—Reattachment in execution of a decree though no reattachment is necessary under this rule, is not by itself a waiver or abandonment of the attachment before judgment unless there was an express or manifest abandonment.—*Shibnath v. Sheikh Saberuddin*, 56 C. 416 : A. I. R. 1929 Cal. 465.

**12.** Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce. [New.]

## COMMENTARY.

**History.**—"The rule represents the views of the Government of India, as expressed in the former Bill."—*See the Report of the Special Committee.*

**Compensation for improper arrest or attachment.**—Section 491, C. P. Code, 1882, which contained provisions for compensation for improper arrests and attachments has been relegated to the body of the Code as S. 95, and all the cases bearing on the point have been noted under that section. Besides the cases noted under S. 95, see also the following cases:—

An order under S. 483, C. P. Code, 1882 (Or. XXXVIII, r 5), where the application has been made on insufficient grounds must necessarily cause damages to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable. *Quare*—Whether it is necessary to prove that the defendant acted maliciously in the above case.—*Palani Kumarasamia v. Udayar Nadan*, 32 M. 170 · 18 M. L. J. 490.

Pending a civil suit against him, the defendant was arrested before judgment, but was afterwards released. He then made a claim of Rs. 25,000 against the plaintiff as damages for his wrongful arrest and applied to include in the suit his counterclaim of Rs. 25,000. *Held*, that the question which the defendant desired to be tried was not one which ought to be tried by counterclaim.—*Magoomal Jethanand v. Hamid Bin Ali*, 10 Bom. L. R. 1002.

No appeal will lie from an order under S. 491, C. P. Code, 1882 (S 95), granting compensation to a person against whom an attachment has been obtained upon insufficient grounds.—*Leknath v. Amir Singh*, 28 A. 81 (*Narasinga v. Govinda*, 24 M. 62 followed).

Section 104 (g) of the present Code has given an appeal from an order under S. 95. The cases (28 A. 81, and 24 M. 62) have been overridden by S. 104 (g).

Small Causes  
Court not to attach  
Immoveable pro-  
perty.

**13.** Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property.

### COMMENTARY.

**Scope.**—This is a new rule added by the Amending Act I of 1926 to set at rest the previous conflicting decisions as to whether a Small Causes Court had power to make an order for the attachment of immoveable property. Its effect is retrospective because the said Act is a declaratory act and not a repealing or amending Act and a right to apply for the attachment is a processual right, and so the usual presumption that an Act is not retrospective does not apply; and an *interim* order of attachment before judgment of a Small Cause Court before the passing of the Act which was made subsequently to the coming into force of the Act is void.—*Muthu Kr. Ayyaswami*, 113 I. C. 416: A. I. R. 1928 Mad. 1173: 55 M. L. J. 340. See notes of S. 7, C. P. Code, ante.

# ORDER XXXIX.

## TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

### TEMPORARY INJUNCTIONS.

1. Where in any suit it is proved by affidavit or otherwise—

Cases in which temporary injunction may be granted

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders. [S. 492.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 492, C. P. Code, 1882, with some additions and alterations.

The word "*where*" has been substituted for the word "*when*" in the beginning.

In clause (b), the word "*intends*" has been substituted for the words "*is about,*" and the words "*with a view*" have been substituted for the words "*with intent*" which occurred in Cl. (b) of the old section.

In the last para. the words "*or make such other order,*" have been substituted for the words "*or give such other order*" which occurred in the old section; and the words "*until the disposal of the suit or until further orders,*" have been added, after the words "*as the Court thinks fit.*"

**Injunctions.**—An injunction is an order or command preventing a party from doing that which he is under a legal obligation not to do. Injunctions are of two kinds, *temporary* and *perpetual*. Temporary injunctions are such as are to continue until a specified time, or until further order of the Court. They may be granted at any period of a suit and are regulated by the Code of Civil Procedure (S. 94 and Or. XXXIX, rr. 1 and 2). The object of the temporary injunction is to prevent mischievous malicious waste, unlawful alienation, fraudulent removal, or disposal or wrongful seizure in execution of the property in dispute pending the trial of the suit, to preserve the property in dispute in *status quo* until

the further hearing of the case or until further order; it is merely provisional in its nature and does not conclude a right; and it may be dissolved at any time under S. 95 and Or. XXXIX, r. 4 of the C. P. Code, on defendant's showing sufficient cause to the satisfaction of the Court against the order granting the injunction. Before granting a temporary injunction it must be proved to the satisfaction of the Court that unless the defendant is immediately restrained by an injunction, irreparable loss or damage will be caused to the plaintiff, during the pending of the suit. A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. It is regulated by Ss. 55-57 of the Specific Relief Act (I of 1877).

**Principles governing temporary injunctions.**—The effect and object of an *interim* injunction is merely to keep matters in *status quo* until the final disposal of the suit, and the principles on which such injunction will issue or will be continued pending the final disposal of the suit are well settled. The person who seeks the aid of the Court in that behalf must, as a rule be able to satisfy the Court on three points: (1) that there is a serious question to be tried at the hearing, and there is a probability that he will be entitled to the relief sought by him or in other words, that he has a *prima facie* case to go to trial, (2) that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial, and (3) that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it.—*Daily Gazette Press Ltd. v. Karachi Municipality*, 127 I. C. 690: A. I. R. 1930 Sind 237. This *ad interim* injunction is merely provisional in nature and it does not conclude or purport to conclude a right.—*The Hindu Panchayat of Laki v. The Mahomedan Community of Laki*, A. I. R. 1923 Sind 82: 21 S L R. 368. The granting of such an injunction under the powers conferred by this rule is a matter of discretion. True, it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion.—*Per White, C. J. in Subba Naidu v. Haji Badsha*, 26 M. 168.

It should not be lightly granted because it would be a serious thing if the persons in possession were restrained from making use of the property merely because a suit has been instituted with reference to the property. It is only in cases where property, which it is essential should be kept in its existing condition during the pendency of the suit, is in danger of being wasted, alienated or damaged that the Court ought to interfere so as to restrain persons who may turn out in the final event of the litigation to be the actual owners of the property from proper enjoyment and possession of it.—*Begg Dunlop & Co. v. Satish Chandra*, 46 C. 1001: 23 C. W. N. 677: 29 C L J. 584. See *Lalbharethi v. Panchayat Akhada*, 110 I. C. 621.

The general principle applicable to a case of *interim* injunction is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed.—*Bishnu Prasad v. Sashi Bhusan*, A. I. R. 1923 Pat. 133.

The Court, in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immovable property in *status quo*.—*Gomes v. Carter*, 1 Ind. Jur. N. S. 411; *Begg Dunlop & Co. v. Satish Chandra*, 46 C. 1001: 23 C. W. N. 677: 29 C. L. J. 584; *Krishna Chandra v. Hem Chandra*, 21 C. L. J. 462: 29 I. C. 855; *Doherty v. Allman*, 3 App. Cas. 709; *Subba v. Haji Badsha*, 26 M. 168, 175; *Alloh Din v. Shankar Das*, 66 I. C. 599; *Kanshi Ram v. Sharf Din*, A. I. R. 1922 Lah. 356: 66 I. C. 161; *Kenneth Arthur Hill v. Ranjan Baydhan*, 75 I. C. 859.

The withdrawal of a relief as to permanent injunction would not always preclude the plaintiff from obtaining a temporary injunction of a like nature because the other reliefs asked for in the suit may be sufficient for the purpose.—*Nandalal v. Kalipada*, 36 C. W. N. 290: 54 C. L. J. 317.

A person who seeks the aid of the Court by way of interlocutory injunction must as a rule be able to satisfy the Court (1) that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that he will be entitled to relief, (2) that the Court's interference is necessary to protect such person from that species of injury which the Court calls irreparable before his legal right can be established upon trial, and (3) that the comparative mischief or the inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise by granting it.

Thus when a mortgagee or attaching creditor is proceeding to sell the right title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases and all that the Court might do *ex maseura cautela* is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit.—*Ismail v. Tayaballi*, A. I. R. 1929 Sind 182.

In a suit by sons for partition of property by their father with whom they form a joint family, a temporary injunction can be granted to the plaintiff to restrain the defendant from recording a finding as to whether the plaintiffs are entitled to contest the compromise made by their father on the ground that it was not *bona fide*.—*Ram Rakhi v. Brij Bhusan*, 110 I. C. 118: A. I. R. 1938 Lah. 235: 29 Punj. L. R. 50.

In a suit by sons for partition and declaration that the debts incurred by their father were illegal and immoral, if the sons applied for a temporary injunction to stop the sale threatened by some of the creditors, the chief ground for granting or refusing an injunction is whether, apart from considerations of balance of convenience and inconvenience, the plaintiffs have or have not a *bona fide* claim, and in deciding this, it is inevitable that the Court should pre-judge the merits of the case to a certain extent.—*Vithal v. Dawoo*, 127 I. C. 345: A. I. R. 1931 Nag. 106.

Where it is shown to the satisfaction of the Court that the defendant is in possession of property which is likely to endanger or make away with any property in dispute in the suit, the Court in such a case ought to issue an injunction to the defendant

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to refrain from the particular act complained of, and, in case of necessity, appoint a receiver or manager of so much of the property only as is in dispute.—*Joy Narain v. Shib Persad*, 6 W. R. Misc. 1. See also *Mun Mohinee v. Ichamoyee*, 13 W. R. 60.

The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute and ceases when the suit comes to an end. An injunction in respect of property cannot be maintained after a claim is dismissed or pending an appeal.—*Moheooddeen v. Ahmed Hossain*, 14 W. R. 384.

A Civil Court has no right to issue an injunction which would have the effect of staying proceedings in a Criminal Court.—*Munni Begum v. Dooli Chand*, 2 I. C. 266.

The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed, is that, while in either case, it must be shown that property should be preserved from waste or alienation, in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while, in the latter case a good *prima facie* case has to be made out.—*Chandidat Jha v. Padmanand Singh*, 23 C. 459; *Gurusami v. Chinna*, 10 L. W. 551; 53 I. C. 760. See also *Nasarvanji Cowasji Arjani v. Shahjadi Begam*, 24 Bom. L. R. 378.

No Court would grant an injunction against persons residing outside its jurisdiction and not subject to its jurisdiction in case, where there would be no means of enforcing the order. But where the acts complained of are acts taking place within the Court's jurisdiction and the party although a resident outside the Court's jurisdiction appears in the suit and submits personally to the jurisdiction of the Court (not under protest or to question the Court's jurisdiction) the Court has power to grant an injunction against him. Before granting a temporary injunction the Court must be satisfied in the first instance that the plaintiff applicant has a fair question to raise as to the existence of the rights alleged and further that the defendants have infringed or are threatening an infringement of these rights.—*Maharaj Bahadur Singh v. Hukum Chand*, 71 I. C. 11; A. I. R. 1923 Pat. 209; 4 P. L. T. 48.

A obtained a decree against B and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which C a (Hindu) was jointly entitled. On A's proceeding to execute his decree, C brought a suit alleging that A had obtained no title under his purchase, and praying for partition of the property and for an *interim* injunction to restrain A from executing his decree pending the partition suit. The Court granted the prayer.—*Anant Nath v. Mackintosh*, 6 B. L. R. 571.

The plaintiffs, being in possession of a dock used for docking and repairing vessels, and being threatened by the defendant with an ejectment suit, sued the defendant for specific performance of the contract and for an injunction to restrain him from ejecting them until the completion of the repairs of their two vessels. Both parties filed contradictory affidavits. Held, that, looking into the inconvenience of allowing the same matter to



be litigated simultaneously in different Courts between the same parties, an *interim* injunction may issue although there is a contradiction on the facts.—*Moran v. River Steam Navigation Company*, 14 B. L. R. 352.

The plaintiffs, who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage, to him of that share, and to set aside the deed of mortgage, on the ground that the mortgagors to the defendant had no interest in the property at the time of their mortgage to him (defendant). The plaintiffs applied for an *ad interim* injunction and the Court granted the application.—*Rup Lal v. Mahima Chunder*, 5 B. L. R. 254; *Sree Narain v. Miller*, 5 B. L. R. 254-note.

... In a suit to restrain the defendant from using the plaintiff's alleged trade mark, the plaintiff applied for an *ad interim* injunction. Held, that the plaintiff's right to an *ad interim* injunction depended on his making out a strong if not an overwhelming *prima facie* case.—*Reddaway & Co. v. Schroder Smidt & Co.*, 8 C. W. N. 151.

The Court has to be satisfied that the applicant has a *prima facie* case, and further that the protection of his interest requires the issue of a temporary injunction.—*Vathiar Ramanuja v. Aiyanaachariar*, 23 M. L. J. 316; *Kalidas v. Probal Chandra*, 18 I. C. 394. See also *Sant Lal v. Ishar Das*, 46 P. L. R. 1919; 51 I. C. 108; *Begg Dunlop & Co. v. Satish Chandra*, 46 C. 1001; 23 C. W. N. 677; 29 C. L. J. 584; *Sundar Singh v. Ramsarandas*, 5 L. L. J. 262; *Upendra Nath v. Union Drug Co. Ltd.*, 43 C. L. J. 405; 95 I. C. 667; A. I. R. 1926 Cal. 837.

In a suit for a permanent injunction, a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to denial of justice to the applicant.—*Gunabala v. Hemnalini*, 43 I. C. 24.

The defendant company acting under a *bona fide* claim of right concerning already finished constructing a declaration of their undertaken injunction restraining the defendant company from interfering with the same and also applied for a temporary injunction. The first Court granted the temporary injunction. The High Court set aside the order granting the temporary injunction on the ground that the balance of convenience was in favour of the defendant company being allowed to continue the mining operations, the plaintiff having stood by and allowed the defendant to spend a considerable sum of money. *Principles on which temporary injunction should be granted pointed out.*—*Singaram Coal Syndicate v. Indra Nath*, 10 C. W. N. 173.

An application for a temporary injunction by the defendants that the plaintiffs should, pending the disposal of the suit, be restrained by injunction from interfering with the defendant's right to worship in, and have free access to, the temple does not fall either within Cl. (a) or Cl. (b) of Or. XXXIX, r. 1, C. P. Code.—*Karori Chand v. Maharaj Bahadur*, 1 P. L. J. 660.

An injunction cannot be issued on a mere allegation that the defendant wished to realize debts by bringing actions in Court, without proof

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of an intention of waste, damage or alienation.—*Prosunnomoyee v. Woomamoyee*, 14 W. R. 409. There must be some evidence that the property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit.—*Dhundiran v. Chandanbai*, 2 B. H. C. R. 98.

In a suit for the specific performance of an agreement to grant a lease, the Court should grant a temporary injunction to restrain the defendant from granting a lease to any other person for the disposal of the suit.—*Promathanath v. Jagannath*, 17 C. L. J. 427; 16 I. C. 359.

A Court cannot be asked to give the relief which forms the cause of action in the suit, under colour of a temporary injunction.—*Brojendra Kishore v. Nawab Syed Abdur Sobhan*, 21 C. L. J. 464.

An injunction although subsequently discharged when the plaintiff's case failed, must be obeyed while it lasts.—*Eastern Trust Co. v. McKenzie Mann & Co.*, 20 C. W. N. 457 (P. C.); 35 I. C. 378.

During the pendency of an application to restore to file a suit which had been dismissed for default, a Court has no jurisdiction to pass an injunction order, as there is no suit pending then.—*Ram Sarup v. Emperor*, 77 I. C. 238.

**Temporary Injunction in suit for declaration only.**—Although a hard and fast rule cannot be laid down that an *ad interim* injunction can never be granted in a suit for declaration, it should not be granted when in that suit there is no prayer for consequential relief or for a perpetual injunction and where the plaintiff, if successful in his suit for declaration, must bring another action for enforcing the right which he seeks to keep undisturbed by such injunction.—*Shiroman v. Bania*, 8 L. L. J. 299.

**Temporary Injunction restraining proceedings in Legislative Council.**—A temporary injunction can only be granted if the Court is satisfied that in all probability the declaration which is the foundation of the permanent injunction will be made when the suit comes to be tried. The Court cannot make a declaration that a Bill in the form in that moment which is sought to be introduced in the Legislative Assembly is *ultra vires*, because a Bill as such has no legal effect, and if the declaration is meant to refer to the Act which may be passed, the Court is invited to deal with a future and hypothetical question which may never arise. It follows that no temporary injunction can be passed in such a case.—*Mulji Haridas v. Sir Ibrahim Rahimtulla*, 34 Bom. L. R. 231; A. I. R. 1932 Bom. 166 (distinguishing *Kumar Shankar v. H. E. A. Cotton*, 85 I. C. 14; A. I. R. 1925 Cal. 373, in which it has been held that proceedings of a local legislature could be held to be *ultra vires* on the ground that they were inconsistent with the provisions of an Act of the Government of India).

**Against whom injunction can be issued.**—An injunction under this rule cannot be issued to a Court but only to a party, and an injunction to a party contemplates that some property, the subject-matter of the suit, is in danger of being wasted.—*Raja Ram v. Dharam Das*, 2 A. L. J. 601; *Sant Lal v. Ishar Das*, 46 P. L. R. 1919; 51 I. C. 108; *Malhiuddin v. Athar Hossain*, 44 I. C. 496.

During the pendency of an application by the mother for the guardianship of her minor girl, the Court on the application of the mother, granted

an injunction restraining the bridegroom's brother and some other persons who were residing out of the jurisdiction of the Court, and who were not parties to the proceeding, from marrying or allowing the marriage of the minor. *Held*, that S. 12 of the Guardian and Wards Act (VIII of 1890) authorizes the Court to make such order for the protection of the person of the minor; and that the mere fact that a person resides outside the jurisdiction of the Court is not *per se* sufficient to prevent the Court from granting an injunction.—*Harendra Nath v. Brinda Rani*, 2 C. W. N. 521.

**Injunction against a person not a party to the suit.**—No injunction can be granted under this rule against a person who is not a party to the suit.—*Ram Sunder v. Ram Dheyan*, (1918) P. 302; 46 I. C. 224; *Ram Saran v. Maulu*, 96 I. C. 540; A. I. R. 1926 Lah. 284.

**"Property in dispute in a suit".**—The property in respect of which an injunction may be granted under Cl. (a) of this rule must be property in dispute in the suit and no other.—*Joy Narain v. Shib Persad*, 6 W. R. Misc. 1. No injunction can, therefore, be granted to restrain a man who is alleged to be a debtor from parting with his property.—*Sunder Singh v. Ram Saran*, 5 L. L. J. 262; 81 I. C. 322; A. I. R. 1923 Lah. 227.

**Power of Court to issue injunction where defendant resides outside jurisdiction but has property within jurisdiction.**—On an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the applicant must show a *prima facie* case. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction against which the Court could proceed in the event of any contempt of the Court's authority.—*Rameshwar Singh v. Gaganand Singh*, 1 P. L. R. 462; 75 I. C. 381.

**"Wrongfully sold in execution of a decree."**—By these words, the Legislature intended that an injunction might be granted when property which the claimant claimed to be his was in danger of being sold in execution of a decree against another person or even against himself.—*Abdullah Khan v. Banke Lal*, 33 A. 79 (F. B.); 7 A. L. J. 932.

The Rules Committee of the High Court of Allahabad has now amended Or. XXXIX, r. 1 (a) by deleting the words "or wrongfully sold in execution of a decree" and in a case which came up to that High Court after the amendment, where one K obtained a money-decree against M, the husband of G and attached a building in execution of the decree, but G successfully objected to the attachment claiming the building as her property, and K subsequently brought a suit for declaring that the property was attachable in execution of his decree and succeeded, and in such appeal against that decision when G applied for execution it was held, that G had that remedy under the law as it stood before the said amendment by the Rules Committee, and if the previous law were in force, this was pre-eminently a case in which an injunction should have been granted but in view of the amendment no relief could be granted to her and her application for injunction should be refused, although the result would be that the house would be sold in execution, and if G succeeded in second appeal, she would be thrown into another litigation with the auction-purchaser.—*Gomti v. Kanhaiya Lal*, 116 I. C. 794; A. I. R. 1929 All. 115; 27 A. L. J. 214.

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A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold no such order can be passed.—*Dharam Chandra v. Mitsui Bussan Kaisha & Co.*, 54 I. C. 929.

"With a view to defraud his creditors."—The threat or intent to remove or dispose of property with a view to defraud creditors must be proved by definite evidence.—*Kulian Singh v. Musst. Shanno*, 6 L. L. J. 298: 85 I. C. 88: A. I. R. 1924 Lah. 718.

Temporary injunction to restrain execution of decree lawfully obtained cannot be granted.—A Court has no power to issue a temporary injunction to restrain the defendant from executing a decree lawfully obtained by him.—*Varada Charyulu v. Narasimha Charyulu*, 92 I. C. 615: A. I. R. 1926 Mad. 258.

Temporary injunction to stay execution and sale—When there is a *bona fide* contention to be determined between the parties and the balance of convenience is that the execution sale should be stayed, an *ad interim* injunction to prevent the sale should be passed.—*Nawab Kishore v. Santosh*, 123 I. C. 527: A. I. R. 1930 Lah. 109: 31 P. L. R. 587.

After rejection of a claim, the unsuccessful party may institute a suit under Or. XXI, r. 63 of the C. P. Code and ask for a temporary injunction to stay sale, and a temporary injunction may be granted when the property which the claimant claimed to be his is in danger of being sold in execution of a decree against another person even against himself.—*Abdullah Khan v. Banke Lal*, 33 A. 79 (F. B.): 7 A. L. J. 932 (10 A. 80 followed; 26 A. 311 overruled). See also *Brojendra v. Rup Lal*, 12 C. 515 (followed in *Narendra v. Haji Abdul*, 25 I. C. 9). As to principles which should govern disposal of application for temporary injunction to stay execution of decree, see *Bhabhikan Singh v. Chakradhar Prasad*, 9 I. C. 227.

In execution of a money-decree certain property belonging to the judgment-debtor was attached, to which a claim under Or. XXI, r. 58, C. P. Code, was successfully preferred, and thereupon the decree-holder brought a suit under r. 63 for a declaration of the judgment-debtor's right to the property and the suit was dismissed. The defendant preferred an appeal to the High Court for an injunction against the execution of the decree. The injunction could not be granted, inasmuch as it was impossible to say that the attached property was in danger of being "wrongfully" sold in execution of a decree within the meaning of this rule.—*In the matter of Chando Bibi*, 26 A. 311 (10 A. 80, overruled).

In a suit under Or. XXI, r. 63 after rejection of a claim to establish a right to the property attached and advertised for sale, an injunction to stay execution proceedings should not issue. The proper course is to apply by petition for a postponement of the sale, the attachment continuing.—*Luchmeput Singh v. Secretary of State*, 11 B. L. R. App. 27: 20 W. R. 11; *Doorga Churn v. Ashoolosh*, 24 W. R. 70.

After rejection of a claim, when the unsuccessful claimant brings a suit under Or. XXI, r. 63 to establish his title to the property, his proper course is to apply to the Court in which the suit is brought for an injunction to stay the sale; the Court executing the decree cannot stay the sale.

on his application.—*Brojendra v. Rup Lall*, 12 C. 515. Referred to in *Amir Dulhin v. Administrator-General of Bengal*, 23 C. 351, where it has been further held that a subordinate Court may issue an injunction restraining proceedings in execution pending before a superior Court.

After the dismissal of a suit brought by an unsuccessful claimant under Or. XXI, r. 63 for a declaration of his right to the property in dispute, the Court cannot grant a further injunction restraining the decree-holder from executing his decree, merely on the possibility of the appellate Court reversing its decision.—*Gossain Money Puree v. Gour Pershad*, 11 C. 146. But where an appeal is preferred against the order of dismissal of a suit under Or. XXI, r. 63 and the property was sold in execution of the decree but possession was not delivered to the auction-purchaser, the appellate Court can grant *ad interim* injunction preventing the delivery of possession.—*Inayat Ullah v. Gurdit Singh*, 127 I. C. 360: A. I. R. 1930 Lah. 850: 31 P. L. R. 972.

There is no distinction between the cases of sale in execution of a money decree and of a mortgage-decree except this that in the latter case there is no attachment and that is the reason why the claim sections such as Or. XXI, r. 58 are not applicable to cases of a mortgage decree but Or. XXXIX, r. 1 is intended to cover cases of this kind and a temporary injunction restraining sale under an order absolute passed in a mortgage suit can be granted when a suit is brought by a person for a declaration that the property really belonged to him and not to the judgment-debtor in the mortgage suit.—*Fate Mahammad Mia v. Ebrahim Biswas*, 35 C. W. N. 910.

Where a person claimed to be a mortgagee of the property purchased in execution by the decree-holder himself and was proceeding in appeal to get it decided whether his mortgage was before or after the attachment and applied for stay of confirmation of sale in favour of the decree-holder and thereupon the order of stay was passed by the Court on certain condition, but the same was not communicated to the petitioner and the condition being unfulfilled the sale was confirmed, the High Court declined to refuse possession to the decree-holder at that stage but asked the decree-holder to give security for mesne profits pending the result of the appeal.—*Beni v. Lachman*, 133 I. C. 128: A. I. R. 1931 Lah. 289: 32 P. L. R. 171.

The rule that a stay order issued by an appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed, cannot be extended to the case of an injunction passed under Or. XXXIX, r. 1.—*Dharam Chand v. Mitsui Bussan Kaisha & Co.*, 54 I. C. 928.

Where no ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property, and made an application for a temporary injunction directing stay of sale pending the decision of the suit; held that what was advertised for sale was the rights and interest of the judgment-debtor in the property, and it could not be said that the property being "wrongfully sold in execution of a decree," the injunction prayed for could not be granted. Order granting an injunction without notice to the opposite party is irregular.—*Amalok Das v. Sahib Singh*, 7 A. 550.

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In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the defendants from executing in another Court, a decree which they had obtained against the plaintiff; *Kumar Ganga Singh v. Pirthi Chand*, 1 P. 356. See also *Maharaj Bahadur Singh v. Hukum Chand*, 71 I. C. 11; A. I. R. 1923 Pat. 209; 4 P. L. T. 48.

**Stay of sale in execution of a decree of revenue Court.**—The term "decree" as used in the Code of Civil Procedure does not include the decree of a Court of Revenue. *Held*, therefore, that an application under S. 492, C. P. Code, 1882, for stay of a sale in execution of a decree of a Revenue Court under S. 93 of Act XII of 1891, cannot be entertained by a Civil Court.—*Onkar Singh v. Bhup Singh*, 16 A. 496.

The Revenue Courts are Courts of civil jurisdiction within the meaning of the C. P. Code, in that their decrees, when transferred in the regular course, are to be treated in all respects, as if they were passed by a Court of civil jurisdiction. *Held*, therefore, that an application under this section for stay of a sale in execution of a decree of a Revenue Court can be entertained by a Civil Court.—*Ram Lochan v. Beni Prasad*, 36 C. 252; 9 C. L. J. 125; 13 C. W. N. 791 (16 A. 496 dissented from; 9 C. 295 (P. C.); 5 A. 406 referred to); followed in *Jit Lal v. Raja Kamaleswari*, 16 C. L. J. 555.

**Injunction to restrain marriage.**—Under S. 26 of the Indian Contract Act (Act X of 1872) every agreement in restraint of the marriage of a person who is of age is void and consequently no injunction can be granted in respect of the breach of such agreement.

This rule is not applicable to a suit for specific performance of contract to give in marriage, and the Court will not grant an *interim* injunction to restrain the defendant from making another marriage with a third person.—*Gunput Narain v. Rajun Koor*, 24 W. R. 207; 1 C. 74. See, however, *Nanabhai Ganpatrav v. Janardhan*, 12 B. 110; *Venkata Charyulu v. Ranga Charyulu*, 14 M. 316; *Harendra Nath v. Brinda Rani*, 2 C. W. N. 521; and *Kanahi Ram v. Biddya Ram*, 1 A. 549.

**Power of High Court to restrain a party from proceeding with a suit pending in another Court**—It has been held by the High Court of Calcutta that the powers of High Courts to grant a temporary injunction are not confined to the terms of rr. 1 and 2 of this Order, and that these Courts have inherent power, under their general equity jurisdiction, to grant such an injunction independently of the provisions of the Code, and, further, that such power can be exercised by a single Judge sitting on the Original Side of the High Court.—*Mungle Chand v. Gopal Ram*, 34 C. 101; *Rash Behary v. Bhowani*, 34 C. 97; *Mul Chand v. Gill & Co.*, 44 B. 283; 53 I. C. 518; 21 Bom. L. R. 963. It has been held by the Bombay High Court that it has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding, in the Small Cause Court at Bombay, with a suit filed by the defendant referring to the same matter to which the High Court suit relates; *Uderam v. Hyderally*, 33 B. 469 (*Jairamdas v. Zamonia*, 27 B. 357 distinguished). Where pending the disposal of an appeal by the High Court the party had filed a suit in the lower Court and thereupon an application was made to the High Court for

an injunction restraining the party from proceeding with the suit till the disposal of the appeal, the High Court could grant the injunction if the balance of convenience was in favour of such a course.—*Muhamada v. Jhanda*, 129 I. C. 889: A. I. R. 1931 Lah. 65: 31 P. L. R. 550. As to the question whether the power of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court is confined to suits pending in a Court subordinate thereto, or whether it extends to suits pending in any Court in British India, it has been held by the Bombay High Court (*per Macleod, J.*) that though the Court has power to restrain a party from proceeding with a suit pending in a Court subordinate to it, it has no such power in respect of a suit pending in a Court not subordinate to it.—*Narayan v. Jankibai*, 39 B. 604 (F. B.).

The plaintiff, in a suit instituted in the High Court for money due on a balance of account, sought for an injunction to restrain the defendants from proceeding with a suit previously instituted in the Court of the Sub-Judge at Bareilly, in which the present defendants sought to recover from the present plaintiff a sum of money as balance due to themselves on the same account. *Held*, that the High Court was competent to grant the injunction. The powers of the High Court to grant temporary injunctions are not confined to the terms of Ss. 492 and 493, C. P. Code, 1882.—*Mungle Chand v. Gopal Ram*, 34 C. 101. But see *Vulcan Iron Works v. Bishumbhur Prosad*, 36 C. 233: 13 C. W. N. 346, where it has been held (dissenting from 34 C. 101) that the High Court can only restrain a person from proceeding with a suit in a foreign Court if the person sought to be restrained is within the jurisdiction of the Court.

The High Court is not bound by the Code in issuing injunctions in appropriate cases. Thus the High Court can restrain a decree-holder from executing his *ex parte* decree, pending an appeal from an order refusing to set such *ex parte* decree aside.—*Govindarajulu v. Imperial Bank of India*, 136 I. C. 346: A. I. R. 1932 Mad. 180.

The powers of the High Court in the matter of issuing injunctions on parties to an appeal pending before it are not circumscribed by the provisions of Or. XXXIX, r. 1. Any order may be made which the ends of justice or expediency may require.—*Nandalal v. Kalipada*, 36 C. W. N. 290: 64 C. L. J. 317: A. I. R. 1932 Cal. 353.

Unless a party can satisfy the Court that no advantage can be gained by the defendant in proceeding with the action in which he is plaintiff in another part of the King's Dominions, the Court should not stop him from proceeding with the only proceedings which he as plaintiff can control, where therefore, the defendant had filed a suit earlier in point of time against plaintiffs in the Supreme Court of Ipoh and in the subsequent suit in British India, the defendant did not file a written statement and there was nothing to show that the foreign suit was vexatious or oppressive as against the plaintiff, it was held that assuming that the subordinate Court in British India had the power to restrain the defendant from prosecuting the foreign suit, it was not a proper case in which such an order should be passed.—*Periakaruppan v. Ramaswami*, 109 I. C. 291: A. I. R. 1923 Mad. 491. See also *Naik v. Balvant*, 29 Bom. L. R. 138: 100 I. C. 951: A. I. R. 1937 Bom. 135.

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The High Court has no power to stay a partition proceeding in a Revenue Court which is not subordinate to the High Court and an injunction also cannot be issued for that purpose.—*Matloob Hasan v. Kalawati*, 53 A. 180: 132 I. C. 42: 23 A. L. J. 1469.

**Effect of a temporary injunction.**—The effect of a temporary injunction granted under Or. XXXIX, r. 1 is not to make a subsequent alienation of the property in question illegal and void.—*Balbhaddar v. Balia*, 127 I. C. 577: A. I. R. 1930 All. 387; *Darbari Ram v. Ghulam Farid*, 128 I. C. 304: A. I. R. 1930 Lah. 858. Hence if a party, against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void. The only penalty that he incurs by alienating the property in spite of the injunction is that prescribed by r. 2 (3), namely, that his other property may be attached and sold for satisfying, out of the sale-proceeds, compensation to the party on whose application the injunction was granted, and he may also be detained in the civil prison. But alienation after attachment has a different effect. When a property is attached, any private alienation of the property contrary to the attachment is void under S. 64.—*Delhi and London Bank v. Ram Narain*, 9 A. 497; *Manohar v. Ram Autor*, 25 A. 431; *Beli Ram v. Ram Lal*, 6 L. 380: 90 I. C. 937: A. I. R. 1925 Lah. 644. See *Hakim Singh v. Wasan Singh*, 108 I. C. 395: A. I. R. 1923 Lah. 639, in which it has been held that an alienation effected in violation of an injunction is not void though the person who alienates it may be liable for action in contempt of Court or damages.

**Appeal.**—An order refusing or granting an injunction is appealable under Or. XLIII, r. 1 (r), C. P. Code.—*Lachmi Narain v. Ram Charan*, 35 A. 425: 11 A. L. J. 613; *Ottapurakkal v. Alabi Mashur*, 27 I. C. 131. An order refusing temporary injunction is appealable.—*Harilal v. Prayag Ram*, 17 C. W. N. 996: 18 C. L. J. 39. But where the lower Court in granting or refusing to grant an *ad interim* injunction, has exercised its discretion judicially, the mere fact that the Judge of the appellate Court might have come to a different conclusion is not sufficient ground for interference.—*Daily Gazette Press Ltd. v. Karachi Municipality*, 127 I. C. 690: A. I. R. 1930 Sind 287.

**Appellate Court's power to stay interim injunction.**—An appellate Court can order stay of an *interim* injunction *ex parte* provided it thinks that a fit case has been made out.—*Syed Ahmad v. Barlow*, A. I. R. 1932 All. 223.

**Revision.**—No appeal lies to the High Court from an order made by the lower appellate Court under this rule; see S. 104 (2). But where a temporary injunction was refused by the lower appellate Court, the Calcutta High Court made an order granting an injunction in the exercise of powers conferred upon High Courts by S. 15 of the Charter Act.—*Israil v. Shamser*, 41 C. 436; *Hemanta v. Baranagore Jute Factory Co.*, 19 C. W. N. 442: 24 I. C. 318.

This rule does not apply to probate proceedings.—An application by a caveator in probate proceedings, for a temporary injunction, cannot be granted, as a probate proceeding is not a suit in which any property is in dispute.—*Nirod v. Chamatkarini*, 19 C. W. N. 205: 27 I. C. 617.



**Valuation and court-fee in suits for injunction.**—In a suit for injunction the Court has no power to increase the valuation of the suit. Section Cl. (iv) (d) of the Court-Fees Act requires that, in a suit for injunction, the plaintiff shall state the amount at which he values the relief sought; the Court has, therefore, no power to increase the valuation and to return the plaint for want of jurisdiction.—*Guruvajamma v. Venkatakrishnama*, 24 M. 34.

In a suit for injunction and damages on the allegation of possession the Court has no power to ascertain the value of the property for the purpose of jurisdiction but it should accept the value of the relief stated in the plaint both for the purposes of court-fee and jurisdiction.—*Hari Sankar v. Ka. Kumar*, 32 C. 734; 9 C. W. N. 690 (17 B. 56, 18 B. 207, 2 A. 320, 15 A. 371 and 20 M. 289 referred to; 8 C. 757 and 17 C. 680 distinguished). Followed in *Vachhani v. Vachhani*, 33 B. 307.

As to court-fee, see also *Manmatha Nath v. Rohilli Mohini*, 27 A. 406.

#### GENERAL PRINCIPLES GOVERNING GRANT OF INJUNCTIONS (TEMPORARY OR PERPETUAL)—SPECIAL CASES.

(a) **Alienation by Hindu widow—Prevention of waste.**—A creditor of a Hindu widow obtained a decree against her, whereupon the next reversioner brought a suit to set aside the decree on the ground of fraud and collusion. This suit was compromised on the reversioner's surrendering up his reversionary interest to the widow for a consideration. Subsequently the more remote reversioners sued to set aside the decree on the compromise as fraudulent and collusive, and prayed for an *ad interim* injunction which was granted.—*Gopee Nath v. Kally Doss*, 10 C. 225.

If there is any reasonable apprehension of waste by a Hindu widow sufficient provision should be made in the final decree for partition for the prevention of such waste, to safeguard the interests of the reversioners; a separate suit for injunction is not necessary.—*Durganath v. Chintamani*, 31 C. 214; 8 C. W. N. 11 (6 M. I. A. 433 distinguished and 2 C. 262 and 9 C. 580 referred to).

A suit by a heir presumptive against a life tenant to restrain waste by the life-tenant and for an injunction and appointment of receiver is maintainable. (Question of court-fee).—*Manmatha Nath v. Rohilli Mohini*, 27 A. 406 (8 I. A. 14; 6 C. 764 (P. C.) followed; 10 M. 90 referred to; and 8 C. 15 dissented from).

(b) **Breach of agreement.**—Where more than 20 artisans signed an agreement, whereby they constituted themselves an association for the purpose of co-ordinating the price of their work by bringing all the business of the trade into one shop, and dividing the prices amongst the members according to their skill, but which association was not registered as a company under Act X of 1866, held, that the Court could not grant an injunction to restrain the breach of such agreement.—*Bhikeji Sabaji v. Bepu Saju*, 1 B. 550.

A Hindu widow in order to settle disputes with the relatives of her husband entered into an agreement with them that she would not adopt a son. Subsequently her husband's relatives brought a suit against her

alleging that the widow, in violation of the agreement was about to adopt a son, and praying for an *interim* injunction to restrain the adoption, but the Court refused to grant the *interim* injunction.—*Assur Purshotam v. Ratanbai*, 13 B. 56.

The granting of an injunction under this rule, for breach of contract, is a matter of judicial discretion. *Quere*—Whether the principles which govern the grant of a temporary injunction under the C. P. Code are the same as those which are laid down in the Specific Relief Act to the grant of a perpetual injunction.—*Subba Naidu v. Haji Badsha*, 26 M. 168.

The defendant signed an agreement in England with a Railway Company contracting to serve the company for 4 years in India under a penalty of £ 100. The defendant having accordingly served it for two years, left its service for that of another employer, alleging ill-treatment. *Held*, that the plaintiff company was entitled to an injunction restraining the defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.—*Madras Railway Company v. Rust*, 14 M. 18.

Agreement not to work for a rival tradesman—Agreement made when under criminal charge—Suit for injunction to restrain the defendant from working for a rival tradesman. *Held*, that in the exercise of the discretion given to the Court by S. 22 of the Specific Relief Act (I of 1877), the injunction should be refused, but the Court should award pecuniary compensation to plaintiff as his proper remedy.—*Callanji Harjivan v. Narsi Tricum*, 19 B. 764.

Injunction granted to restrain a partner from excluding his co-partner from the partnership business, and from doing any act to prevent its being carried on according to the articles.—*Virdachala v. Ramaswami*, 1 M. H. C. R. 341.

Where a charter-party has been actually completed, the Court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted.—*Abdul Allarakhi v. Abdul Bacha*, 6 B. 5.

(c) Collection of rents—Injunction to restrain the defendant from collecting without any title, from the ryots of the plaintiff's estate, two annas rent over and above the full sixteen annas in the rupee, may be granted without proof of any actual damage.—*Nadir Jumma v. Ram Chunder*, W. R. (1864) 362.

(d) Digging well.—The digging of a well by a talukdar intermediate between the zemindar and the ryots, is not an act of waste to restrain which the Court will issue an injunction.—*Magneeram v. Gunesh Dutt*, W. R. (1864) 375.

(e) Digging close to a neighbour's land.—Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of the act.—*Dindu Bashini v. Jahnabi Chowdhurani*, 24 C. 260. *See, however, Moho Lal v. Bai Jirkore*, 23 B. 472, where it has been held that a person

has a right to build on his land and for the purpose of building to make ditches for foundations.

(f) **Stay of execution of decree.**—An injunction restraining a decree-holder from executing a decree against the person applying for the injunction was granted, on the ground that the proceedings by which the decree was obtained against him were altogether illegal.—*Dhuronidhur v. Agra Bank*, 5 C. 86 : 4 C. L. R. 434 (reversing in review 4 C. 380 ; 3 C. L. R. 288 ; 3 C. L. R. 421). See also *Amir Dulhin alias Muhamdijan v. Administrator-General of Bengal*, 23 C. 351 ; and *Appu v. Raman*, 14 M. 425. But see *Venkatesa Tawker v. Ramasami*, 18 M. 338, where the suit for injunction to restrain execution of decree was dismissed on the ground that the injunction sought for was not necessary to prevent a multiplicity of proceedings within the meaning of S. 56, Cl. (a) of the Specific Relief Act (I of 1877).

(g) **Injury or obstruction to rights to property.**—A tank for the use of the public having been dug by the ancestor of the plaintiffs, they claimed its exclusive conservancy and repairs, and prayed for an injunction prohibiting others from interfering with the general conservancy of the tank. *Held*, that whether or not they were entitled to exclude others from interfering with the repairs of the tank they were not entitled to an injunction prohibiting others from interfering with the general conservancy of the tank.—*Muttaya v. Sivaraman*, 6 M. 229 (affirmed by the Privy Council in 12 M. 241).

The plaintiff's ancestor built a temple and a ghat close to it, to which persons on the point of death were removed and certain ceremonies were performed. The defendants used the ghat for landing goods. *Held*, that if, when the plaintiff's ancestor erected the buildings he intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership to the community ; the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes.—*Jaggamoni Dasi v. Nilmoni Ghosal*, 9 C. 75 : 11 C. L. R. 502.

Plaintiff's beams overhung defendant's soil and defendant erected a building which overhung those beams. *Held*, that the defendant being the owner of the soil was entitled *prima facie* to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.—*Ranched Shamji v. Abdulabhai*, 28 B. 423.

Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than 12 years.—*Rathinavelu v. Kolandavelu*, 29 M. 511 (3 B. 174, followed).

If a stranger builds on the land of another believing it to be his own, the owner is entitled to recover the land and the party building on the land of another is allowed to remove the building, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land.—*Govind Venkaji v. Sadashiv*, 17 B. 771 ; *Premji v. Haji Gasrum*, 20 B. 298.

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Where the plaintiff's eaves had projected over the defendant's roof, which rested on a wall common between the parties for more than 30 years, and the plaintiff had thus acquired a right to have the water carried from his roof on to the defendant's roof, and where the defendant raised the common wall and removed the plaintiff's eaves, *held*, that the plaintiff was entitled to relief either by damages or by injunction.—*Nasarbhoi Ahmedbhai v. Badruddin*, 16 B. 533.

(h) **Erection of building.**—Building erected after suit filed but before hearing.—At the hearing the Court may grant mandatory injunction directing removal of the building, although only preventive relief was prayed for in the plaint.—*Magan Lal v. Chhotalal*, 26 B. 136. See, however, *Sri Rangachariar v. Rungasami*, 32 M. 291.

(i) **Intrusion upon office.**—A *Vatandar Joshi* of a village has the right to recover damages from a person who has intruded upon his office and received fees properly payable to him; but the Court will not grant any injunction against such intruder which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognize, and forbidding them to employ a priest whose ministrations they desire.—*Raja Valad Shwapa v. Krishnabhat*, 3 B. 232.

The plaintiff, who had bought a share in a *Kulkarnivatan* and *Joshi Vritti* was obstructed by the defendants in the performance of his duties. *Held*, that he was entitled to an injunction against the defendants.—*Moro Mohadev v. Anant Bhimaji*, 21 B. 821.

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Court found that the plaintiffs possessed the right claimed and granted the injunction. *Held*, that the injunction was properly granted.—*Srinivasa v. Triuvangada*, 11 M. 450.

The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution.—Introducing a new metal idol in addition to the existing stone idol —*Krishnasami v. Samaram*, 30 M. 158.

(j) **Obstruction to light and air.**—When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determined is—Is the obstruction such as seriously to interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause material injury to it, an injury which cannot be completely compensated by damages? The Court will in such cases interfere as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy.—*Ratani Hormasji v. Edalji Hormasji*, 8 B. H. C. R. 181.

The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction; but to constitute an actionable obstruction the same must amount to a nuisance. The question that has to be decided is not how much light is left in spite of the obstruction, but whether there has been such a diminution of light as to

constitute an actionable nuisance.—*Anath Nath v. Galstaun*, 35 C. 661: 12 C. W. N. 519.

To constitute an actionable obstruction to light and air, it is not enough that the light is less than before and the plaintiff enjoys less flow of air. The test is whether the obstruction complained of is a nuisance. An injunction was granted where it was found that a wall built by the defendant on his own land would cause such privation of light and impede the flow of air to such an extent as would prevent the plaintiff's carrying on their business as beneficially as before.—*Anderson v. Hardut Roy*, 9 C. W. N. 543.

To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort. Meaning of the expression "physical comfort" explained.—*Framji Shapurji v. Framji Shapurji*, 30 B. 319.

In cases of obstruction to light and air, where the plaintiff prays for a perpetual injunction: *Held*, that, under S. 54 of the Specific Relief Act (I of 1877), an injunction is not to be given when the remedy in damages is considered adequate.—*Dhunjibhoy v. Lisboa*, 13 B. 252; *Ghansham Nilkant v. Moroba Pam Chandra*, 18 B. 474; *Sultan Nawazjung v. Rustomji Nanabhoy*, 20 B. 704; *Boyson v. Deane*, 23 M. 251; *Kallian Das v. Tulsi Das*, 23 B. 786; *Delhi and London Bank v. Hem Lall*, 14 C. 839; and *Chota Lal v. Lallubhai*, 99 B. 157. But where the obstruction to light and air is of such a nature as to render the house quite unfit for the ordinary purposes of habitation or business, and renders it practically useless, an injunction and not merely damages is the appropriate remedy.—*Kadarbhai v. Rahimbhai*, 13 B. 674; *Delhi and London Bank v. Hem Lall*, 14 C. 839; *Yaro v. Sanaullah*, 19 A. 259 and *Jethalal v. Lalbhai*, 28 B. 298.

Re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be redressed by award of damages, and against which the Court will grant relief by issuing a mandatory injunction directing the defendant to pull down so much of the house as is necessary, to stop the injury.—*Jamna Das v. Atmaram*, 2 B. 133.

The plaintiff had two windows in his house. He rebuilt his house and opened new windows, which were of nearly the same size, but were little higher than the old ones. Subsequently the defendant built his house and blocked up these two new windows. The plaintiff sued for injunction. *Held*, that where the position of the old windows has been changed, the old easement is lost and the easement respecting the new windows can be acquired only by enjoying it for the required length of time.—*Bai Hariganja v. Tricamlal*, 26 B. 374.

There are at least two necessary ingredients for a *quia timet* action. There must be, if no actual damage is proved, the proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial or irreparable.—*Gangabai v. Purshotam*, 32 B. 146: 9 B. L. R. 912.

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Where the defendant without leave or licence took possession of the plaintiff's window as completely as if he had blocked it up altogether, *held*, that no precedent warranted the substitution of damages for an injunction in such a case against the plaintiff's will.—*Nandkishore v. Bhagubhai*, 8 B. 95. See also *Kunni Lal v. Kundan Bibi*, 29 A. 571: 4 A. L. J. 477.

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open, and not build upon them or divide them by a wall, *held*, that the mere fact that the defendant, when rebuilding his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal.—*Ranchhod Jamna Das v. Lallu Haribhai*, 10 B. H. C. R. 95.

(k) Effect of delay and acquiescence.—Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been completed, and then asks the Court for its removal, a mandatory injunction will not generally be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, an efficiently special circumstance for granting such relief.—*Benode Coomaree v. Soudamney*, 16 C. 252 (2 B. 133 referred to). Followed in *Ulagappan v. Ohidambaran*, 29 M. 497 and in *Haji Syed Muhammad v. Gulab Rai*, 20 A. 325. See, however, *Provabutti v. Mohendra Lal* 7 C. 453, where a mandatory injunction was granted, although the plaintiff brought his suit two days after completion of the building; and also *Maganlal v. Chottalal*, 26 B. 136.

Improper delay in applying for a temporary injunction stands in the way of its being granted.—*Yeshimi Boshaka v. Firm of Dwarkadas*, 139 I. C. 490: 26 S. L. R. 335.

(l) Obstruction to a view of a shop.—The defendants built a shed and put screens on their own land in front of the plaintiff's shop, the view to which was obstructed on account of these constructions. *Held*, that the plaintiff was not entitled to have the construction removed on the ground that the view to his shop was interrupted from the neighbouring road.—*Gopi Nath v. Munno*, 29 A. 22: 3 A. L. J. 637.

(m) Obstruction to watercourse or right to flow of water.—In cases of obstruction of right to an uninterrupted flow of water, it must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction.—*Ponnusawmi Tevar v. Collector of Madura*, 5 M. H. C. R. 6; *Kristna Ayyan v. Venkatachella*, 7 M. H. C. R. 60.

Alteration of watercourse by opening a new channel.—Where the new channel effected a material alteration in the mode of passage of the water from the defendant's land into that of plaintiff, the plaintiff was entitled to the injunction.—*Raja of Venkatagiri v. Rajah Muddukrishna*, 29 M. 15. See *Rama v. Subramania*, 31 M. 171: 18 M. L. J. 178, where injunction was granted for blocking up the entrance of a channel; and *Belbhadar Persad*

v. *Barkat Ali*, 11 C. W. N. 85, where an injunction was granted restraining the defendant from interfering with the natural flow of water.

In a suit for an injunction to compel defendant to reduce to its original dimensions an embankment which he had recently raised to a greater height, on the ground that the effect of defendant's act had been, and would be, to injure plaintiff's land by preventing the passage of water which used to overflow that land; *held*, that the plaintiff was bound to establish an injury caused by infraction of some right which plaintiff possessed or by the omission of something which defendant was legally bound to do.—*Prankisto v. Horo Chunder*, 10 W. R. 435. See also *Venkata Chalam v. Zamindar of Sivaganga*, 27 M 409 (18 M 158 distinguished).

Obstruction to plaintiff's right to have the water carried from his roof on to the defendant's roof—See *Nasarbhai Ahmedbhai v. Badruddin*, 16 B 533.

(n) *Obstruction to right of way*.—The defendants closed a gateway leading across a level-crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this gateway access to his hungalow during the monsoon was completely stopped, and he sued to have the gateway reopened. *Held*, that the inconvenience caused to the plaintiff was real and substantial; that the plaintiff was entitled to the use of the right of way in question, and under the circumstances to an injunction against its obstruction.—*G. I. P. Railway Company v. Nowroji*, 10 B. 390.

*Right of way—Ownership of soil*.—Suit for trespass, injunction and to close doors. *Held*, that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant from making new doors on the lane, and to restrain him from using the doors already made; they had only a right of way, but an injunction was granted, restraining the defendant from using his doorways for the purpose of cleaning his privies, or in any other manner so as to obstruct the free use by the plaintiffs of the lane.—*Madan Mohan v. Chandra Kumar*, 9 B. L. R. 329; 18 W. R. 379.

(o) *Right of co-sharer to deal with joint property*.—Before a Court will, in case of co-sharers, make an order directing that a portion of the joint property, alleged to have been dealt with by one of the co-sharers without the consent of others, should be restored to its former condition (as, for instance, where a tank has been excavated), a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position.—*Joy Chunder v. Bipro Churn*, 14 C. 336 (approved and followed in *Atarjan Bibee v. Sheikh Ashak*, 4 C. W. N. 783 and in *Ananda Chundra v. Parbati*, 4 C. L. J. 198). See also *Shamnugger Jute Factory v. Ram Narain*, 14 C. 189; *Watson & Co. v. Ram Chund Dutt*, 17 I. A. 110; 18 C. 10 (P. C.) (reversing 15 C. 214); *Lachmeswar Singh v. Manowar Hossein*, 19 I. A. 48; 19 C. 253 (P. C.); and *Paras Ram v. Sherjit*, 9 A. 661. In all these cases it has been laid down that there is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damages to be sustained by the one side or the other from the granting or withholding of the injunction. See, however,

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*Shadi v. Anup Singh*, 12 A. 436 (F. B.); and *Najju Khan v. Imtiaz-uddin*, 18 A. 115, where it has been held that one of several joint owners is not entitled to erect a building upon the joint property without the consent of the other joint-owners, notwithstanding that the erection of such building may cause no direct loss to the other joint-owners. In *Macneil v. Debendra*, A. I. R. 1928 Cal. 293, it has been held that an order passed against a co-sharer restraining him from building upon a portion of the joint property must be passed with great caution.

In disputes between members of a joint Hindn family in respect of joint property, the exercise of a Court's discretion to grant relief by injunction should be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster.—*Anant Ramrav v. Gopal Balvant*, 19 B. 269. Followed in *Soshi Bhusan v. Gonesh Chunder*, 29 C. 500, where it has been further held that in a case where the act of the defendant amounts to an ouster of the plaintiff from his possession of joint property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy.

(p) To restrain the act of public functionaries.—The High Court has jurisdiction by proceeding in the nature of a *quo warranto* to restrain the functions of a municipal corporation in the matter of municipal elections.—*In the matter of Corkhill*, 22 C. 717. See also *In the matter of Mutty Lal Ghose*, 19 C. 192; *In the matter of Rajendra Lal Mittra*, 195-note; and *In the matter of Election of Municipal Commissioners &c.*, 198.

Suit for injunction restraining the Municipality from pulling down a house which is alleged to be in a ruinous condition—Meaning of dangerous structures—Power of Municipality to remove dangerous structures—Person affected by the action of the Municipality is entitled to be heard as a matter of common justice.—*Lalbhai v. Municipal Commissioner of Bombay*, 33 B. 334.

An individual is not entitled to protection by way of injunction against the act of a corporation, which affects that individual's character and reputation, whether private, professional or commercial, though the act in question was one which the corporation had no power to do under its instrument of incorporation and was in excess of its power where he would not have been entitled to such protection had the act complained of been committed by an individual defendant.—*Shepherd v. Trustees of the Port of Bombay*, 1 B. 132.

A suit to restrain the Municipality from cutting off pipe water connection from the plaintiff's house is maintainable.—*Surat Municipality v. Tyabji*, 32 B. 460 : 10 Bom. L. R. 622.

A suit does not lie against the corporation for an injunction restraining the same from causing portions of plaintiff's buildings to be demolished which had been erected without sanction from the Chairman or the General Committee in alleged breach of the building regulations.—*Bholaram v. Corporation of Calcutta*, 13 C. W. N. 740.

Where a public body has received by statute a discretionary power to levy, and is laid under an obligation to collect a rate, an injunction



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Where a public body has received by statute a discretionary power to levy, and is laid under an obligation to collect a rate, an injunction  
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cannot be granted by a Court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation.—*Municipal Commissioners of Madras v. Branson*, 3 M. 201.

(g) Trade-mark.—In an application for an injunction to restrain the use of a trade-mark, it is not a sufficient defence to say that there was no fraudulent intention, and that is no reason for granting the application.—*Graham & Co. v. Ker Dods & Co.*, 3 B. L. R. App. 4.

The defendants adopted a label, which though different in some respects from the picture on the plaintiff's label, was in its general appearance so similar to plaintiff's trade-mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers: Held, that the plaintiffs were entitled to an injunction against the defendants.—*Badische Anilin v. Manecke*, 17 B. 584.

The right of exclusive user of a name or a number as trade-mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives, or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived; it is not enough to show a mere possibility of deception.—*Barlow v. Gobind Ram*, 24 C. 364; 1 C. W. N. 281. See also *Reddaway & Co. v. Schroder Smidt & Co.*, 8 C. W. N. 151 (affirmed in 32 C. 401).

An importer and seller of matches bearing manufacturer's or producer's trade-mark is not entitled to an injunction to restrain the defendants from importing or selling in Bombay or other parts of India matches similar in appearance to a certain class of matches imported or sold by the plaintiff.—*Heiniger v. Droz*, 25 B. 433.

(r) Copy right.—In order to justify the grant of a temporary injunction in an action by the plaintiff restraining the defendant from infringing his copy-right, it is not necessary to make out a strong case and show that there is no other remedy open to him by which he can protect himself from the consequences of the injury. In such a case, ordinarily an injunction is the appropriate relief. In doubtful cases, where the question as to the legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial or to order the motion to stand over until the legal right has been tried. In such a case in determining which of those two alternatives it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction.—*Kartar Singh v. Ladda Singh*, 132 I. C. 586; A. I. R. 1931 Lah. 624.

The plaintiff brought out a new and annotated edition of a well-known Sanskrit work on religious observances. The defendants printed and published one edition of the same work, the text of which was identical with that of the plaintiff's work, which, moreover, contained the same additional passages and the same foot-notes at the same places, with many slight differences. Held, that the plaintiff's work was an original work and entitled

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to protection and that as the defendants had pirated the plaintiff's work, they must be restrained by injunction.—*Gangavishnu Srikisondas v. Moreshwar Bapuji*, 13 B. 358.

Copy-right in a portion of a publication, how protected.—*Lawrence v. Bushnell*, 12 C. W. N. 753.

(s) **Landlord and tenant.**—Where land has been let out for agricultural purposes, the erection of an indigo factory on any part of such land renders it unfit for the purposes of tenancy and the landlord is entitled to a permanent injunction restraining the tenant from erecting the factory.—*Surendra Narain v. Hari Mohan*, 31 C. 174: 9 C. W. N. 87 (reversed in 34 I. A. 133: 34 C. 718 (P. C.): 11 C. W. N. 794: 6 C. L. J. 19: 9 Bom. L. R. 750: 17 M. L. J. 361).

The tenant of an agricultural holding planted his jote with mango trees to the knowledge, but without the consent of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. *Held*, that having stood by more than three years, and allowed the tenant to spend his labour and capital, the landlord was not entitled to a mandatory injunction.—*Noyya Misser v. Rupikuan*, 9 C. 609: 12 C. L. R. 300. *See*, however, *Lakshmana v. Ram Chandra*, 10 M. 351.

A landlord cannot have a mandatory injunction in respect of a building erected by a tenant of an agricultural holding, if knowing of such construction he does not object.—*Ulagappan v. Chidambaram*, 29 M. 497.

A zemindar sued for an injunction to compel the defendant who held agricultural lands with occupancy rights, to demolish a dwelling-house which he had erected thereon for purposes not connected with agriculture and to restrain him from altering the character of the land. *Held*, that the plaintiff was entitled to the injunction sued for.—*Ramanathan v. Zamindar of Ramnad*, 16 M. 407. *See*, however, *Prosunno Coomnar v. Jagunnath*, 10 C. L. R. 25 (reversing 9 C. L. R. 221).

In the absence of custom, the general rule is that the property in timber on a tenant's holding vests in the landlord, but the landlord has no right to interfere with the enjoyment by the tenant of the trees upon his holding so long as the relation of landlord and tenant subsists. *Held*, therefore, that a landlord is not entitled to an injunction restraining the tenant from offering obstruction to the cutting down and removal of the trees upon the holding.—*Ganga Dei v. Badam*, 30 A. 134: 5 A. L. J. 99 [W. R. (1864) 367 referred to].

(t) **Nuisance.**—Nuisance by erection of a privy close to plaintiff's house by order of Municipality—Injunction granted to remove the privy.—*Jafir Saheb v. Kadir Rahiman*, 12 B. 634.

Where the defendant, the owner of a shellac factory, discharged into the municipal drain, which was not constructed or intended for carrying off such stuff, refuse liquid of an offensive character which interfered with the ordinary comfort of the plaintiff's occupation of property and caused him special injury: *held*, that the plaintiff was entitled to restrain him:

that an injunction was the only effectual remedy in the case and substantial damages should be awarded against the defendant who has persisted in a nuisance causing material injury to plaintiff.—*Galstoun v. Doonia Lal*, 32 C. 697 : 9 C. W. N. 612.

Nuisance for using land as a burial and burning ground—Injunction refused as it was not proved to be an actionable nuisance.—*Muhammad Mohidin v. Municipal Commissioners of Madras*, 25 M. 118.

The right of Muhammadane to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with.—*Shahbaz Khan v. Umrao Puri*, 30 A. 181 : 5 A. L. J. 147.

The use of a building as a masjid and giving "bang" by a Mulla in the vicinity of a Hindu temple is an actionable wrong which can be prevented by an injunction.—*Hindu Panchayat of Laki v. Mahomedan Community of Laki*, A.I. R. 1928 Sind 82 : 21 S. L. R. 368.

Nuisance from cotton-mill—Noise, smoke, and fluff of mill—Damages—Combination of injunction and damages. The Court, after going into the evidence, considered that the case would be best dealt with by a combination of damages and injunction, and made an order for injunction to issue against noise, smoke, and cotton fluff so as to be a nuisance to the plaintiffs. Such injunction not to issue in case the defendants should pay to the plaintiffs the sum of Rs. 40,000 before the expiration of a fortnight from the date of the decree.—*Land Mortgage Bank of India v. Ahmedbhai Habibhai*, 8 B. 35.

(u) Trees overhanging neighbour's Land—Injunction.—It is competent to a Court to grant a perpetual injunction directing the defendant to remove the branches of trees overhanging his neighbour's land and also to restrain him from planting trees so close to his neighbour's land that their roots may not extend or penetrate his land.—*Lakshmi Narain v. Tara Prosanna*, 31 C. 944 : 8 C. W. N. 710; *Behari Lal v. Ghisa Lal*, 24 A. 499; *Hari Krishna v. Shankar Vithal*, 19 B. 420. In *Ram Lal v. Dalganjan*, 5 A. 369, it has been held that a plaintiff has no right to the removal of trees planted by the defendant on his own land until the plaintiff's enjoyment of his own land is directly and immediately interfered with by the growth of the trees.

(v) Stay of criminal proceedings pending civil suit.—*Per Ghose, J.*—The High Court has power to direct that criminal proceedings in the Court of a Magistrate should be stayed, until the disposal of a civil suit, in which the question at issue in the criminal proceedings shall have been decided. *Contra*—*Per Rampini, J.* (following B. L. R. (F. B.) 426).—*Raj Kumari v. Bama Sundari*, 23 C. 610. See also *Jogiah v. Emperor*, 31 M. 510 (B. L. R. (F. B.) 426 distinguished); *Anna Ayyar v. Emperor*, 30 M. 226; *Ram Charan v. King-Emperor*, 5 C. L. J. 233; *Queen v. Acheet Lall*, 17 W. R. Or. 46; *In re Nana Maharaj*, 16 B. 729; *In re Bal Gangadhar Tilak*, 26 B. 785, and *Dwarka Nath v. Emperor*, 31 C. 653. But see *In re Devji Valad Bhavani*, 18 B. 591.

A Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy under S. 488, Or. P. Code for maintenance in a

rr. 1, 2.

criminal Court.—*Krishna Govinda v. Kishori Bala*, 129 I. C. 103 : A. I. R. 1930 Cal. 753. But a suit is maintainable for a declaration that the defendant had no right to a share in the maintenance out of plaintiff's properties.—*Deraji Malinga v. Marati*, 30 M. 400 (14 C. 276 followed; 18 A. 29 explained).

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. [S. 493.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 493, C. P. Code of 1882, with some additions and alterations.

In sub-rule (1) the words "of any kind" have been added after the words "other injury."

Sub-rule (2) corresponds to para 2 of the old section with omission of the words "or refuse the same" which occurred after the words "thinks fit."

Sub-rule (3) has been substituted for para. 3 of the old section; the para. have been completely changed below to observe the changes made, an injunction granted under this

section or S 492, may be enforced by the imprisonment of the defendant for a term not exceeding six months or the attachment of his property or both."

Sub-rule (4) corresponds to para. 4 of the old section with some alterations. The words "*if the disobedience or breach continues*" have been substituted for the words "*if the defendant has not obeyed the injunction*"; and the words "*shall pay the balance to the party entitled thereto*" have been substituted for the words "*may pay the balance (if any) to the defendant,*" which occurred in the old section.

**Temporary injunction to restrain breach of contract.**—To prevent the violation of contracts, the Court has the power to interfere by injunction, and to compel parties to perform their covenants and agreements by injunction, temporary or perpetual, mandatory, or otherwise. This rule deals with temporary injunctions to restrain the breach of a contract. Perpetual injunctions to restrain the breach of a contract are regulated by S. 56 (f) and S. 57 of the Specific Relief Act, 1887. The ordinary remedy for breach of contract is damages. Hence no injunction can be granted where damages afford adequate relief. See also *Sohanlal Chuman Lal v. Jai Narain Babu Lal*, 54 I. C 546, where the principles governing grant of temporary injunction to restrain breach of contract have been explained.

**"Or other injury."**—The words "*or other injury*" in this rule mean any legal injury other than that arising from breach of contract, as in the case of obligation arising from transfer of property or trust or in cases of tort. The addition of the words "*of any kind*" in this rule makes it clear that injunction can be granted to prevent injury from any wrongful act whatever be its nature. The word "*injury*" in Or. XXXIX, r. 2 (1), C. P. Code, means an act which is contrary to law. To justify a temporary injunction plaintiff must show irreparable injury or inconvenience likely to result to him before the disposal of the suit, if the opposite party were not restrained by injunction.—*Firm of Manohar Lal Mahabir Pershad v. Firm of Jai Narain Babu Lal*, 2 L. L. J. 283 : 55 I. C. 403, *Firm of Kirpal Das Kalian Das v. Firm of Ganmal*, 15 S. L. R. 5; *Rameshwar Das v. Yakim-ud-din*, 75 I. C. 428.

A suit for a declaration that a certain person is not eligible to stand as a candidate cannot be said to be a suit for restraining him from committing an injury of any kind. To restrain the defendant in such a case would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled.—*The Election Officer, Gujrat v. Abdul Ghani*, A. I. R. 1923 Lah. 47.

Under Or. XXXIX, r. 2 (1) the Court may grant an injunction restraining a person living within the jurisdiction of another Court from instituting certain proceeding.—*A. Milton & Co. v. Ojha Automobile Engineering Co.*, 57 C. 1280 : 130 I. C. 252 : A. I. R. 1931 Cal. 279.

**Mode of execution of a decree for injunction.**—See the cases noted under Or. XXI, r. 32.

**Sub-rule (3)—Disobedience of order for injunction—Contempt of Court.**—The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt.—*In the matter of the*

*petition of Chandra Kanta De*, 6 C. 445: 7 C. L. R. 350. See *Salam Chand v. Joogul Kissore*, 55 C. 777: 32 C. W. N. 114: 107 I. C. 65: A. I. R. 1928 Cal. 462; in which it has been said that under the Code permanent injunctions are enforced in execution but under Or. XXXIX, interlocutory injunctions are enforced under a special power which is given to Courts in the mofussil and as well as to the High Court notwithstanding that such Courts have no inherent right of arrest for contempt. The provision is contained in Or. XXXIX, r. 2 (3).

Order XXXIX, r. 2 (3) applies not only to disobedience of an order issued under Cls. (1) and (2) of that rule, but has a more general application and applies equally to disobedience of all injunctions issued under S. 94 of the Code. Where an injunction order issued by a Division Bench of the High Court is disobeyed by a party residing in the Bench, in punishing him for contempt, S. 136 of the I. P. Code, and send to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. In such a case, the District Court, on receipt of the warrant and order, will adopt the procedure laid down in S. 136—*Adakkala v. Imperial Bank, Madura Branch*, 50 M. L. J. 401: A. I. R. 1926 Mad. 574: 95 I. C. 196.

In *Balbhaddar v. Balla*, 127 I. C. 577: A. I. R. 1930 All. 387; it has been observed that the provisions of Or. XXXIX, r. 2 (3) were intended to be applied to a breach of an injunction under r. 1 also, but as it is included under r. 2, it would follow that its provisions will not apply to r. 1.

Therefore in case of disobedience of an order of injunction the Court may punish the party under Or. XXXIX, r. 2 (3); *Wadhawa Singh v. Ladha Singh*, 131 I. C. 343: A. I. R. 1931 Lah. 201: 12 L. L. J. 309 (referring to *Ram Parshad v. Benares Bank Ltd.*, 42 A. 98: 58 I. C. 600; *Vidyapurana v. Vicar of Surakkal Church*, 44 I. C. 56; *Adakkala v. Imperial Bank*, noted ante).

But it is the Court which actually granted the injunction that can punish the contempt under Or. XXXIX, r. 2 (3) and not the Court to which the suit may be transferred but which did not grant the injunction.—*Jaharuddi v. Hari Charan*, 18 C. W. N. 470: 22 I. C. 499.

In case of disobedience by a person, residing outside the local limits of the Original Side of the High Court of Calcutta (i.e. at Nadia), who is guilty of contempt of Court in not having handed over certain articles to the Receiver appointed by the Court, it is extremely doubtful whether the High Court on its Original Side can direct the District Judge of Nadia to execute a warrant of arrest of the person; but it is eminently desirable to proceed regularly by asking for an injunction in express terms, in which case S. 136 of the Code can be applied and the High Court has statutory power to make the necessary order.—*Salam Chand v. Joogul Kissore*, noted ante; *Mathura Das v. Venkat Rao*, 21 M. L. J. 829. The Court can order either arrest or attachment of property and is not bound in the first instance to attach and then only to order imprisonment.—*Suppi v. Kunhi Koya*, 39 M. 907 (F. B.); *Mawazam v. Shebesh*, 31 C. W. N. 814: 105 I. C. 348: A. I. R. 1927 Cal. 598.

Where a personal guardian appointed by the Court undertook not to marry the minor without the Court's permission, the marriage or connivance



at marriage with the ward without the consent of the Court is contempt of Court liable to be punished; but the power of the Court to punish for this act is limited to the actual guardian in respect of whom the order is made and cannot be exercised against persons who indirectly committed the breach by assisting the guardian in the act.—*Bar Mani v. Bhai Lal*, A. I. R. 1929 Bom. 417; 31 Bom. L. R. 1120.

Where a temporary injunction was issued against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention in prison is incompetent.—*Muhammed Wazir Agha v. Muhammed Abdul Gafoor*, 118 I. C. 675; A. I. R. 1929 Nag. 273.

Before a Court commits a party to prison for alleged disobedience of an order of injunction in a case where the party contends that he received no notice of the order, he should be given an opportunity to establish his contention.—*Basanta v. Nagendra*, 137 I. C. 425; A. I. R. 1932 Cal. 719.

A judgment-debtor applied to the High Court for stay of sale of certain property attached in execution of a decree of a Subordinate Court and got the order of stay subject to certain conditions but afterwards transferred a part of the property ignoring the condition. Held, that the Court could punish him for disobedience under Or. XXXIX, r. 2.—*Ram Prasad v. Benares Bank Ltd.*, 17 A. L. J. 1127.

When an injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the injunction has been infringed, an attachment will issue, even though the defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the injunction. The Court in such cases is not bound by the opinion of surveyors.—*Pranyivan Dass v. Mayaram*, 1 B. H. C. R. 148.

Where a plaintiff has once obtained a decree for a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for him, if in future, the defendant ignores such injunction, to sue again for a similar relief; such a suit would be barred by the principle of *res judicata*. When the person to whom the order has been issued disobeys that order, he is guilty of contempt of Court, and the Court can take proceedings to enforce its authority notwithstanding anything contained in Art. 182 of the Limitation Act.—*Ram Saran v. Chatar Singh*, 23 A. 465 (followed in *Bagwan Das v. Sukdei*, 28 A. 300; 3 A. L. J. 836).

The jurisdiction which a Court has to commit in case of disobedience to an injunction is conferred by this Rule; but the powers conferred therein are only exercisable when the Court is set in motion by a party who deems himself aggrieved.—*Kochappa v. Sachi Devi*, 26 M. 494.

By this rule, the Legislature indicated that the imprisonment for contempt should not extend beyond six months. Where, however, the defendant had been in jail for more than 20 months for the criminal offence (contempt of Court), the Court would not be justified in indirectly adding to its duration.—*Advocate-General of Bombay v. Ganji Akhai*, 19 B. 152.

r. 2.

By S. 43 (4) of the Guardian and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under Or. XXXIX, rr. 1 and 2 of the C. P. Code.—*Abdul Rohman v. Ganapathi*, 23 M. 517.

In *Bosanta v. Nagendra*, 137 I. C. 425; A. I. R. 1933 Cal. 719, it was doubted whether a proceeding for the appointment of a guardian can be treated as a suit or a proceeding to restrain the other party from committing a breach of contract or other injury within the meaning of Or. XXXIX, r. 2, so as to confer jurisdiction in the Court to commit the other party for alleged disobedience of an order of temporary injunction passed therein.

No second appeal lies against an order under this rule, dismissing a petition to commit for disobedience to an injunction.—*Venkatapathi Naidu v. Tirumalai Chetti*, 24 M. 447.

The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for trespass, and an injunction, and a decree was passed for damages, and for a mandatory injunction, directing the defendant within two months to remove the wall. Two years subsequently the plaintiff brought another suit for damages. Held, that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution.—*Jawitra v. Emile*, 13 A. 98 (11 App. Cas. 127 distinguished).

**Temporary mandatory injunction.**—A doubt was expressed in *Rasul Karim v. Pirubhai*, 38 B. 381 as to whether mofussil Courts have power to issue mandatory injunctions. It was not followed in *Kandaswami v. Subramania*, 41 M. 238; 33 M. L. J. 448, where it has been held that the description of a temporary injunction in S. 53 of the Specific Relief Act does not exclude injunctions of a mandatory nature. See also *Israel v. Shamser*, 41 C. 436; *Chamsey Bhimji & Co. v. The Jamna Flour Mills Co.*, 16 Bom. L. R. 566; 28 I. C. 121.

Whether the injunction be one restraining a party from altering the position of affairs or directing him to restore the conditions which prevailed at the time the cause of action arose, that order must not go further and must not create a totally new state of things.—*Lahore Electric Supply Co., Ltd. v. Bombay Motor Cycle Co.*, 67 I. C. 742.

**Appeal.**—An appeal lies under Or. XLIII (1) (r) against an order under Or. XXXIX, r. 2; and a person cannot be deprived of his right of appeal merely because the lower Court acts under Or. XXXIX, r. 2 by virtue of S. 141 of the Code.—*Muhammad Wazir Agha v. Muhammad Abdul Gafoor*, 118 I. C. 675; A. I. R. 1929 Nag. 273.

An appeal lies to the District Court from an order of the District Munsif refusing to take action under Or. XXXIX, r. 2 (3) for an alleged breach of a temporary injunction granted under Or. XXXIX, r. 2 (2).—*Suppi v. Kunhi*, 39 M. 907 (F. B.); *Devan Chand v. Jharla Coal Co.*, 5 I. L. J. 142.

Where on an application for an interlocutory injunction the defendant gave an undertaking that he would not alienate the property pending the

disposal of the suit which was recorded in the Court's order and then in breach of that undertaking sold the property and the plaintiff thereupon applied for proceedings for contempt of Court, but the lower Court refused the application, it was held that the undertaking given by the defendant read in conjunction with the order of the Court recording it, amounted to the grant of injunction, and an appeal lay from the order of the lower Court refusing the application for proceedings for contempt.—*Chaturbhuj Das v. Natvarlal*, 134 I. C. 1165 : A. I. R. 1931 Bom. 509.

**3.** The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party. [S. 494.]

Before granting  
injunction Court  
to direct notice to  
opposite party.

### COMMENTARY.

**History.**—This rule exactly corresponds to S. 494 of the C. P. Code, 1882.

**Notice.**—This rule enacts that as a general rule where an application for the issue of an injunction is made, notice of the same must be given to the opposite party but such notice may be dispensed with in urgent cases where the Court thinks that the object of granting the injunction would be defeated by the delay. The power to issue an *ex parte* injunction no doubt exists, but the greatest care should be employed in its exercise, and it should be exercised only in cases where considerable mischief might ensue if the issue of the process were delayed until notice was given.—*Hari Pandurang v. Secretary of State*, 27 B. 424, 451; *Amalak Ram v. Sahib Singh*, 7 A. 550, *Burma Oil Co. Ltd. v. Sampson*, 13 Bur. L. T. 227.

Where a Court made an order granting a temporary injunction without directing notice of the application for injunction to be issued to the other side, and its order, directing stay of sale of property in execution, was passed *ex parte*, without the other side being given an opportunity to show cause, held that the order was irregular.—*Amolak Ram v. Sahib Singh*, 7 A. 550. See also *Baddam v. Dhunput Singh*, 1 O. W. N. 429, where it has been held that an injunction should not issue without notice to the opposite party.

A petition praying for a temporary injunction was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without notice to the opposite party. On appeal, the District Judge granted the injunction. Held, that no appeal lay from the order of the Subordinate Court, and that the District Judge had acted illegally.—*Luis v. Luis*, 19 M. 186

**4.** Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. [S. 496.]

Order for in-  
junction may be  
discharged, varied  
or set aside.

## COMMENTARY.

**History**—This rule exactly corresponds to S. 496, C. P. Code, 1882. It is intended to cover two classes of cases (1) when an urgent order *ex parte* has been passed under rr 3 and 4 will allow the party against whom it has been passed to apply to have it discharged or varied or set aside; and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable, it would be open to either party to apply under r. 4 to the Court to discharge, vary or set it aside. But this rule (r. 4) is not intended to set at naught the ordinary *curtus curia* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed.—*Govinda Ramanuja v Vijayaramaraju*, A. I. R. 1929 Mad. 803.

**Compensation to defendant for issue of injunction on insufficient grounds**.—Section 497, C. P. Code, 1882, contained the provisions for awarding compensation to a defendant for issue of injunction on insufficient grounds, the provisions of that section have been embodied in S. 95 of the present Code—See notes under that Section.

**Appeal**—An appeal will lie under Or. XLIII, r. 1, Cl. (r), from an order under this rule—See *Zabada Jan v Muhammad Tarab*, 15 A. S.

Whatever be the scope of Or XXXIX, r 4 it cannot be that a party can appeal against a mere re-iteration of the original order of injunction when he has failed to appeal against the original order. Therefore, where an order under Or. XXXIX, r 1 staying delivery of property in execution was passed after notice, and the non-applicant without filing an appeal applied under this rule for dissolution of the order, and the Court thereupon appointed a Receiver, the original injunction staying delivery remained in full force and was re-iterated and revised and was not varied though the Court purported to do so by appointing a Receiver—*Govinda Ramanuja v. Vijayaramaraju*, A. I. R. 1929 Mad. 803

**5. An injunction directed to a corporation is binding not**  
 Injunction to cor- only on the corporation itself, but also on all  
 poration binding members and officers of the corporation whose  
 on its officers personal action it seeks to restrain. [S. 495.]

## COMMENTARY.

**Alterations**.—This rule corresponds to S. 495, C. P. Code, 1882, with the omission of the words "or public company" which occurred in the old section after the word "corporation."

**Corporation**.—An individual is not entitled to protection by way of injunction against the act of a corporation which affects that individual's character and reputation, whether private, professional or commercial, though the act in question was one which the corporation had no power to do under its instrument of incorporation and was in excess of its power, where he would not have been entitled to such protection had the act complained of

been committed by an individual defendant.—*Shepherd v. Trustees of the Port of Bombay*, 1 B. 132.

Agreement that the plaintiffs should be the agents of a company for 25 years—Resolution of the directors ousting the plaintiff from their agency—Suit by agents of the company to restrain it from carrying into effect the resolution of the directors. *Held*, that in as much as the Court would not, by a decree for specific performance or by injunction, compel the company to retain the plaintiff in the confidential position of agent, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principle part of the contract, viz., the agreement that the plaintiff should be the agent of the company for 25 years.—*Nasserwanji v. Gordon*, 6 B. 266.

### INTERLOCUTORY ORDERS.

**6.** The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks, fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once. [S. 498.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 498, C. P. Code, 1882, with some additions and alterations. It gives power to a Court to sell a perishable article but does not authorise it to send a commissioner to sell any crop.—*Kristnayya v. Karnedhan*, 126 I. C. 284; A. I. R. 1930 Mad. 324.

In order to enable a Court to order an *interim* sale of moveable property it must either be the subject-matter of the suit, or it must have been attached before judgment in a suit but if either of these two conditions do not exist then the Court cannot exercise the power conferred by this rule.—*Kalu Mal v. Ganga Bishan*, 134 I. C. 118.

The words "*or attached before judgment in such suit*" and the words "*or which for any other just and sufficient cause it may be desirable to have sold at once.*" have been added.

"Words have been added to S. 498, so as to empower the Court to order a sale of securities when the state of the market requires such a course."—*See the Report of the Special Committee.*

Detention, preservation, inspection, etc., of subject-matter of suit.

**7.** (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

rr. 7, 8.

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule. [S. 499.]

### COMMENTARY.

**Alterations.**—This section corresponds to S. 499, C. P. Code, 1882, with some additions and alterations. In Cl. (a) the words "*or as to which any question may arise therein*" have been added; the other changes are merely verbal.

**Inspection of subject-matter of suit.**—In a suit for damages alleged to have been caused to plaintiff's house by the erection by the defendant of an adjoining house the defendant applied for an order allowing him to enter into the plaintiff's house for the purpose of inspecting, examining, and surveying the alleged injuries. *Held*, that the house and the premises of the plaintiff formed the "subject of the suit," within the meaning of this rule and the Court had the power to make the order applied for.—*Dhorany Dhur v. Radha Gobind*, 24 C. 117: 1 C. W. N. 99.

"For all or any of the purposes aforesaid, etc."—The Court has jurisdiction to make an order for preparation of any inventory under this rule.—*Amjad v. Ali Hossain*, 12 C. L. J. 519: 15 C. W. N. 353; *Giribala v. Prokash Chandra*, 49 C. L. J. 484: A. I. R. 1929 Cal. 498, in which it has also been held that the Probate Court also is invested with powers to make an order for preparing an inventory by S. 228 of the Succession Act. But see *Mahomed Rasek v. Tahidunnissa*, 52 I. C. 33.

**Production of property.**—In a suit by a pledgor against the pledgee for redemption of the pledge, *held*, that the Court is competent to make an order for the production of the property pledged under Or. XXXIX, r. 7 (1) (a).—*Jitendra Nath v. Asoke Nath*, 30 C. L. J. 64: 52 I. C. 4.

**8. (1)** An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.  
Application for such orders to be made after notice.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

[S. 500.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 500, C. P. Code, 1882, with some modifications.

In sub-rule (1), the words "*after institution of the suit*" have been substituted for the words "*after service of summons*"; which occurred in the old section; and in sub-rule (2) the word "*appearance*" has been substituted for the words "*after the applicant has appeared*" which occurred in the old section. The other changes are merely verbal.

**Notices.**—An application under this rule can only be made by a plaintiff, after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. —*Sengotha v. Ramasami*, 7 M. 241.

**Appeal or review**—If an interlocutory order is wrongly refused by one Judge, the proper course is to apply for a review or to appeal from it; not to seek to obtain the order by resorting to another Judge, even though arguments should then be forthcoming which were not put before the first Judge. —*Motivahu v. Premvahu*, 16 B. 511.

9. Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit. [S. 501.]

## COMMENTARY.

**Alterations.**—This rule exactly corresponds to S. 501, C. P. Code, 1882 with the substitution of the word "*where*" for "*when*" in the beginning.

Plaintiff was put in possession of property in suit under this rule, and the suit was dismissed; but an order was passed under the latter part of the rule to enable the defendant for recovery of what he had lost during the period of dispossession by the plaintiff. Held that the defendant was entitled

to obtain mesne-profits in execution of the decree and that a separate suit was unnecessary.—*Radhey Singh v. Mangniram*, 6 C. W. N. 710.

**10.** Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court. [S. 502.]

### COMMENTARY.

**Alterations.**—This rule exactly corresponds to S. 502, C.P. Code, 1882 with the substitution of the word “where” for “when” in the beginning.

**“Holds.”**—This rule would seem to apply only when the party making the admission holds the property or other thing which the party in whose favour the order is made, seeks to have delivered to him. But even if that rule was intended to apply to a case where the property is not so held by the party making admission, it would not cover a case where the money was held by another Court to the credit of another suit.—*Rajah Parthasarathi v. Rajah Rangiah*, 27 M. 168. 13 M. L. J. 501.

**Deposit.**—As to liability for interest for money not deposited, see *Ram Dass v. Prosunno Moyee*, 16 W. R. 297.

**Appeal.**—An appeal lies from an order under this rule, see Or. XLIII, r. 1, Cl. (r).



# ORDER XL.

## APPOINTMENT OF RECEIVERS.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—  
**Appointment of receivers.** (a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. [S. 503.]

2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver. [S. 503, Cl. d.]  
**Remuneration.**

**Duties.**

3. Every receiver so appointed shall—

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

[S. 503.]

### COMMENTARY.

**Alterations and their effect.**—Section 503 of the C. P. Code, 1882, has been divided into these three rules.

The wording and the language of the first para. of the old section have been materially changed, and several additions, alterations and omissions have been made.

In subrule (1) the words "*where it appears to the Court to be just and convenient*" have been substituted for the words "*whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immovable, the subject of a suit, or under attachment,*" which occurred in the first para. of the old section.

By the above change the power of the Court in the matter of appointment of receivers has been enlarged. According to the language of subrule (1), the Court can appoint a receiver where it appears to it to be just and convenient. The conditions attached to the para. of the old section are no longer necessary for the appointment of a receiver. The omission of the words "*the subject of a suit*" or "*under attachment,*" is material, as the words "*property the subject of a suit*" were the subject of much discussion in *Poresh v. Omerto*, 17 C. 614 and in *Ramasami Nair v. Ramasami Chetty*, 30 M. 255. By the omission of the above two expressions, a receiver can now be appointed where a personal remedy is sought against the defendant or the property is not under attachment (30 M. 255). The other alterations are mere change of words and phrases.

**Receiver in proceedings other than suits.**—Section 503 of the Code of 1882 contained the words "*subject-matter of a suit.*" Under the old Code, therefore, a receiver could only be appointed in a suit. By the omission of these words in the present rule, a receiver may now be appointed even in proceedings other than a suit—*Asadali v. Mahomed*, 43 C. 986 : 36 I. C. 177. A receiver may be appointed in a suit—*Shankar*, 17 B. 388 ; or in proceedings other than a suit—*In re Bai Jamnabai*, 36 B. 1 I. C. 554 ; *Chandrawati v. Jagannath*, 7 L. L. J. 231 : 90 I. C. 611 : A. I. R. 1925 Lah. 489 ; *Godubai v. Janabai*, 116 I. C. 642 : A. I. R. 1929 Nag. 119. But a Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificate Act.—*Kanhaya v. Kanhaya Lal*, 46 A 372 : 79 I. C. 363 : A. I. R. 1924 All. 376 ; or in proceedings for the removal of a trustee under S. 74 of the Trusts Act—*Assardas v. Thakuribai*, 103 I. C. 816 : A. I. R. 1927 Sind 237.

**"Just and convenient."**—The words "*just and convenient*" have been taken from the English Judicature Act, 1873. They mean that the Court should appoint a receiver for the protection of property or the prevention of injury, according to legal principle, and not that the Court can make such appointment because it thinks convenient to do so. They confer

no arbitrary and non-regulated discretion on the Court.—*Hobibullah v. Abtia Kallah*, 23 C. L. J. 567; *Pana Seene v. Ana*, 8 I. C. 1191; *Dharendra v. Surendra*, 34 C. W. N. 440; 129 I. C. 609; A. I. R. 1930 Cal. 610; *Bhupendra v. Manohar*, 28 C. W. N. 86. See also *Hemendra v. Prokash*, 35 C. W. N. 1066. Before appointing a receiver in any particular case, the Court must take the whole circumstances of the case into consideration and then decide whether it would be "just and convenient" to appoint a receiver. Primarily this discretion is to be exercised by the Court in which the case is pending and to which the application is made. The Court has full discretion to appoint or remove a receiver and the appellate Court will not as a rule when the first Court has acted after considering all the circumstances, interfere with the exercise of that discretion.—*Kadir Bakhsh v. Ghulam Mahomed*, 55 I. C. 50; *Amar Nath v. Tehal Kaur*, 4 U. P. L. R. 73; 67 I. C. 353; *Dhumi v. Nawab Muhammad Suggad Ali Khan*, 73 I. C. 600; A. I. R. 1923 Lah. 623; *Benoy Krishna v. Satish Chandra Giri*, 55 I. A. 131; 55 C. 720 (P. C.); 32 C. W. N. 681; 47 C. L. J. 424; 108 I. C. 348; A. I. R. 1928 P. C. 49; 54 M. L. J. 423; 30 Bom. L. R. 815; 5 C. W. N. 272; 23 A. L. J. 481 (on appeal from *Satish Chandra Giri v. Benoy Krishna*, 96 I. C. 80; A. I. R. 1926 Cal. 1092); *Jaswant Singh v. Punjab National Bank Ltd.*, 133 I. C. 433; A. I. R. 1931 Lah. 82. Where there is no apprehension of waste or damage a receiver will not be appointed merely on the ground that the applicant apprehends difficulty in obtaining possession of the property in the event of success or in realising the mesne profits which will accrue during the pendency of the appeal.—*Trial Singh v. Shriamoni Gurdwara Prabandhak Committee*, 134 I. C. 799; A. I. R. 1931 Lah. 688; 32 P. L. R. 665.

"May by order."—The order on an application under Or. XL, r. 1, should not express an opinion on the merits of the case.—*Bhupendra v. Manohar*, 28 C. W. N. 86.

The appointment of a receiver is a matter resting in the discretion of the Court. The powers of appointing a receiver conferred by this rule, must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out.—*Sitheswari v. Abhayaswari*, 15 C. 818; *Meyappa Chetty v. Narayana Chetty*, 43 I. C. 550; *Isht v. Shib Ram*, 71 I. C. 743; A. I. R. 1923 Lah. 239. See also *Mai Bu v. Mai Oh Gyi*, 5 R. 70; 101 I. C. 717; A. I. R. 1927 Rang. 179. Where property is shown to be *in medio*, i.e., in the enjoyment of no one, the Court can hardly do wrong in appointing a receiver, for it is the common interest of all parties to prevent a scramble.—*Alkama Dibi v. Syed Istak*, 29 C. W. N. 836; 89 I. C. 183; A. I. R. 1925 Cal. 970. The mere circumstances that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver.—*Prasonomoyi v. Beni Madhab*, 5 A. 556; *Kunhan v. Kannan*, 79 I. C. 561; 46 M. L. J. 137; A. I. R. 1924 Mad. 482. Neither can a receiver be appointed simply for the purpose of ascertaining the income of an estate in order to fix the amount of maintenance to be paid out of it.—*Rujammal v. Tyagaraja*, A. I. R. 1925 Mad.

1245: 89 I. C. 943. In *Chandidat v. Padmanand*, 22 C. 459, it has been further held that *the distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed*, is that, while in either case, it must be shown that the property should be preserved from waste or alienation; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out.—*Sivagnanathammal v. Arunachalam*, 2 M. W. N. 75. See also *Mikanbai v. Dassimal Gangaram*, 45 I. C. 224.

**Selection of persons for appointment as receivers and their removal.**—The selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case.—*Kali Kumari v. Bachhan Singh*, 17 C. W. N. 974; 19 I. C. 873; *Sripati v. Bibhut*, 53 C. 319; 92 I. C. 940; A. I. R. 1926 Cal. 593.

There is no hard and fast rule that a party or his agent should not be appointed a receiver; and that is a question which must be determined under the peculiar circumstances of each case; *Dhiyan Singh v. Har Narain*, A. I. R. 1929 Lah. 780. But as a general rule the receiver appointed should be a disinterested person, although it is competent to the Court upon the consent of the parties and in a proper or special case without such consent, to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate.—*Bhupendra v. Manohar*, 28 C. W. N. 86; *Kali Kumari v. Bachhan Singh*, noted *ante*.

Residence beyond jurisdiction is not by itself a fatal objection, but when a non-resident is appointed receiver, there must be an adequate guarantee that he will be subject to the effective control of the Court (*Kali Kumari v. Bachhan Singh*, noted *ante*). Residence at a great distance from the property which is to be subject to his management and control, while not regarded as an absolute disqualification for the office, is an important circumstance to be taken into consideration (*Ibid*). The Court which has the power of appointing a receiver is also invested with the power of dismissal.—*A. U. John v. Agra United Mills*, 134 I. C. 454; A. I. R. 1931 All 72; 29 A. L. J. 13.

A receiver who has been once appointed cannot be removed merely because he is rather old but he can be removed only for proved incapacity.—*Ram Kumar v. Ashutosh*, 115 I. C. 831; A. I. R. 1929 Pat. 114. In a matter of appointment of a receiver for equitable execution, the wishes of the creditors are entitled to great weight as they have virtually the right of nomination (*Ibid*).

The attorney of a party should not be appointed receiver as such an appointment interrupts the arrangement by the party for his defence in the suit.—*Johurmull v. Kedar Nath*, 55 C. 113; 31 C. W. N. 953; 104 I. C. 387; A. I. R. 1927 Cal. 714.

"Appoint a receiver of any property, whether before or after decree."—The power conferred by the Court by Or. XL, r. 1 (a) to appoint a receiver of any property whether before or after decree, refers only to the appointment of a receiver in respect of the property in regard to which the litigation is pending, that is to say as long as the suit before the Court

remains *lis pendens*, the function of the receiver will continue until he is discharged by the Court.—*Chandreswar Prasad v. Bisheswar Pratap*, 5 P. L. J. 513 : 1 P. L. T. 642.

Whether issue of notice to the opposite party before appointment of receiver is necessary.—Order XL, r. 1, C. P. Code, does not lay down that notice to the opposite party should be issued before appointing a receiver and it is obvious that in many cases the object of the appointment might be nullified if notice were issued.—*Ishri v. Shibram*, 71 I. C. 743 : A. I. R. 1923 Lab. 239 (22 C. 459, 21 M. L. J. 821, 107 P. R. 1908 *distd.*).

Courts empowered to appoint receivers.—Another most important change in this order is the omission of S. 505, C. P. Code, 1882, under which only the High Courts and the District Judges were empowered to exercise the powers conferred by Chap. XXXVI of the C. P. Code, 1882. The Subordinate Courts could only nominate a person and the District Judge could authorize the Subordinate Courts to appoint the person so nominated or he could pass such other order as he might think fit.

"Having regard to the standard of efficiency, the Committee see no reason to withhold from Subordinate Judges, the power to appoint receivers. They therefore propose that S. 505 of the Code should no longer be retained, for its effect in practice is often to defeat the purposes for which an application is made"—*See the Report of the Special Committee*.

Power of Court to appoint receivers and grounds for appointment.—The powers conferred by this rule are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver that it can do no harm to appoint one. The discretion is one that should be exercised with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made.—*Prosonomoyi v. Beni Madhob*, 5 A. 556; *Kumar Satya Narain v. Srimati Rani Keshabaty*, 18 C. W. N. 537; *Kunhan v. Kannan*, 79 I. C. 561 : A. I. R. 1924 Mad. 482 : 46 M. L. J. 133.

In an application for the appointment of a receiver, one has got to see the nature of the charges made, and if one finds that they are somewhat vague in character, it is a ground for declining to interfere on an interlocutory application for the appointment of a receiver.—*Satis Chandra v. Benoy Krishna*, 96 I. C. 30 : A. I. R. 1926 Cal. 1092.

In all cases where a property is in the hands of one co-sharer and the share of the profits is withheld from the other, there is sufficient reason for appointing a receiver.—*Basantram v. Dasandhi Mal*, 117 I. C. 375 : A. I. R. 1929 Lab. 497.

When an application is made to the Court to take the property into its hands by appointing a receiver, the plaintiff must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a

r. 3.

receiver.—*Govind Narayan v. Vallabhrao*, 22 Bom. L. R. 217: 55 I. O. 827; *Banwari Lal v. Moti Lal*, 3 P. L. T. 466: 63 I. C. 656: A. I. R. 1922 Pat. 493; *The Firm Raghbir Singh v. Narijan Singh*, 72 I. C. 569: A. I. R. 1923 Lah. 43; *Mahomed Qasim v. Nagaraja*, 106 I. C. 167: A. I. R. 1928 Mad. 813.

On an interim application for a receivership, the Court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the Court gives its protection.—*Benoy Krishna v. Satish Chandra Giri*, 55 I. A. 131: 55 C. 720 (P. C.): 32 C. W. N. 631: 47 C. L. J. 424: 103 I. C. 348: A. I. R. 1923 P. O. 49: 54 M. L. J. 423: 30 Bom. L. R. 815: 5 C. W. N. 372: 26 A. L. J. 481. See also the judgment of the Calcutta High Court in *Satish Chandra Giri v. Benoy Krishna*, 96 I. C. 30: A. I. R. 1926 Cal. 1092.

Waste or misappropriation of property is . . . . .  
receiver—The fact that the acts complained of . . . . .  
rather than waste makes no difference for the . . . . .  
*mayya v. Venkata Subbaya*, 18 M. 23.

The mere fact that a Mahomedan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry into the merits of the application. There is nothing in Or. XL, r. 1, to prevent the appointment of a receiver in such a case.—*Zahros Syed Ali v. Ahmad Syed*, 68 I. C. 502: A. I. R. 1923 Nag. 21.

Where both the claimants are mendicants and have no worldly property of their own, and the property in dispute is of considerable value and acts of waste have been found to have been committed by the defendant who is in possession, held, that the appointment of a receiver is the proper order.—*Ram Sunder v. Kamal Tha*, 32 C. 741.

which might be decreed, are not adequate reasons for the appointment of a receiver.—*Muhammad Askari v. Nisar Husain*, 43 A. 311: 19 A. L. J. 50.

The removal of a large amount of property by the defendant and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a receiver.—*Sia Ram Das v. Mohabir Das*, 27 C. 279: 5 C. W. N. 362 (15 C. 818 and 22 C. 459 referred to). See also *Sham Chand Giri v. Bhaya Ram Pandey*, 5 C. W. N. 365.

Where the subject of dispute between the parties in a litigation was a large impartible zamindari with valuable forests, mines and minerals and the zamindari had long been under the management of the Court of Wards, held, that the case was a fit one for the appointment of a receiver pending the appeal and for stay of execution of the decree by the successful claimant.—*Sri Pratap Chandra v. Sri Raja Jagadish Chandra*, 37 C. L. J. 417: 75 I. O. 417.

Order XL, r. 1 of the Code prevents the Court from ejecting a person not a party to the suit unless one or other of the parties to the suit has such a right. But the Court has always the power to appoint a receiver to take possession of the properties from the parties to the suit itself and this has nothing to do with the fact that the plaintiff, even if he succeeds, can only get possession and does not seek to eject the defendants.—*Kumaraswami v. Pasupathia*, 12 L. W. 254.

When a suit is brought under the Bengal Tenancy Act (VIII of 1885) for arrears of rent and for ejectment of the defendant. *Held*, that a receiver of the rents and profits of the tenure might properly be appointed under the provisions of this rule.—*Kartie Nath v. Padmarund*, 11 C. 496.

But where in a suit for recovery of arrears of rent and cess based on an *Ijara potta* with a prayer for ejectment under S. 66 (2) of the B. T. Act, the prayer for *Khas* possession as made in the plaint was given up and the plaintiff does not claim as specific appointee of any part of the defendant's separate estate, he is, merely in the nature of general creditors, seeking to obtain payment by a sort of equitable action or assumpsit or debt and has no right to be paid out of a specified fund; and so, he cannot, in general, ask for the appointment of a receiver.—*Dharendra v. Surendra*, 34 C. W. N. 440: 129 I. C. 609: A. I. R. 1930 Cal. 610.

Where dispute arose between two persons as to who was entitled to be a *mahant* and there was something to be said regarding the claim of each and under the circumstances putting one of them into possession would give him a greater advantage over the other, a proper case was made out for appointing a receiver.—*Manohar Das v. Kalyan Das*, 69 I. C. 361.

No receiver can be appointed under the Religious Endowments Act. (XX of 1863) except under S. 5 of that Act. A Civil Court has power under that section to appoint a manager only where there is a dispute as to the right of succession.—*Gyananand v. Kristo Chandra*, 8 C. W. N. 404; *Veeraragava v. Krishnasami*, 4 M. L. T. 88, where it has been held that a receiver can be appointed in a suit under S. 539, C. P. Code (S. 92). The property of a temple is a subject of the suit within the meaning of this rule and the Court has jurisdiction to appoint a receiver.

A strong case must be made out to induce a Court to dispossess a trustee or executor who is willing to act, and appoint a receiver. (Per Woods, J. in the case of *Haines v. Carpenter*, quoted at length in the footnote of para. 707 of *High on Receivers*.) If there is no danger to the trust property and interference is unnecessary by appointing a receiver the Court will not appoint one.—*Syed Asad Reza v. Wahidunnissa*, 30 C. L. J. 231.

There is no jurisdiction in a Court to appoint a receiver at the instance of a simple creditor, unless the creditor establishes a special equity in his favour for such appointment. The appointment of a receiver is an equitable relief and will be granted only on equitable grounds. The first essential condition for the appointment of a receiver is that the applicant must satisfy the Court that he has an "interest" in the property to be affected by the order.—*Pirthi Chand Lal v. Kalikanand Singh*, 61 I. C. 849: 6: P. L. J. 366.

Where the executor was to act in consultation with other heirs and the fulfilment of that condition had become impossible that was held to be a sufficient circumstance to justify the appointment of a receiver.—*Surendra v. Sushil*, 55 C. 249: 109 I. C. 759: A. I. R. 1923 Cal. 256.

Where a money-decreo against the assets of a deceased debtor was sought to be executed against the property in possession of only one of the heirs holding the deceased's assets, the appointment of a receiver in respect of the whole of the property of such heir so as not to leave anything for the maintenance of his family would not be just or convenient, if the heir was willing to place some property in the hands of the receiver and allow the appropriation of its profits towards payment of the decree.—*Sharaf Jahan Begum v. Mohammad Sadiq Ali Khan*, A. I. R. 1923 Oudh 40.

In a suit brought by the reversioners of a Hindu widow during her lifetime for a declaration that a certain alienation made by the widow was void, the Court should not appoint a receiver.—*Shankarbhai v. Bai Shiv*, 54 B. 837: 127 I. C. 897: A. I. R. 1930 Bom. 545.

**Receiver in partnership suit.**—The appointment of a receiver to manage a partnership business where all the partners are not parties to the suit is *ultra vires*.—*Mikanbai v. Dassimal*, 45 I. C. 224.

In a suit brought by the widow of a deceased partner to wind up a partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation. After decree, on the application of the plaintiff, a receiver was appointed to collect outstanding debts for the purpose of executing the decree. *Held*, that the appointment of the receiver was valid.—*Shunmugam v. Moidin*, 8 M. 223.

**Receiver of a Company.**—The Court has no jurisdiction to appoint a receiver of a company. If it is necessary to protect the assets, recourse must be had to the provisions of the Companies Acts.—*Kailash v. Sadar Munsif, Silchar*, 52 C. 513: 88 I. C. 826: A. I. R. 1925 Cal. 817.

**Receiver in matters referred to arbitration.**—When a dispute has been referred to arbitration in accordance with the prayer of all parties, the duty of the Court is to act upon the agreement entered into by the parties themselves and in order to determine whether the Court's power to appoint a receiver has been ousted or not by such reference to arbitration, it will have to be ascertained in each individual case as to what was actually referred. If the Court finds that the question of management *interim* was also referred, it may defer the consideration of the question of appointment of a receiver in the view that the parties by agreement between themselves have disentitled themselves to the auxiliary relief which otherwise they could have from the Court. If in the petition for reference the words used are "to do all works in connexion with the subject-matter of the suit and to decide the suit" they do not include the passing of orders for *interim* protection and the Court has jurisdiction to appoint a receiver in such cases.—*Surendra v. Sushil*, 55 C. 249: 109 I. C. 759: A. I. R. 1923 Cal. 256 (referring to *Zalinoff v. Hammond*, (1893) 2 Ch. 92: 67 L. J. Ch. 370: 78 L. T. 456; and also referring to *Law v. Garret*, (1878) 8 Ch. 26: 36 L. T. 3; *Compagnie du*





execution of whose decree he is appointed; nor can it be said that the moneys realised by the receiver become *ipsa facta* moneys belonging to the judgment-creditor, and, as moneys paid to the credit of the judgment-creditor's suit the moment the receiver comes into possession of the same.—*Noteso Pillai v. Govindasami*, A. I. R. 1930 Mad. 4.

It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree, when such continuance is necessary or for so long as it may be so. A decree of the High Court directing the permanent receivership was held not in variation of the judgment which it purported to follow; and that the Court had a discretion to make such an order when necessary for the preservation of the estate.—*Mothusri Umamba v. Mathusri Dipamba*, 23 I. A. 28: 19 M. 120 (P. C.).

For other cases on the appointment of Receiver by way of execution, see notes to S. 51 (d), ante.

**Receiver of property in hand of common manager.**—A receiver can be appointed in respect of property in the hands of a common manager appointed under S. 95 of the B. T. Act.—*Madaneswar v. Mahamaya Prosad*, 15 C. W. N. 672: 13 C. L. J. 487; and the fact that an application for the appointment of a common manager is pending before the District Judge does not preclude the Sub-Judge before whom the suit is pending from appointing a receiver in a proper case.—*Jibanessa v. Majidunnessa*, 17 C. W. N. 581.

The District Judge has no jurisdiction to appoint a receiver of properties which are the subject of a suit or attachment in other Courts, even though such Courts may have been subordinate to his Court.—*Latafat Husein v. Anunt Chowdhry*, 23 C. 517.

**Receiver in joint family partition suit.**—The words "the owner" in Or. XL, Cl. (1) (d), mean the whole body of owners to whom the joint estate belongs. In a suit for partition of a joint estate, the Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a receiver, and to order that the receiver shall be at liberty to raise money on the security of the whole joint estate.—*Pareek v. Omerto*, 17 C. 614.

The Court will not appoint a receiver in a partition suit between members of a joint family except by consent and especially where the family property consists of land. Thus in order that a receiver should be appointed of joint family property in a partition suit special circumstances will have to be proved before the Court will be entitled to appoint a receiver.—*Govind Noroyon v. Vallabh Rao*, 22 Bom. L. R. 217: 55 I. C. 827.

**Receiver in mortgage suit.**—A receiver may be appointed at the suit of a first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrances thereon. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession. A receiver can be appointed at the instance of a mortgagee who holds a simple mortgage.—*Rameswar Singh v. Chuni Lal*,

31 C. L. J. 385; *Gobind Ram v. Jwala Pershad*, 43 I. C. 533; *Punjab National Bank Ltd. v. Moosaji*, 102 I. C. 353; A. I. R. 1927 Sind 230; 23 S. L. R. 49. See *Dhian Singh v. Har Narain*, A. I. R. 1929 Lah. 780.

A hard and fast rule cannot be laid down as to under what circumstances a receiver should be appointed at the instance of a simple mortgagee, but in order to justify the appointment of a receiver there should ordinarily be some loss or detriment not foreseen by the mortgagee at the time he took a simple mortgage, which loss could not be compensated except by appointing a receiver.—*Ethirajulu v. Rajagopalachari*, 115 I. C. 344; A. I. R. 1929 Mad. 138; 56 M. L. J. 115.

The Court may appoint a receiver at the instance of a mortgagee where the action is either for foreclosure or sale, if there is reason to suspect that the security is insufficient or if the interest is in arrear (7 C. W. N. 452 and 16 C. W. N. 997 referred to); and the right of the mortgagee to ask for a receiver is not affected by the fact that a decree for sale has been passed, because the suit cannot be said to terminate till the property is sold or the mortgage-money paid.—*Manindra v. Sumiti Bala*, 95 I. C. 632; A. I. R. 1926 Cal. 1006. The High Court of Rangoon has also held that where a mortgage decree-holder after obtaining a preliminary decree for sale of the mortgaged premises asked for the appointment of a receiver to collect the rents of the mortgaged premises, a receiver may be appointed and such appointment would be binding not only on the parties to the suit but also on any purchaser of the interest of the mortgagor in the premises, and so long as interest on the mortgage was in arrear the application for the appointment of a receiver by the opposite party cannot be successfully opposed; *Khoo Joo Tin v. Ma Sein*, 6 R. 261; 110 I. C. 620; A. I. R. 1928 Rang. 176 (following *Ahmed Cassim v. Solappa*, 4 I. C. 1031; 5 L. B. R. 135). In *Kshilish v. Raja Janakinath*, 35 C. W. N. 1141, it has been held that a receiver can be appointed in a mortgage suit even after the passing of the decree for sale, but the Court should, before making the appointment, come to the conclusion that it is just and necessary; and where subsequent to the order appointing a receiver but before the actual appointment, certain sales had been effected, the Court should consider whether an appointment is still necessary.

When the properties contained in the mortgages are part of an undertaking for the supply of electric energy to which the prohibition in S. 9 (2), Electricity Act (IX of 1910) applies, the mortgage is void *ab initio* and it cannot give such mortgagee, who has got only a simple money-decree a right to the appointment of a receiver.—*Meyappa Chettyar v. Ma Zu*, 127 I. C. 176; A. I. R. 1930 Rang. 271.

Where in a mortgage suit an *interim* receiver was appointed and the properties were sold in execution and the sale was made absolute and a certificate granted to the purchaser, it is the purchaser and not the receiver who is entitled subsequently to sue for possession of the property.—*Abdulla v. B. K. Chatterjee*, 9 R. 565.

A receiver can be appointed under this rule, in a suit to enforce a mortgage.—*Ghanashyam Misser v. Gobinda Moni*, 7 C. W. N. 452 (3 C. 335; 1 C. L. R. 295 declared obsolete). As regards the Court's power to appoint a receiver of mortgaged property, see also *Latafat Hossein v. Anunt Chowdhry*, 23 C. 517; *Jaikisson Das v. Zenabai*, 14 B. 431; *Weatherall v. Eastern Mortgage Agency Co.*, 13 C. L. J. 495.



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An equitable mortgagee, though not entitled to possession of mortgaged properties, has the right to ask for the appointment of a receiver in his mortgage suit; *Maharaja of Pittapuram v. Gokuldoss*, 54 M. 565: 133 I. O. 504: A. I. R. 1931 Mad. 626: 61 M. L. J. 111; *Jaswant Singh v. Punjab National Bank Ltd.*, 133 I. C. 433.

Where a receiver is appointed, the delay of the Court in adjudicating upon the mortgagee's right to the profits does not prejudice him, nor does the order of the Court permitting the mortgagor a certain time, not exceeding 6 months to pay off the mortgage amount enable the mortgagor not only to withhold payment of the interest which accrues due during that period but to claim that the rents of the mortgaged property recovered by the receiver during that period be applied to purposes other than the payment of interest due on the mortgage.—*In re Moolji Murarji*, 115 I. C. 306: A. I. R. 1929 Sind 114: 23 S. L. R. 200.

**Receiver of future earnings of judgment-debtor.**—The Court has no jurisdiction to enforce satisfaction of a judgment-debt by appointing a receiver of the future earnings of the judgment-debtor.—*Asad Ali v. Haidar Ali*, 38 C. 13; *Ranee Annapurni v. Swaminatha*, 34 M. 7 at p. 9. Likewise, no receiver can be appointed in respect of future allowances of maintenance payable to a judgment-debtor.—*Pali Kandy v. Krishnan*, 40 M. 302.

**"Remove any person."**—The word "person" in r. 1 (1) (b) refers to a person other than the receiver.—*Ramaswami v. Ayyalu*, 46 M. L. J. 196: 78 I. C. 625: A. I. R. 1924 Mad. 614; *Sripati v. Bibhuti*, 53 C. 319: 92 I. C. 940: A. I. R. 1926 Cal. 593. It refers to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a receiver.—*Sripati v. Bhupati*, 53 C. 319: 92 I. C. 940: A. I. R. 1926 Cal. 593.

The Court on an objection being made by persons, who are not parties to the suit, claiming the properties to be theirs and in their possession, is bound by Or. XL, r. 1 (2), C. P. Code to take steps to ascertain the truth of these allegations before it can take possession of the property.—*E* 34 C. L. J. 123.

A Civil Court has no power to appoint a receiver in sequestration of a receiver appointed by a Magistrate under S. 146, Cl. (2) of the Code of Criminal Procedure.—*Bidyaprasad v. Ashraf*, 40 C. 862: similarly when a Civil Court appoints a receiver, a Magistrate has no jurisdiction under S. 145, Cr. P. Code, to interfere with him in respect of his possession of the property without the sanction of the Civil Court.—*Dunne v. Kumar Chandra Kisore*, 30 C. 593. One subordinate Court has no power to restrain the action of another subordinate Court with co-ordinate powers. Therefore, where a subordinate Judge had appointed a receiver; *held*, that it was not competent to another subordinate Judge to issue a *rubkari* to the first Court requesting it to restrain the receiver from taking possession of a part of the property in respect of which the receiver had been appointed.—*Chaudhry Kidar Nath v. Mahmood Ali Khan*, 2 P. L. T. 716: 6 P. L. J. 268.

The powers of a receiver are regulated by Or. XL of the C. P. Code, and the only ground upon which his possession can be resisted is under sub-clause (2) of r. 1 of Or. XL of the Code. Where a person who refuses

to deliver possession to a receiver is ordered by the Court to do so, his remedy is by appeal under Or. XLIII, r. 1 (s) of the C. P. Code.—*Mussamat Dulhin Sona Kuer v. Jamil Ahmad*, 48 I. C. 779.

Order XL, r. 1 (2) deals with cases in which the property is in the possession of a third party and the parties to the suit have no present right to disturb him; but as between parties to the suit, a receiver can be appointed if it is just and convenient for enforcing or carrying out the directions of the decree though one of the parties is in possession and is not liable to be removed.—*Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiagaraja Swami Devasathanam*, 61 M. L. J. 904. Where a creditor, who had purchased the rights of a person in execution of a decree, is made a party to a suit brought by the person's wife and son for partition and declaration that certain decrees, mortgages and attachments were not binding on them, a Court can on a creditor's application appoint a receiver although such creditor being a purchaser of an undivided share has no present right of possession of the property without enforcing partition of the whole estate.—*Babarao v. Narayanrao*, 119 I. C. 687; A. I. R. 1929 Nag. 283.

Where a creditor is put into possession of property for the purpose of enabling him to realise the proceeds and appropriate the same towards the repayment of his debt, his possession or custody is not protected by Or. XL, r. 1 (2) of the C. P. Code.—*Hilendra Singh v. Rameshwar Singh*, 6 P. L. J. 37; 2 P. L. T. 593; 61 I. C. 67; on appeal to Privy Council, 29 C. W. N. 413; 40 C. L. J. 431; 47 M. L. J. 286; 22 A. L. J. 963; A. I. R. 1924 P. C. 202, 206; 81 I. C. 576; 82 I. C. 794.

Power as to the execution of documents.—A receiver has power to execute a conveyance, under this rule, including the share of a minor defendant.—*Basir Ali v. Hafiz Nazir Ali*, 43 C. 124; 19 C. W. N. 817; 30 I. C. 406.

"Realization of property."—Where a receiver has been appointed, the Court, after the dismissal of a suit, has no power to give the receiver any fresh power as for instance liberty to sell.—*Rabeholme v. Smith*, 34 C. 336.

"All such powers as to bringing and defending suits etc., as the owner himself has"—Where a receiver is appointed with full powers under Or. XL, Cl. (1) (d) that is, with such powers as to bringing suits as the owner himself has, the receiver is entitled to sue in his own name though not expressly authorized to do so.—*Pink v. Maharaj Bahadur Singh*, 25 C. 642; *Jagat Tarini Das v. Naba Gopal*, 34 C. 305; 5 C. L. J. 270. The words "all such powers, etc.," are wide enough to empower the Court to authorise a receiver to sue in his own name; where, therefore, a receiver is so authorised he may sue in his own name.—*Oriental Bank v. Gobin Lall*, 10 C. 713.

A receiver appointed under this rule, with such powers as to bringing suits as the owner himself has, is entitled to institute a suit for possession, though as regards suits for possession of property the ordinary rule is that the person, in whom the present title to the property is, should sue.—*Haji Cassim v. K. B. Dutt*, 19 C. W. N. 45. As a receiver takes such title as the owner himself had, he cannot sue for possession of the property in a case where the owner himself could not.—*Mahamad Kasim Sahib v. Panchapakea*, 35 M. 578.

r. 3.

A receiver empowered to collect outstandings and do all things necessary for the realization and preservation of the assets of a firm, has no power to mortgage the property of the firm.—*Subramonian v. Lutchman*, 50 I. A. 77: 1 R. 66 (P. C.): 50 C. 338: 28 C. W. N. 1: 38 C. L. J. 41: 71 I. C. 650: A. I. R. 1923 P. C. 50: 44 M. L. J. 602: 25 Bom. L. R. 582 But a receiver of mortgaged properties, on whom has been conferred "the same powers of realization, management and protection as the owners themselves have," has a discretionary power of sale.—*Rameshwar v. Hitendra*, 29 C. W. N. 43 (P. C.): 40 C. L. J. 431: 81 I. C. 576: 82 I. C. 794: A. I. R. 1924 P. C. 202, 206: 47 M. L. J. 286: 26 Bom. L. R. 1153.

"Collection of the rents and profits thereof."—Where the receiver was given power to collect outstandings and do all things necessary for the realization and preservation of the assets of a firm; *held*, the receiver had no authority to mortgage the property of the firm.—*Subramonian v. Lutchman*, 50 I. A. 77: 1 R. 66 (P. C.): 50 C. 338: 28 C. W. N. 1: 38 C. L. J. 41: 71 I. C. 650: A. I. R. 1923 P. C. 50: 44 M. L. J. 602: 25 Bom. L. R. 582

Position and powers of a receiver and whether he is an officer of the Court.—The preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto, is the object and

The receiver is appointed for the tentative of the Court and of all n he is appointed.—*Jagat Tarini* J. 270.

The receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants, whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject-matter of the suit, *pendente lite*, and the possession of the receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it, without the sanction of the Court.—*Wilkinson v. Gangadhar*, 6 B. L. R. 486. See also *Orr v. Muthia*, 17 M. 501, 503; *Administrator-General v. Prem Lat*, 22 C. 1011, 1015.

Where a receiver has been appointed by a Court of one place to collect rents and profits and distribute the same to some persons and subsequently with the leave of that Court another suit was instituted in another Court against the receiver and certain other persons, the latter Court has no jurisdiction to grant an injunction against the said receiver restraining him from making the distributions directed by the former Court, and the receiver also is not competent to consent to such an injunction being granted; and the giving of leave by the former Court to institute a suit against the receiver does not amount to a relinquishment of possession of the property or to a direction that the receiver should act according to the direction of the Court in which he is sued.—*Jugal Kishore v. Deva Prasanna*, 7 P. 684: 110 I. C. 722: A. I. R. 1923 Pat. 321: 9 P. L. T. 279. See also *Sridhar v. Mugniram*, 3 P. 357: 78 I. C. 620: A. I. R. 1924 Pat. 491.

A receiver is a servant of the Court, and has only such power and authority as the Court may choose to give him.—*Manick Lall v. Surrut Goomaree*, 22 C. 648. He is a public officer.—*Jagadish v. Debendra*, 53 C. 850: 35 C. W. N. 161: 132 I. C. 634: A. I. R. 1931 Cal. 503. But he is



merely a custodian of the properties by order of the Court, and not a judicial officer; and in that capacity it may be his duty to institute a suit on behalf of the estate, but it cannot be that any such officer can act as a Judge in the Court in which the suits are instituted.—*Kershaji v. Kaikhosru*, A. I. R. 1929 Bom. 478 : 31 Bom. L. R. 1081.

The receiver does not represent the estate for which he is receiver, but is merely an officer of the Court, and, as such, cannot sue and be sued except with the permission of the Court—*Miller v. Ram Ranjan*, 10 C. 1014; *Secunder v. J. A. M. Kasiyar & Co.*, 1 R. 138 : A. I. R. 1923 Raog. 209. The receiver can neither sue nor be sued without the leave of the Court—*Dunne v. Kumar Chandra Kisore*, 30 C. 593. See also *Pramatha Nath v. Khelra Nath*, 32 C. 270 : 9 C. W. N. 247, where it has been further held that a subsequent application for permission to continue the action brought without leave of Court cannot cure the defect. But see *Rustomjee Dhanjibhai v. Fredrick Gaebale*, 46 C. 352 : 23 C. W. N. 496 : 51 I. C. 486, in which it has been held (dissenting from 10 C. 1014, 32 C. 270, 30 C. 593) that it is competent for the Court to grant leave to continue a suit instituted by or against a receiver of the Court without such leave, provided a proper case is made out.

This rule authorizes the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. It is competent to a Court to authorize a receiver to sue in his own name and a receiver who is authorized to sue, though not expressly in his own name, may do so by virtue of his appointment with full powers under this rule. See also the cases referred to in this connection.—*Jagat Tirini v. Naba Gopal*, 34 C. 305 : 5 C. L. J. 270; *Satya Kirpal v. Satya Bhupal*, 18 C. W. N. 546 : 19 C. L. J. 191. Clause (d) of Or. XL, r. 1, gives the Court complete discretion as to the powers to be conferred on a receiver.—*Secretary of State v. Komaragiri*, 30 M. L. J. 456.

Where a Court has granted permission to the receiver under Or. XL, r. 1 (1) (d) to file a suit for the enforcement of a pattah under the provisions of the Madras Estates Land Act and dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of such a suit, the receiver is a "person entitled to the rent" within the meaning of S. 26 (3) of the Madras Estates Land Act.—*Muthuvira Reddi v. Venkatesa Mutali*, 57 M. L. J. 659 : (1923) M. W. N. 739 (distinguished *Swaminatha v. Sundaram*, 44 M. 274, in which it has been held, that although a receiver stands in the shoes of the owner and exercises all or most of the powers of the owner with reference to the management of the property, there is, according to the wording of S. 46 (5) of the Madras Estates Land Act of 1918, a distinction between persons who are owners of the estate and persons who may be entitled to collect rents of the estate and do other acts contemplated by the Act as land-holder, and therefore an application by a non-occupancy ryot under S. 46 of the said Act to a receiver of the estate, for confirming occupancy right is not valid, because the statute provides that such application should be made to the owner of the estate himself).

After the termination of the litigation in which a receiver had been appointed and before a formal order discharging him could be obtained from the Court which appointed him, on account of the closing of that

Court, the receiver has *locus standi* to prefer an appeal against an adverse decision in a suit previously started by him in the interest of the estate against a tenant, and such an appeal is competent even though the litigation in which the receiver was appointed had terminated.—*Muthuvira Reddi v. Venkatesa Mudali*, noted *ante*

A receiver has no power to lease a debutter property without the sanction of the Court; and any misrepresentation or concealment of material facts from the Court in connection with the proposed lease at the time of obtaining sanction would vitiate the authority of the receiver to grant the lease; and in the lease, an additional clause cannot be introduced which was not contained in the terms proposed in the application for sanction; and if the lease be disadvantageous and not for the benefit of the debutter estate it is liable to be cancelled.—*Srish v. Debendra*, 50 C. L. J. 333; A. I. R. 1929 Cal. 828.

A receiver appointed to take charge of the property of a firm pending proceedings for a dissolution, with power to do all things necessary for the realization and preservation of the assets, has no power to mortgage the property without the sanction of the Court.—*Subramonian v. Lutelman*, 50 I. A. 77; 1 R. 66 (P. C.); 50 C. 338; 28 C. W. N. 1; 38 C. L. J. 41; 71 I. C. 650; A. I. R. 1923 P. C. 50; 44 M. L. J. 602; 25 Bom. L. R. 582.

A receiver appointed by the High Court, without special leave of the Court, served a notice to quit, on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them. *Held*, that as the order appointing him did not give him power to serve such notices or to institute such suit without special leave of the Court, and as he was not vested with the general powers referred to in this rule, but only with a limited power referred to in the order appointing him, and as a receiver is not otherwise authorized to institute such suits, the suit must be dismissed.—*Drobnmoyi v. Davis*, 14 C. 323. But see *Meer Mahomed v. J. Homasjee*, 39 I. C. 92. But where under the terms of the order appointing the receiver he was authorized to sue to eject, without obtaining the permission of the Court, it was held that the receiver had a right to sue without permission of Court.—*Huri Dass v. Macgregor*, 18 C. 477. The Court has authority, under this rule, to confer on a receiver the power to sue in his own name; and if the order appointing the receiver gives him liberty, he may do so.—*Fink v. Moharaj Bahadur*, 25 C. 612. See also *Oriental Bank v. Gobin Lall*, 10 C. 713.

Where a receiver is validly appointed on the ground that the property was the subject of the suit and it afterwards turns out in appeal that the decree only operates against the defendant personally, the appellate Court has jurisdiction to maintain the receiver as a means of realizing the amount from the judgment-debtor personally, and the property must be considered under attachment, although not attached under S. 217, C. P. Code 1892 (Or. XXI, r. 54).—*Ramasami Naik v. Ramasami Chetti*, 30 M. 255; 17 M. L. J. 201.

Although the dismissal of a suit may in some cases mean the discharge of the receiver, still the Court has jurisdiction over the receiver who is an officer of the Court and the Court may require him to furnish accounts, to

allow parties to examine accounts, and to deal with all the matters connected with the management by the receiver.—*Chandershwar Prasad v. Bisheshwar Pratap*, 5 P. L. J. 513: 1 P. L. T. 643.

A zemindari having been attached by a creditor, a receiver was appointed with full powers under this rule, and he sued to recover rent at the rate reserved in the lease granted by the zemindar before his appointment. *Held*, that the receiver was entitled to recover the rent claimed. The provisions of S. 503 of the Code, 1882 (this rule), were intended to declare that the receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law.—*Gopala Sami v. Sankara*, 8 M. 418.

A zemindari was attached in execution, and the plaintiff was appointed receiver with full powers under this rule. Before the appointment of the receiver the zemindar had expended certain sums at the defendant's request to repair a tank for the irrigation of lands held by them in common with him. The receiver sued to recover the sums expended. It was objected that the receiver could not sue as the sum sued for was neither the subject of a suit against the zemindar nor properly attached 'in execution against him. *Held*, that the receiver could maintain the suit.—*Sundaram v. Sankara*, 9 M. 334.

A receiver or any other person (such as manager) appointed by the Court as an officer of the Court to manage the property in dispute, has no power to pledge the credit of any individual party as an agent of the party.—*Binjraj Marwari v. Das Mookerjee & Co.*, A. I. R. 1929 Cal. 659. But the Court may authorize the receiver to borrow money as a first charge on the property in his possession for the purpose of preserving it from loss or injury, and where a mortgage is executed by the receiver under such authority from the Court, it takes priority over any charge of earlier date.—*Giridhari Lal v. Dharendra Krista*, 11 C. W. N. 1: 34 C. 427 (Rampini, J. holding a contrary view). When however a suit, dismissed, the Court has no power as for instance, liberty

When a receiver has been appointed at the instance of the decree-holder, after attachment of the rents and profits of the judgment-debtor's share therein, and the judgment-debtor did not attack the order in appeal, a third party has no *locus standi* to make a subsequent application to appoint himself receiver of the same property on the basis of an agreement executed in his favour by the judgment-debtor to the effect that the decretal amount was payable by him and that the judgment-debtor agreed to sell the property to him.—*Jai Indar v. Baldeo Singh*, 110 I. G. 410: A. I. R. 1928 Oudh 295: 5 C. W. N. 463.

Where a receiver is given full powers under the provisions of Or. XL, r. 1 (d) of the C. P. Code, no special leave of the Court is necessary for giving notice to quit or for a suit for compensation for use and occupation.—*Meer Mahomed v. J. Hormasjee*, 33 I. C. 92.

Possession of receiver endures for the benefit of the true owner.—Where the Court has appointed a receiver and the receiver is in possession

his possession is the possession of the Court and the possession of the Court by the receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the receiver is in the position of a stakeholder and such custody is for the benefit of the true owner.—*Dwijendra Narayana v. Jages Chandra*, 39 C. L. J. 40 (22 C. L. J. 283, 30 M. 12; 17 C. 814, 5 C. L. J. 270 *rejd. to*); *In re K. C. Bonnerjee*, 107 I. C. 739. A. I. R. 1923 Cal. 402.

**Duties and liabilities of receivers and of the estate.**—Persons contracting with a receiver and manager who is carrying on the business of a company, and are cognizant of his appointment must be taken to know that he is contracting as principal and not as agent for the company whose powers are paralysed; and the receivers and managers appointed by the Court are personally liable to persons dealing with them in respect of liabilities incurred or contracts entered into by them in carrying on the business unless the express terms of the contract exclude, as they may do, any personal liability; and any questions to which the want of sanction may give rise are matters as between the receiver and the Court which appointed him, which, it may be, will indemnify the receiver if he has acted *bona fide*.—*Ramnarayan v. Carey*, 58 C. 174. 134 I. C. 1286; A. I. R. 1931 Cal. 491 (relying on *Burt Boulton v. Bull*, (1895) 1 Q. B. 276; *In re Glasdir Copper Mines Ltd*, (1906) 1 Ch. 365; *Parsons v. Sovereign Bank of Canada*, (1913) A. C. 160).

A creditor is entitled to proceed against the representative of an estate for a recovery of debt incurred by the receiver during his management: the right to maintain such suit against the representative is founded on the just and

of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors.—*Mohari Bibi v. Shyama Bibi*, 30 C. 937; 7 C. W. N. 799.

N obtained a money-decree against P in 1918 and mortgaged the decree to M and subsequently assigned it to the latter in 1920 and thereafter M sued upon the mortgage and obtained a preliminary decree and was appointed receiver of the decree against P and thereafter a final decree was passed in 1922, in which there was no reference to M's receivership. P then filed a suit against N and attached the said decree before judgment and a consent-decree was passed in 1923 by which N agreed to redeem M and to effect a second mortgage to P and the attachment was allowed to continue. But N

at his right to  
the consent-  
in accordance  
d that M was  
entitled to appeal against P from the order dismissing his application in as

much as he was a representative of N.—*Nadirshaw v. Purshottamdas*, 118 I. C. 694: A. I. R. 1929 Bom. 279: 31 Bom. L. R. 320.

In execution of a decree, a receiver was appointed to collect certain rents due to the judgment-debtor. Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the monies collected by him into Court, but misappropriated them. *Held*, that the payment by the tenants to the receiver did not, *pro tanto*, discharge the judgment-debtor from liability under the decree.—*Orr v. Muthia Ohetty*, 17 M. 501 (on appeal 20 M. 224).

A receiver appointed under this rule to collect the rents of an estate, is bound to make good a loss caused to it by a breach of his duties. A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. He should in all important matters apply for and obtain the direction of the Judge who appoints him. A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties.—*Balaji Narayan v. Ram Ghandra Govind*, 19 B. 660.

The provisions of r. 3 make it clear that a receiver has certain duties and that he is responsible to the Court for those duties, and he cannot say that he is appointed to look after the interests of the parties and is only responsible to them. Part of his ordinary duties is to pay into Court or to some one else, as the Court may direct, amounts which he has in his hands or has collected; and such payment would include periodical payments which he is directed to make or amounts which on investigation of his accounts he is directed to pay. Amounts which he is directed to pay in connection with his accounts may include amounts which those accounts show should have been in his hands and amounts which his account, if properly kept, would have shown he ought to have in his hands. The payment of those amounts into Court or into a Bank or otherwise, as the Court directs, is all part of the ordinary duties of the receiver as laid down in r. 3, and he has to pay those amounts under the ordinary control of the Court, which can direct the general conduct and administration of the estate.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760: (1931) M. W. N. 830.

A Court has jurisdiction in special cases and on special conditions, to order a receiver to pay the pressing claims of creditors against the estate or part-owners thereof, out of the money in his hand.—*Motivahu v. Premvahu*, 16 B. 511. But the Court has no power to order that the receiver should, out of the estate, satisfy the claims of persons other than the decree-holders.—*Thakoor Chunder v. Chowdhry Chotee Singh*, Marsh, 261: 2 Hay. 112.

The receiver suing or being sued is in the same position as an ordinary litigant and therefore he is personally bound to pay the costs decreed against him and get himself re-imbursed out of the estate.—*Moti Lal v. Sonu Singh*, 194 I. C. 272: A. I. R. 1931 Nag. 143.

**Sale of property by receiver.**—A sale of properties, the subject of a suit, by the receiver under the order of the Court, cannot, in the absence of fraud, be attacked collaterally by persons who were parties thereto or their representatives.—*Gorachand v. Makhan Lal*, 11 C. W. N. 489: 6 C. L. J. 401 (6 B. L. R. 486 referred to).

A sale of properties, the subject of a suit, by the receiver is not a sale by the Court. The fact that such person is the Court's receiver does not place him in a different position. When the receiver sells under such an order, it is necessary that he, being in possession of the property, should be a party to the conveyance.—*Chandra Nath v Biswa Nath*, 6 B. L. R. 492-note.

**Purchase by receiver at auction-sale.**—When a receiver does not obtain special leave to bid at an execution-sale a sale in his favour is void. An application to have the sale set aside on that ground falls under S. 47 and a second appeal lies from the order disposing of the application.—*Jiteswari v Sudha Krishna*, 59 C. 956; 36 C. W. N. 125; 55 C. L. J. 85.

**Receiver's liability to account.**—A Court, having appointed a receiver in a suit, has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the receiver is its officer, and the dismissal of the suit by an appellate Court does not alter that state of things. The Original Court in such a case may permit parties interested to intervene on questions as to the accounts, and may deal with costs and other matters.—*Administrator-General of Bengal v. Prem Lal Mullick*, 22 I. A. 203; 22 C. 1011 (P. C.). See *Ganeshlal v. Satya Narayan*, 54 I. C. 207; 4 P. L. J. 636; 1920 P. 35.

A receiver is responsible for all properties which come to his custody or management, and he is responsible not only for actual sums received by him, but for those which might have been received by him, but for his wilful neglect and default. The mode of examining and passing receiver's accounts pointed out.—*Coomar Suttia Sankar v. Rane Golap Mones*, 5 C. W. N. 223 (19 B 660 referred to). See also *Mohini Mohan v. Ram Narain and Barada Kanta*, 14 C. L. J. 415; 12 I. C. 780, in which the duties of receiver and his liability to account, and the Court's power to enquire even when he has passed his accounts, and all parties have expressed themselves satisfied, have been fully stated.

An application to take accounts against a receiver on a footing of wilful default and neglect must be made by suit and cannot be entertained when the receiver is passing his accounts.—*Subal Chandra v. Jatindra*, 53 C. 881; 99 I. C. 761; A. I. R. 1927 Cal. 175.

A receiver is not liable to account for any period other than that for which he is appointed.—*Samhanta v. Bhagwati*, 5 P. L. J. 97; 55 I. C. 15; 1920 P. 121.

In all applications for payment of money by a receiver, the receiver must state to the Court about funds in his hands and about claims on the same.—*Chaitan*, 103.

The accounts submitted by the receiver should be supported by vouchers which will be admitted as evidence of payment unless reasonable ground for impeaching them is shown.—*Teller v. Golam*, 40 C. L. J. 23; 82 I. C. 419; A. I. R. 1924 Cal. 1063.

For enforcement of receiver's duties, see Or. XI, r. 4 and notes thereunder.

Remuneration of receivers and security to be furnished by them.—Under this rule, the Court is to determine what fee or commission a receiver is entitled to by way of remuneration. The receiver is an officer of the Court, and the parties cannot by any act of theirs add to or derogate from the functions of the Court without its authority. An agreement between a receiver and a party regarding his remuneration without the knowledge of the Court is a gross contempt of Court and is void.—*Prakash Chandra v. Adlam*, 30 C. 696 (22 C. 648 referred to).

A receiver is generally remunerated by the method of a percentage or commission, but there is no absolute rule that he should be so remunerated. The Court has a discretion, if it thinks fit, to allow him a remuneration at a fixed rate.—*Srepat Singh v. Ram Sarup Surya Prasad*, A. I. R. 1923 Cal. 516.

Where the order of Court appointing receivers in a certain business provided for their commission at a certain percentage on "gross sale proceeds," they are not entitled to commission at that percentage on the sum shown as "trade discount" in as much as "proceeds" mean produce, outcome or profit, and an amount which is never received, *viz.*, the so-called "trade discount" cannot be a part of proceeds, but they might be allowed to retain such commission on freight and packing charges.—*Kabalamurthi v. Subramania*, 131 I. C. 655 : A. I. R. 1931 Mad. 500 : 60 M. L. J. 332.

A receiver appointed in insolvency proceedings under the C. P. Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in S. 356, Cls. (b), (c) and (d) of the C. P. Code, 1882.—*Mahadeva v. Kuppusami*, 15 M. 233.

A receiver who is divested by an erroneous order, has a lien on the estate for his claims and allowances.—*Prem Lall v. Sumbhoo Nath*, 22 C. 960.

The Court has inherent jurisdiction to order a plaintiff to refund to a party, whom he has wrongfully impleaded in a suit, the commission and charges incurred by a receiver of the property of that party, when the suit as against him is dismissed and the receivership cancelled.—*Naikwara v. Ma Aye Buu*, 1 R. 770 : A. I. R. 1924 Rang. 181 : 79 I. C. 721.

Though under the Civil Procedure Code the Court has discretion to appoint a receiver without security it should obviously be done only in the most exceptional cases. Where most of the parties to the suit were females or minors, the receiver should generally not be allowed unfettered control of monies and securities without adequate security being furnished ; *Brij Indar Kuar v. Jai Indar Bahadur*, 59 I. A. 311 : 36 C. W. N. 882 : 56 C. L. J. 48 : 9 O. W. N. 571 : 137 I. A. 900 : A. I. R. 1932 P. C. 191.

Suit by or against receiver—Leave of Court.—A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver.—*Miller v. Ram Ranjan*, 10 C. 1014 ; *Dunne v. Kumar Chandra Kisore*, 30 C. 593 ; *Fink v. Corporation of Calcutta*, 30 C. 721 ; *U On Maung v. Ebrahim*, 6 R. 269 : 110 I. C. 622 : A. I. R. 1928 Rang. 176.

The rule is firmly established that, as against a stranger to the action who is in actual possession, the appointment of a receiver is of no effect. But it is equally well-settled that you cannot sue a receiver except with the leave of the Court. The latter rule is founded upon the doctrine that a suit against the receiver is in substance a suit against the Court that appointed the receiver and that a suit against the receiver should not be permitted except upon leave duly obtained from the Court which appointed the receiver.—*Amulya v. Kashinath*, 102 I. C. 797 : A. I. R. 1927 Pat. 297.

Where a receiver appointed in a suit interferes with the possession of third parties, it is open to the latter to apply to the Court for redress and for an injunction restraining the receiver from such trespass. It is not necessary for them to file a separate suit.—*Thavasimuthu v. Balaguruswami*, 17 L. W. 64 : 70 I. C. 673 : A. I. R. 1923 Mad. 304.

When a party feels aggrieved at the conduct of a Receiver, he should seek redress against him in the proceeding in which he was appointed. If separate proceedings be taken against him, either in that Court or elsewhere, they should be with the leave of the Court, under whose authority the receiver was acting.—*Kamatchi v. Sundaram Ayyar*, 26 M. 492. The Court will dispose of the matter summarily in simple cases.—*K. K. Secunder v. J. A. N. Kasiyar*, 1 R. 138 : 76 I. C. 441 : A. I. R. 1923 Rang. 208; and if the applicant has shown diligence.—*Sreedhar v. Nilmoni*, 41 C. L. J. 197 : 86 I. C. 677 : A. I. R. 1925 Cal. 681. But if questions of title are involved, the Court will authorise a suit to be brought against the receiver.—(*Ibid*). There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. It is a rule based upon public policy and has come down to us as a part of the rules of equity binding upon all Courts of Justice in this country.—*Braja Bhusan v. Sris*, 4 P. L. J. 20 : 47 I. C. 719 : (1918) P. 337. In *Pramathanath v. Khetranath*, 32 C. 270, it was held by the Calcutta High Court that the leave of the Court to sue a receiver was a condition precedent to the right to sue and that if the leave was not obtained before suit, it could not be granted subsequent to the institution of the suit and the suit should be dismissed. This decision was dissented from in *Banku Behari v. Harendra*, 15 C. W. N. 54; *Sarat v. Apurba*, 15 C. W. N. 925; *Maharaja of Burdwan v. Apurba*, 15 C. W. N. 872, where it was held that the leave may be granted even after the institution of the suit. The Bombay High Court, in *Jamsedji v. Husseinbhai*, 44 B. 903, also held that failure to obtain leave prior to the institution of the suit was cured by subsequent leave. As regards suits by a receiver, the Calcutta and Madras High Courts have held that if the suit is instituted without the leave of the Court, the Court may grant leave, after the institution of the suit, to continue the suit.—*Rustomjee v. Frederic Gaebels*, 46 C. 352 : 23 C. W. N. 496 : 51 I. C. 486; *Karooh Parakoti v. Manavikraman*, 43 M. 793 : 59 I. C. 568.

The omission to obtain the previous sanction of the Court appointing a receiver, for bringing a suit against the receiver, does not affect the jurisdiction of the Court trying the suit. It is a mere irregularity which can be effectively cured by the plaintiff obtaining the requisite sanction during the course of the litigation.—*Karooh Parakoti v. Manavikraman*, noted *ante*,



The strictness of the rule as to the necessity of the leave of the Court to bring or defend the suit applies more appositely in the case of appointment of a person who is not a party to the suit or who is not interested in it; and therefore, where a receiver, who is also a party to the proceeding made certain application under S. 105 of the Bengal Tenancy Act without obtaining the sanction of the Court, the proceedings were not rendered invalid, and at any rate the proceedings under S. 105 of the Bengal Tenancy Act could be viewed as being started by the plaintiff in his capacity as a party and owner.—*Jabbar Ali v. Manmohan*, 55 C. 1216 : 49 C. L. J. 70 : 114 I. C. 485 : A. I. R. 1929 Cal. 110.

An application for rateable distribution of the proceeds of sale in the hands of a receiver appointed by the Court does not require the leave of the Court.—*Jamnadas v. Bai Soonabai*, 34 Bom. L. R. 1405.

No summary order can be passed to set aside a lease executed and granted by a receiver. The proper course is to institute a regular suit against the receiver and lessees. Claims against a receiver cannot be decided in a summary proceeding, the aggrieved party must bring a regular suit.—*Krista Chandra v. Krista Sakha*, 12 C. W. N. 1023.

A receiver appointed by the High Court, who has under its order taken possession of property, cannot be prosecuted for criminal breach of trust in respect thereof without first obtaining the leave of the Court.—*Santok Chand v. Emperor*, 46 C. 432.

A receiver in a suit even though he may have been appointed with the consent of parties could be discharged before the termination of the proceedings if it appears that it could be done without injury to the estate.—*Venkatalingama v. Venkatarama*, 61 I. C. 562 : 13 L. W. 367 : 29 M. L. T. 175.

A suit for accounts is not maintainable by the owner of an estate against a *Tahsildar* appointed by a receiver in charge of the estate under an order of Court.—*Harihar Mukerjee v. Jaharaddin*, 62 I. C. 768.

For other cases, see notes under heading "*Position and powers of a Receiver*," above.

As to receiver's liability of costs of the suits by or against him, see under heading "*Duties and liabilities of Receivers and of the Estate*," above.

**Leave of the Court to be obtained before attachment of property in the hands of receiver.**—Where the lower Court appointed one person as receiver but the High Court removed him and appointed another person as receiver, the proper Court to grant sanction for attachment of properties in the hands of the receiver is the lower Court and not the High Court.—*Beharilal v. Punjab National Bank Ltd.*, 111 I. C. 739 : A. I. R. 1929 Lab. 147

**Receiver if necessary party to a suit.**—The receiver is not a necessary party to a suit for possession of immovable property or for declaration of title, when the beneficial owner has been made a party.—*Rodger v. Ashutosh*, 6 C. W. N. 829 : *Suttya Ghosal v. Rani Golap Moni*, 5 C. W. N. 27 : *Maharani Janki Koer v. Sham Sivendra*, 10 C. L. J. 23 : *Meos v. Abdul Husain*, 90 I. C. 600 : 27 Bom. L. R. 1147 : A. I. R. 1925 Bom. 523.

Where a receiver appointed under this rule, institutes civil proceedings and is then replaced by another receiver, it is necessary that the new receiver should be made a party to those proceedings.—*Akula Paradesi v. Dhelli Jagannadha*, 28 M. 157

**Appointment of receiver by two Courts in respect of the same property.**—A receiver is merely the officer of the Court through whom the Court takes possession of property, the subject of a litigation. Consequently where a receiver of certain properties had been appointed by a Court, it is inexpedient that another Court of independent jurisdiction should appoint another receiver for the same property.—*Sridhar v. Mugniram*, 1924 P. 54.

**Appeal from orders under Or. XLI.**—An order granting or refusing an application to appoint a receiver is appealable.—See Or. XLIII, r. 1, Cl. (s) and *Venkatsami v. Strideamma*, 10 M. 179 (6 M. 355 overruled). See also *Khagendra Narain v. Shasadhar*, 31 C. 495; 8 C. W. N. 608; *Anonymous case*, 10 M. 180 note; *Gossein Dulmir Puri v. Tekait Het Narain*, 6 C. L. R. 467; *Abdul Rahiman v. Ganapathi Bhatta*, 23 M. 517; *Sangappa v. Shiebasawa*, 24 B. 38; *Bodhya Nath v. Mahan Lal*, 17 C. 680; *Lachmi v. Ram Charan*, 35 A. 425.

But the selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case and the exercise of this, like other matters of judicial discretion, will rarely be interfered with by an appellate tribunal; and to induce the appellate Court to interfere it is necessary to show some overwhelming objection in point of propriety or some fatal objection in principle to the person named.—*Kali Kumar v. Bachhan Singh*, 17 C. W. N. 974; 19 I. C. 873; *Sripati v. Bibhuti*, 53 C. 319; 92 I. C. 940; A. I. R. 1926 Cal. 593.

An order appointing a receiver, but without specifying anybody by name and adjourning the application to a future date for so appointing somebody, is not an order within the meaning of Or. XL, r. 1 and is therefore not appealable under Or. XLIII, r. 1, Cl. (s).—*Upendranath v. Bhupendra Nath*, 13 C. L. J. 157; *Narbadashankar v. Kevaldas*, 17 Bom. L. R. 510; *Ramji v. Koman*, 13 A. L. J. 79; *Teomal v. Gyanomal*, A. I. R. 1927 Sind 202. But see *Palaniappa v. Palaniappa*, 40 M. 18 (F. B.); and *Firm Raghbir Singh v. Narayan Singh*, 72 I. C. 569; 1923 Lah. 48, where a contrary view has been taken.

When a receiver has been appointed conditional on his furnishing security, the appointment is not complete till the security is furnished, and therefore the order is not appealable before the security is furnished.—*Raja Shyam Lal v. Raj Kumar*, 31 C. W. N. 235; 45 C. L. J. 63; A. I. R. 1927 Cal. 253 (14 C. L. J. 489, 17 Bom. L. R. 510, 13 A. L. J. 79, 42 A. 227 *fold.*). But such an order is appealable as a judgment under the Letters Patent.—*Arumugam v. Kannappa*, 5 R. 99; 101 I. C. 791; A. I. R. 1927 Rang. 139.

Where the Court appoints a receiver of the defendant's property in a suit, and a third person not a party to the suit but who claims to be in possession of the property objects to such appointment, but the objection is

dismissed, the order dismissing the objection is appealable.—*Hudson v. Morgan*, 36 C. 713; *Agabag v. Sundari*, 48 I. C. 133: 3 P. L. J. 573. See also *Ramaswami v. Janaki Ammal*, 16 L. W. 833: (1922) M. W. N. 725 (36 C. 713, and 3 P. L. J. 573 relied on).

An appeal lies from an order appointing a receiver pending an application for the appointment of a common manager under S. 93, B. T. Act, 1855, as falling under Or. XLIII, r. 1, Cl. (s).—*Isadali v. Mahomed*, 43 C. 956.

No second appeal lies against an order appointing or refusing to appoint a receiver in proceedings in execution of a decree, in as much the order comes within Or. XL, r. 1 of the Code.—*Cheria Kunhi v. Valla Narayan*, 114 I. C. 839.

The orders which are appealable under S. 503 of the Code of 1881 (Or. XL, rr. 1 to 3) are of four classes: first, orders appointing a receiver; secondly, orders removing a person, in whose possession or custody the property may be, from the possession or custody thereof; thirdly, orders committing property to the custody or management of a receiver; and fourthly, orders granting to such receiver such fees or commission on the rents and profits of the property by way of commission as the Court thinks fit.—*Keshobati v. Mac Gregor*, 35 C. 568: 12 C. W. N. 648. Directions given by a Court in passing receiver's accounts are not appealable, as such directions come under S. 503 (f) which corresponds to Or. XL, r. 3 (b) and not Or. XL, r. 1 of the present Code.—(*Ibid*).

The Code has provided no appeal against any of the ordinary directions which a Judge may give a receiver in the course of his administration and no appeal against an order that such amounts as he has or are found due from him on investigation of his accounts should be paid into Court or elsewhere.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760: (1931) M. W. N. 830 (referring to *Palaniappa v. Palaniappa*, 65 I. C. 403; A. I. R. 1922 Mad. 234; *Ganesh Lal v. Satyanarayan*, 54 I. C. 207: 4 P. L. J. 636, *Arunachallam v. U. Po Lu*, 3 R. 318: 92 I. C. 631: A. I. R. 1925 Rang. 265). In this case the duties of the receiver and the Court's power to give directions have also been discussed. See notes under heading: "Duties and Liabilities of Receivers &c.," ante.

An order construing an order of appointment of a receiver, when the appointment itself is not objected to, does not fall under Or. XL, r. 1 and is not appealable.—*Samhantta v. Bhagwati*, 55 I. C. 15: 1920 P. L. J. 97. (In this case after the termination of the suit in which the receiver was appointed, the receiver asked for his discharge whereupon the Munsif held that the receiver must submit accounts for a certain year and the Subordinate Judge, on appeal, after construing the order of appointment, directed that accounts of some other years also should be taken. The High Court, while holding that no appeal lay to the Subordinate Judge, also held, that it was not right for a Court, when considering the accounts submitted by the receiver to go into the question of his liability to account for periods other than that covered by the account itself).

No appeal lies against an order passed under Or. XL, r. 3 but the High Court may in a proper case revise it. However, in an appeal under Or. XL,

r. 4 against an order levying the amount due from a receiver out of the property in the hands of his representatives, the order under r. 3 is not to be taken as conclusive and the whole matter, including the proceedings under Or. XL, r. 3 is laid open for decision on the merits—*Khan Chand v. Abdul Majid*, 76 I. C. 203.

An order for the appointment of a receiver in proceedings under S. 12 of the Guardians and Wards Act is appealable under Or. XLIII, r. 1 (s).—*Godoobai v. Janabai*, A. I. R. 1929 Nag. 119 : 116 I. C. 642.

For other cases, see notes under Or. XLIII, r. 1 (s), *post*.

**Appeal against order removing or refusing to remove a receiver.**—An appeal lies against an order removing a receiver even though another receiver is not appointed in his place.—*Sripati v. Bibhuti*, 53 C. 319 : 92 I. C. 940 : A. I. R. 1926 Cal. 593 (where it has also been held that after the order of removal of the old receiver is passed, the mere fact that the selection of the new receiver is postponed does not make the order of removal interlocutory so as to bar an appeal against the said order because so far as the Court which passed the order is concerned, the order is final (distinguishing *Upendra v. Bhupendra*, 13 C. L. J. 157)). This view has been dissented from in *A. U. John v. Agra United Mills*, 134 I. C. 454 : A. I. R. 1931 All. 72 : 29 A. L. J. 13 ; where it has been held that in such a case no appeal lies under Or. XLIII, as Or. XL, r. 1 (1) (a) refers only to appointment of receiver, but is silent as to his removal, and when a right of appeal has to be expressly conferred by the statute, it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic.

An order refusing to remove a receiver is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.—*Mithibai v. Limji Nowroji*, 5 B. 45. But see, *Ramaswami v. Ayyalu*, 46 M. L. J. 196 : 78 I. C. 625 : A. I. R. 1924 Mad. 614 where a contrary view has been taken.

**When the appellate Court may interfere with the lower Court's order.**—The order for the appointment of a receiver is discretionary, and the discretion, is in the first instance, that of the Court in which the suit itself is pending ; and so where the first Court has acted after considering all the circumstances, the appellate Court will not as a rule interfere with the exercise of that discretion.—*Kadir Bakhsh v. Ghulam Mahomed*, 55 I. C. 50 ; *Amar Nath v. Mt. Tahal Kuer*, 67 I. C. 383 : 4 U. P. L. R. 73 ; *Dhumi v. Nawab Muhammad Sajjad*, 73 I. C. 600 : A. I. R. 1923 Lah. 623, but where the primary Court has not used proper discretion, in accordance with the principles on which judicial discretion must be exercised, the appellate Court is at liberty to exercise its own discretion in the matter.—*Benoy Krishna v. Satish Chandra Giri*, 55 I. A. 131 : 55 C. 720 (P. C.) : 32 C. W. N. 681 : 47 C. L. J. 424 : 108 I. C. 348 : A. I. R. 1923 P. C. 49 : 54 M. L. J. 423 : 30 Bom. L. R. 815 : 5 O. W. N. 273 : 26 A. L. J. 431 (on appeal from *Satish Chandra Giri v. Benoy Krishna*, 96 I. C. 30 : A. I. R. 1926 Cal. 1092). See *Kali Kumari v. Bachhan Singh*, 17 C. W. N. 974 : 19 I. C. 873, in which it has been held that the selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and the exercise of that discretion like other matters of judicial discretion will rarely be interfered with by an appellate tribunal ; and to induce the appellate Court to interfere it is

dismissed, the order dismissing the objection is appealable.—*Hudson v. Morgan*, 36 C. 713; *Agabag v. Sundari*, 48 I. C. 133: 3 P. L. J. 573. See also *Ramaswami v. Janaki Ammal*, 16 L. W. 833: (1922) M. W. N. 725 (36 C. 713, and 3 P. L. J. 573 relied on).

An appeal lies from an order appointing a receiver pending an application for the appointment of a common manager under S. 93, B. T. Act, 1885, as falling under Or. XLIII, r. 1, Cl. (s).—*Asadali v. Mahomed*, 43 C. 986.

An order appointing or refusing to appoint a receiver pending an application of a decree, in as much the order comes within Cl. (s), is appealable under Code.—*Cheria Kunhi v. Valla Narayan*, 114 I. C. 839.

The orders which are appealable under S. 503 of the Code of 1882 (Or. XL, rr. 1 to 3) are of four classes: *first*, orders appointing a receiver; *secondly*, orders removing a person, in whose possession or custody the property may be, from the possession or custody thereof; *thirdly*, orders committing property to the custody or management of a receiver; and *fourthly*, orders granting to such receiver such fees or commission on the rents and profits of the property by way of commission as the Court thinks fit.—*Keshobati v. Mac Gregor*, 35 C. 568: 12 C. W. N. 648. Directions given by a Court in passing receiver's accounts are not appealable, as such directions come under S. 503 (f) which corresponds to Or. XL, r. 3 (b) and not Or. XL, r. 1 of the present Code.—(*Ibid*).

The Code has provided no appeal against any of the ordinary directions which a Judge may give a receiver in the course of his administration and no appeal against an order that such amounts as he has or are found due from him on investigation of his accounts should be paid into Court or elsewhere.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760: (1931) M. W. N. 830 (referring to *Palaniappa v. Palaniappa*, 65 I. C. 403; A. I. R. 1922 Mad. 234; *Ganesh Lal v. Satyanarayan*, 54 I. C. 207: 4 P. L. J. 636, *Arunachallam v. U. Po Lu*, 3 R. 318: 92 I. C. 631: A. I. R. 1925 Rang. 265). In this case the duties of the receiver and the Court's power to give directions have also been discussed. See notes under heading "Duties and Liabilities of Receivers &c," *ante*.

An order construing an order of appointment of a receiver, when the appointment itself is not objected to, does not fall under Or. XL, r. 1 or r. 4 and is not appealable.—*Samhantta v. Bhagwati*, 55 I. C. 15: 1920 P. L. J. 97. (In this case after the termination of the suit in which a receiver was appointed, the receiver asked for his discharge whereupon the Munsif held that the receiver must submit accounts for a certain year and the Subordinate Judge, on appeal, after construing the order of appointment, directed that accounts of some other years also should be taken. The High Court, while holding that no appeal lay to the Subordinate Judge, also held, that it was not right for a Court, when considering the accounts submitted by the receiver to go into the question of his liability to account for periods other than that covered by the account itself).

No appeal lies against an order passed under Or. XL, r. 3 but the High Court may in a proper case review it. However, in an appeal under Or. XL,

r. 4 against an order levying the amount due from a receiver out of the property in the hands of his representatives, the order under r. 3 is not to be taken as conclusive and the whole matter, including the proceedings under Or. XL, r. 3 is laid open for decision on the merits—*Khan Chand v. Abdul Majid*, 76 I. C. 203.

An order for the appointment of a receiver in proceedings under S. 12 of the Guardians and Wards Act is appealable under Or. XLIII, r. 1 (s).—*Godobai v. Janabai*, A. I. R. 1929 Nag. 119; 116 I. C. 612.

For other cases, see notes under Or. XLIII, r. 1 (s), *post*.

**Appeal against order removing or refusing to remove a receiver.**—An appeal lies against an order removing a receiver even though another receiver is not appointed in his place.—*Sripati v. Bibhuti*, 53 C. 319; 92 I. C. 940; A. I. R. 1926 Cal. 593 (where it has also been held that after the order of removal of the old receiver is passed, the mere fact that the selection of the new receiver is postponed does not make the order of removal interlocutory so as to bar an appeal against the said order because so far as the Court which passed the order is concerned, the order is final (distinguishing *Upendra v. Bhupendra*, 13 C. L. J. 157)). This view has been dissented from in *J. U. John v. Agra United Mills*, 134 I. C. 454; A. I. R. 1931 All. 72; 29 A. L. J. 13; where it has been held that in such a case no appeal lies under Or. XLIII, as Or. XL, r. 1 (1) (a) refers only to appointment of receiver, but is silent as to his removal, and when a right of appeal has to be expressly conferred by the statute, it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic.

An order refusing to remove a receiver is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.—*Mithibai v. Limji Nowroji*, 5 B. 45. But see, *Ramaswami v. Ayyalu*, 46 M. L. J. 196; 78 I. O. 625; A. I. R. 1924 Mad. 614 where a contrary view has been taken.

**When the appellate Court may interfere with the lower Court's order.**—The order for the appointment of a receiver is discretionary, and the discretion, in the first instance, that of the Court in which the suit itself is pending; and so where the first Court has acted after considering all the circumstances, the appellate Court will not as a rule interfere with the exercise of that discretion.—*Kadir Bakhsh v. Ghulam Mahomed*, 55 I. O. 50; *Amar Nath v. Mt. Tahal Kuer*, 67 I. C. 383; 4 U. P. L. R. 73; *Dhumi v. Nawab Muhammad Sajjad*, 73 I. C. 600; A. I. R. 1923 Lah. 623, but where the primary Court has not used proper discretion, in accordance with the principles on which judicial discretion must be exercised, the appellate Court is at liberty to exercise its own discretion in the matter.—*Benoy Krishna v. Satish Chandra Giri*, 55 I. A. 131; 55 C. 720 (P. C.); 32 C. W. N. 681; 47 C. L. J. 424; 108 I. C. 348; A. I. R. 1928 P. C. 49; 54 M. L. J. 423; 30 Bom. L. R. 815; 5 O. W. N. 272; 26 A. L. J. 481 (on appeal from *Satish Chandra Giri v. Benoy Krishna*, 96 I. C. 30; A. I. R. 1926 Cal. 1092). See *Kali Kumari v. Bachhan Singh*, 17 C. W. N. 974; 19 I. C. 873, in which it has been held that the selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and the exercise of that discretion like other matters of judicial discretion will rarely be interfered with by an appellate tribunal; and to induce the appellate Court to interfere it is

necessary to show some overwhelming objection in point of propriety or some fatal objection in principle to the person named. In *Ram Kumar v. Ashutosh*, 115 I. C. 881: A. I. R. 1929 Pat. 114 it has been held that this rule is applicable to cases of original appointment, but not to the appointment of a new receiver in place of another receiver.

**Letters Patent appeal.**—An order directing a receiver in a suit to advance money to a guardian ad litem to enable him to conduct the defence on behalf of a defendant, is not a judgment within the meaning of Cl. 15 of the Letters Patent, and no appeal lies therefrom.—*Kuppuswami v. Rathnavelu*, 24 M. 511.

**Appeal to Privy Council.**—In *Chundi Dutt v. Pudmanand*, 22 C. 928, the High Court refused to grant leave to appeal to England against an order refusing the appointment of a receiver in a suit as it was neither a "final" order within the meaning of S. 595, Cl. (a) and (b) of the Code of 1882 and S. 39 of the Letters Patent nor one falling within the meaning of S. 595, Cl. (c) of the said Code of 1882 or S. 40 of the Letters Patent. And in a case relating to a *Muth* in which the same High Court having regard to its public importance granted leave to appeal against an order setting aside the appointment of a receiver passed by the lower Court in respect of some alleged personal properties of the *Mohunt* the Privy Council refused to interfere and laid down that as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for an appeal to the Privy Council.—*Benoy Krishna v. Satish Chandra Giri*, noted under heading "When the appellate Court may interfere etc.," ante.

**Revision.**—Where a Court appoints a receiver in a case in which it has no jurisdiction to do so (as where a receiver is appointed in a proceeding under the Succession Certificate Act, 1889), the Court acts without jurisdiction, and the High Court may interfere in revision.—*Kanhaiya v. Kanhaiya*, 46 A. 372: 79 I. C. 363: A. I. R. 1924 All. 376: 22 A. L. J. 345.

**Bond.**—For Form of bond to be given by receiver, see App. F, Form No. 10, and for Form of appointment of receiver, see App. F, Form No. 9.

**Miscellaneous cases.**—Practice of the Original Side of the Court followed in recognising the right of a purchaser at a receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Code relating to sale in a suit.—*Minatoonnessa v. Khatoonnessa*, 31 C. 479.

Property in the hands of a receiver of the High Court cannot be proceeded against by attachment in the mofussil.—*Hem Chunder v. Pran Kristo*, 1 C. 403. This case has been distinguished in *Jogendra Nath v. Devendra Nath*, 26 C. 127: 3 C. W. N. 90, where it has been held that a judgment-creditor can sell properties in the hands of the receiver of the Court in execution of a mortgage-decree without the leave or sanction of the Court, although he cannot execute a decree against such properties by way of attachment and sale.

The possession of a receiver should be regarded as possession for the party who might ultimately turn out to be the true owner and entitled to possession as such. The effect of such possession by the receiver is to

destroy the adverse possession, if any, of either of the parties.—*Sarala Sundari v. Sarada*, 2 C. L. J. 602 (11 C. 496, 17 M. 501, and 20 A. 341 applied).

A servant of a firm, the business of which is being managed by a receiver appointed under this rule, has no preferential claim over the attaching creditor on the assets of the firm for wages due before the appointment of the receiver.—*Short v. Pickering*, 6 M. 138.

An attachment of money in the hands of the receiver made without previous permission or sanction of the Court is improper and irregular, for such an attachment is an interference with the Court's possession through its official receiver, and the Court will refuse to recognize it.—*Mohammed Zohuruddeen v. Mahomed Noorooddeen*, 21 C. 85. See also *Kahu v. Ali Mahomed*, 16 B. 577; *Perygag v. Bhudhar Mal*, 130 I. C. 836: A. I. R. 1931 Pat. 204. 12 P. L. T. 318.

Under the Code of Civil Procedure, once a suit has been dismissed, the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs. An application, therefore, made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted.—*Yaminuddowallah v. Ahmed Ali Khan*, 21 C. 561.

Attachment by a judgment-creditor of a debt due to the judgment-debtor by a third party. Where the existence of the debt is denied, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under this rule.—*Toolsa Goolal v. Antone*, 11 B. 448.

An application for the appointment of a receiver on the retirement of another receiver should be made in Court and not in Chambers.—*Stalkart v. Stalkart*, 28 C. 250.

Where a Court executing a decree made an order directing the payment of the rents of certain property which had been attached as they became due from the tenant to the judgment-debtors; and subsequently default having been made by the tenant in the payment of the rents of certain years, the decree-holder applied for an order directing the payment of the rents which were in arrears to be made by the tenant in accordance with the previous order. Held, that the effect of the order in the execution proceedings was virtually to appoint the decree-holder receiver under the provisions of this rule.—*Radha Kishore v. Aftab Chandra*, 7 C. 61.

The fact that there exists in respect of immoveable property an order of a Magistrate passed under S. 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by S. 505, C. P. Code, 1882, of appointing a receiver in respect of the same property.—*Barkatunnissa v. Abdul Aziz*, 22 A. 214.

A receiver appointed in an administrative suit, instituted by a creditor of a deceased, against his executor is not an agent of the executor, and an acknowledgment by the receiver is not an acknowledgment within the meaning of S. 19 of the Limitation Act. He is an agent and officer of the Court.—



*Baij Nath v. Hem Chunder*, 10 C. W. N. 959. As to the effect of a payment or acknowledgment by receiver on the question of limitation, see also *Periasami v. Seetharama*, 27 M. 243 (F. B.): 14 M. L. J. 84.

#### 4. When a receiver—

Enforcement of receiver's duties. (a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached, and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver. [NEW.]

#### COMMENTARY.

Alterations.—“We have redrafted this rule on the lines of S. 18 (4) of the Provincial Insolvency Act, 1907. We think that the power to imprison receivers is too wide and should be omitted.”—*See the Report of the Select Committee.*

“Occasions loss to the property by his wilful default or gross negligence.”—“Property” includes also the income derived from it.—*Raman v. Gopala*, 39 M. 584. Where owing to the wilful default or gross negligence of the receiver any loss is caused to the property, the loss is to be made good out of the estate in the first instance and not by the party on whose application the receiver was appointed, failing which the party damaged by the loss may proceed against the receiver.—*Orr v. Muthia*, 17 M. 501 (on appeal *Muthia v. Orr*, 20 M. 224). The income from a property entrusted to the charge of a receiver is covered by the word “property” and one cannot say that a man who uses for his own benefit the money entrusted to him does not occasion loss by his wilful default.—*Raman v. Gopala*, 39 M. 584 (585).

Where the accounts filed by the receiver, who was appointed to collect the rents of the suit lands for one year, have been passed unchallenged but afterwards the Commissioner appointed to find out the amount of mesne profits gave a different figure, the proper course to pursue is to hold an enquiry as to whether the receiver has occasioned any loss by his wilful default or gross negligence and to pass an order under Or. XL, r. 4, or, if desired, to proceed against the sureties under S. 145 of the Code.—*P. L. T. L. Ohettyar Firm v. Maung Tha Lu*, A. I. R. 1927 Rang. 334 (referring to *Maung Po Then v. Ma Waing*, 59 I. C. 844: 13 Bur. L. T. 91: 10 L. B. R. 236, in which it has been held that S. 145, C. P. Code applies where any person has become liable as surety for a receiver and such surety can be ordered to pay the sum which he has bound himself to pay.

If money paid to some one else by the receiver does not reach its proper destination, the receiver will be liable to make good the loss unless he can show that he acted prudently and with perfect regularity where a receiver, who had in his hands some money belonging to the estate, feeling that he would die at any moment and in order to ensure that the money would not be mixed up with his own private property, called a cashier who received the money and in whom the receiver had reason to trust, and the cashier subsequently misappropriated the money, the receiver was not guilty of wilful default or gross negligence.—*Moore v. Asharafi Singh*, 125 I. C. 117 : A. I. R. 1930 Pat. 332.

Where at the time of the appointment of a receiver there was a decree in favour of the estate about 11 years old and after his appointment the receiver applied for arrest of the debtor and not for attachment of his property in execution of the decree, on the ground that the property was so encumbered that it would not be worth while to throw good money after bad, the receiver was not guilty of gross neglect unless it is proved that it would have been more profitable to the estate if the debtor's property had been attached.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760 : (1931) M. W. N. 830 : 84 L. W. 533.

**Removal of receiver.**—A receiver should not be allowed to continue in office if he fails to comply with the order of the Court to submit his accounts.—*Bhari Lal v. Shankar*, 7 L. L. J. 6 : 86 I. C. 246 : A. I. R. 1925 Lah. 309. The Court which has the power of appointing a receiver is also invested with the power of dismissal.—*A. U. John v. Agra United Mills Ltd.*, 184 I. C. 454 : A. I. R. 1931 All. 72 : 39 A. L. J. 13.

The Court may direct his property to be attached.—Where no money is due from the receiver but it is found that he has caused loss to the estate by wilful default or gross negligence, r. 4 provides that that amount may be recovered by attachment and sale of the receiver's property; and the fact that it provides for the attachment implies that that is the only way it is to be enforced, and an order for arrest or imprisonment of the receiver is illegal.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760 : (1931) M. W. N. 830 : 34 L. W. 533. After the death of the receiver an order can be made for execution being levied against his properties in the hands of his appropriation of the income of the v. *Gopala*, 39 M. 584. See also

**Appeal.**—An order under r. 1 or r. 4 of this Order is appealable.—*See* Or. XLIII, r. 1, Cl. (s). Order XL, r. 4 specifically deals with attachment of property in the hands of the receiver and for its realisation; and an order holding the receiver of an estate liable to estate for a certain sum of money is not appeal unless it is accompanied by an order under Or. XL, r. 4 directing the attachment of his property.—*Ganeshlal v. Satyanarayan*, 54 F. 202, 1 D. 100 (1902).—*unachallam v. U Po Lu*, which it has been held which enables the Court to attach and sell the receiver's property; Cls. (a), (b) and (c) of the Rule give only the grounds on which such an order is made; therefore, unless an order is made under the operative part of the rule no appeal would lie under

Or. XLIII, r. 1 (s). So also an order requiring a receiver to deposit a certain sum of money due by him in Court, unaccompanied by any direction as to the attachment of his property, is not an order under Or. XL, r. 4 and consequently not appealable.—*Palaniappa v. Palaniappa*, 65 I. C. 403 : (1921) M. W. N. 806 : A. I. R. 1922 Mad. 234 ; and an order refusing an application to call upon a discharged receiver to render accounts and refund losses due to his neglect during the time he was in office, is also not appealable because it is not an order under the operative part of Or. XL, r. 4.—*Gokal v. Udheram*, 70 I. C. 292 : A. I. R. 1922 Lah. 324.

An order granting leave to sue a receiver for damages arising from his negligent discharge of duties is not appealable. Such an order is not one under Or. XL, r. 4.—*Shrinivas v. Waz*, 45 B. 99 : 59 I. C. 421 : 32 Bom. L. R. 1126.

Where the Subordinate Judge found that the receiver had caused loss to the estate by his gross negligence and made an order that the Receiver should pay into Court a certain sum on account of the loss which he had caused to the estate, and that, if he failed to do so, the party should realise the amount from property given by the receiver as security for the performance of his duties, the order was really one under Or. XL, r. 4 and the receiver had a right to appeal against such an order.—*Gurumurthi v. Ramaswami*, A. I. R. 1931 Mad. 760 : (1931) M. W. N. 830 : 34 L. W. 538.

When after recording an order under Or. XL, r. 3 as to the indebtedness of the receiver to the estate the Court passes an order under r. 4 for attachment and sale of his property and an appeal is preferred from the last order, the previous order under r. 3 is not to be taken as conclusive and the whole matter including the proceedings under r. 3 is laid open to the appellate Court for decision on the merits.—*Khan Chand v. Abdul Majid*, 76 I. C. 203.

5. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property. [S. 504.]

When Collector  
may be appointed  
receiver.

This rule exactly corresponds with S. 504 of the C. P. Code, 1882.

# ORDER XLI.

## APPEALS FROM ORIGINAL DECREES.

1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. [S. 541.]

## COMMENTARY.

Alterations in the rule.—This rule corresponds to S. 541, C. P. Code, 1882, with same additions.

Sub-rule (1) corresponds to para. 1 of the old section, with change of some words and phrases. No alteration seems to have been made in the meaning. The word "every" has been substituted for the word "the" in the beginning; the word "preferred" has been substituted for the word "in".

Sub-rule (2) corresponds to para. 2 of the old section, with some verbal alterations only.

The provisions of this Order are subject to the general provisions contained in Part VII of the Code.

Presentation and certification of grounds of appeal.—A vakalat-nama executed in favour of two vakils was accepted only by one who presented the appeal. The appeal was subsequently transferred to the Sub-Judge, who held that it had not been duly presented, and made an order rejecting it. Held, that the appeal had been duly presented.—*Ayyanna v. Nagabhooshanam*, 16 M. 295. But where a memorandum of appeal is presented by a vakil whose name does not appear in the vakalatnama through an oversight, it cannot be said to be properly presented. In such a case

Lah. 771 : 11 L. L. J. 363 : 30 P. L. R. 587. The filing of a copy of the translation of the decree is not a sufficient compliance with the provisions of this rule.—*Sher Dil Khan v. Samundar Khan*, 132 I. C. 3 : 32 P. L. R. 127 : 12 L. L. J. 305.

An order determining any question referred to in S. 47, is a decree under S. 2, when therefore an appeal is preferred against such an order it is sufficient to attach to the memorandum of appeal a copy of the order itself and it is not necessary to attach to the memorandum a copy of the decree even though such decree may have been drawn up. In the case, however, of a suit or proceedings which have the character of a suit (*e.g.*, contentions probate proceedings, etc.), it is necessary to file a copy of the decree.—*Khirode Sundari v. Jnanendra Nath*, 6 C. W. N. 283 (distinguished in *Gopal Chandra v. Preonath*, 32 C. 175).

It is not left to the litigant's choice to file or not to file copy of a judgment along with the memorandum of appeal, though the Court may dispense with it.—*Ramchandra v. Mayaram*, 106 I. C. 57 : A. I. R. 1928 Nag. 131. Where the counsel filed the memorandum of appeal accompanied by a brief order recorded by the lower appellate Court but noted that the detailed judgment was filed in a connected appeal, *held*, that the error, if any, might be condoned and the copy of the detailed judgment dispensed with.—*Arit v. Akbar*, 130 I. C. 519 : A. I. R. 1930 Lah. 935.

A second appeal filed without a copy of the trial Court's judgment within time is competent in as much as Or. XLI, r. 1, C. P. Code, requires that only a copy of the lower appellate Court's judgment is to be filed and does not require the filing of the judgment of the trial Court.—*Ramdeo Singh v. Makhan Singh*, (1923) P. 19 : 74 I. C. 330. But where the High Court rules require that copies of judgment of both the lower Courts should be filed, an appeal cannot be said to be legally presented without those judgments, and the mere fact that such copies are already on the record of some other appeal filed by the opposite party in the same Court is not a good reason for dispensing with such copies.—*Ghulam Muhammad v. Bura*, A. I. R. 1927 Lah. 721 : 104 I. C. 290.

Under the rules of the Allahabad High Court, a copy of the judgment appealed from is required to be presented with the memorandum of appeal under Cl. 10 of the Letters Patent.—*Fazal Muhammad v. Phul Kuar*, 2 A. 192 (F. B.).

Where from the decree in a suit two appeals were preferred and two decrees were drawn up by the appellate Court, Or. XLI, r. 1, C. P. Code requires both decrees to be filed for the presentation of a second appeal to be valid.—*Muhammad Din v. Musst. Zerunnisa*, 3 L. 215.

Where the first Court passed a decree partly in favour of the plaintiff and both parties appealed against the decree and the lower appellate Court delivered a full judgment in the defendant's appeal and a formal separate judgment in the plaintiff's appeal and two separate decrees were drawn up with the result that the plaintiff's suit was dismissed, the plaintiff can file one second appeal against both the decrees accompanied by copies of both the judgments and of both the decrees of the lower appellate Court, because the "formal expression of adjudication" by the lower appellate Court was in form two

contradictory decrees, but was in substance and intention a single consistent decree, substituted in place of the decree of the first Court.—*Sheoram v. Hiranman*, A. I. R. 1929 Nag. 229 (F. B.): 25 N. L. R. 183 (referring to *Ghansham v. Bhola*, 45 A. 506 (F. B.); *Mt. Lachmi v. Mt. Bhulli*, 8 L. 384 (F. B.); *Raghubans v. Mt. Asloo*, 20 W. R. 294).

A Full Bench of the Lahore High Court has held that the word "judgment" in this rule means the statement of the final adjudication of the rights of the parties in the action and does not include orders whereby some preliminary issue, point or plea was determined or some step taken or other question settled in the progress of the case; and therefore a memorandum of appeal should be accompanied by a copy of the decree and (unless the appellate Court dispenses therewith) of the final judgment or order and it is not necessary to file with it a copy of the order disposing of a preliminary issue in the case.—*Mt. Saban v. Shahabal*, 10 L. 587 (F. B.): 115 I. C. 753; A. I. R. 1929 Lah. 431. See also *Khushi Mohammed v. Mahant*, 30 P. L. R. 236, *Dwarka v. Telu Mal*, 127 I. C. 719; A. I. R. 1931 Lah. 202; 12 L. L. J. 74; *Ram Narain v. Gwalior Light Railway*, 134 I. C. 300; A. I. R. 1932 Lah. 136. *Hashmi v. Pir Sant*, 10 L. L. T. 23.

An interlocutory order refusing a stay could not be considered as a part of the judgment on which the decree was founded and as such it could not be said that there was no proper presentation of the appeal on account of failure to file the stay order on appeal from the decree.—*Ishar Das v. Buta Mal*, 115 I. C. 67; A. I. R. 1929 Lah. 42.

The Punjab Government Notification No. 138 G. dated 19th March, 1926 empowers the High Court to dispense with a copy of the preliminary order but the power to dispense with it should ordinarily be exercised at the first hearing.—*Joti Ram v. Harbakhsh Singh*, A. I. R. 1928 Lah. 60; 105 I. C. 653.

An appeal, if presented in time, is validly presented for the purpose of the Limitation Act if it is accompanied by copies required by the C. P. Code. The High Court has held that an appeal presented in this manner is validly presented for the purpose of computation of time.—*Chumal v. Dahyabhai*, 32 B. 1.

**Delay in presenting appeal—Discretionary power of Court to excuse—Sufficient cause.**—Section 5 of the Limitation Act (IX of 1908), provides that an appeal may be admitted after the period of limitation if the appellant shows "sufficient cause" for not preferring

Section 5 of the Limitation Act is a mandatory section, but does not exclude the discretionary power of the Court to excuse delay in presenting an appeal.—*Shrimant Sagajirao v. Smith*, 20 B. 736.

The presentation of an appeal to a wrong Court under a *bona fide* mistake may be "sufficient cause" within the meaning of S. 5 of the Limitation Act.—*Dadabhai Jamselji v. Maneksha*, 21 B. 552. See also *Balaram v. Sham Sunder*, 23 C. 526 (5 A. 591 followed). But see *Daudbhai v. Emnabai*, 28 B. 235.

The time during which an appellant was prosecuting his application under S. 108, C. P. Code, 1882 (Or. IX, r. 13), should not be excluded in computing the period of limitation for presenting an appeal. Section 14 of the Limitation Act does not apply to appeals but only to suits.—*Ardha Chandra v. Malangini*, 23 C. 325.

The words "sufficient cause" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputable to the appellant. Where the appellants being themselves pleaders and well acquainted with the facts of the case preferred the appeal to a wrong Court, they had not acted in good faith, but with gross negligence and carelessness and were not entitled to extension of time under S. 5 of the Limitation Act.—*Sarat Chander v. Saraswati Devi*, 34 C. 216; 5 C. L. J. 380. See also *Gobinda Lal v. Shiba Das*, 33 C. 1323; 10 C. W. N. 986; 3 C. L. J. 545.

When the time for appealing is once passed, the Court must be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time.—*Karsandas v. Gungabai*, 30 B. 329; 7 Bom. L. R. 965. See also *Bhimrao v. Ayyappa*, 31 B. 33; 8 Bom. L. R. 858.

When owing to the mistake of the clerk of the appellant's pleader, certain persons were not added as respondents till after the period for preferring the appeal had expired, held, that as the omission was not intentional, the appeal should be heard as duly filed.—*Promoda Nath v. Kinoo Mollah*, 13 C. W. N. 167; 8 C. L. J. 135. See also *Rup Chand v. Dasodha*, 30 A. 55.

Where the original decree was signed on the 6th July, 1903, and the plaintiffs applied for amendment of the decree and the amendment was made on the 22nd August, held, that the period of limitation for presentation of an appeal should be reckoned from the 22nd August as the date when the correct decree was prepared; *Amar Chandra v. Asad Ali*, 33 C. 908 (referred to in *Brojo Lal v. Tara Prasanna*, 3 C. L. J. 188). See also *Visvanathan v. Ramanathan*, 24 M. 646, where the decree was amended and appeal was allowed to be preferred from the amended decree, though the appeal against the original decree was barred.

When a memorandum of appeal was filed accompanied by a copy of the judgment and by a translation of the decree in Urdu and where the attention of the counsel filing the appeal was drawn to the fact that a copy of the original decree in English should have been filed—held, that there was no sufficient cause for extending the time within the meaning of S. 5 of the Limitation Act in as much as counsel had been put on his guard and he was remiss in not making a further application for the copy of the decree in English.—*Daim v. Hayat*, 4 L. L. J. 381.

Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time, for sufficient cause. Poverty is "not sufficient cause" within the meaning of that section.—*Manickya Moyee v. Boroda Prosad*, 9 C. 355; 11 C. L. R. 430; *Moshaullah v. Ahmedullah*, 13 C. 78; *Huro Chunder v. Surnamoyi*, 13 C. 266; *Husaini Begam v. Collector of Muzaffarnagar*, 9 A. 11 and 655.

## r. 1.

The discretion conferred by S. 5 of the Limitation Act, is a discretion which the Court cannot exercise loosely, but which should be exercised on a consideration of the circumstances of each case as it arises. At the same time the words "sufficient cause" should receive a liberal construction, so as to advance substantial justice when no negligence, nor inaction, nor want of bona fides is imputable to the appellant.—*Kichilappa Naicker v. Ramamujam*, 25 M. 166.

When the High Court refused to admit an appeal filed out of time, the Judicial Committee refused to interfere with the discretion exercised by the High Court.—*Ram Narain v. Parmeswar Narain*, 30 I. A. 20: 30 C. 309 (P. C.). See also *Hamid Ali v. Gayadin*, 26 A. 327.

When a lower appellate Court admits an appeal filed out of time, the High Court ought not to interfere with the discretion exercised by the District Court in admitting the appeal under S. 5 of the Limitation Act.—*Fatima Begam v. Hansi*, 9 A. 244. See *Parvati v. Ganpati*, 23 B. 513.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of S. 5 of the Limitation Act, for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.—*Jay Lal v. Har Narain*, 10 A. 524 and *Ramjiwan v. Chand Mal*, 10 A. 537.

Delay in filing appeal—Sufficient cause—Deduction of time spent in another litigation in respect of the same subject-matter—Mistake of law. *Held*, that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit.—*Sitram v. Nimba Valad*, 12 B. 320 (explained in *Dadabhai Jamsetji v. Maneksha*, 21 B. 552).

Where it is not a sufficient cause prescribed for J. 242.

Where an appellant was misled by his legal adviser as to the course to be followed, he is entitled to the benefit of S. 5 of the Limitation Act.—*Kura Mal v. Ram Nath*, 23 A. 414: 3 A. L. J. 218 (followed in *Anjora Kunwar v. Babu*, 29 A. 638: 4 A. L. J. 515).

A mistake in law may be under some circumstances a "sufficient cause" for admitting an appeal presented out of time.—*Krishna v. Chathappan*, 13 M. 269. But see the judgment of Mahmood, J., in *Bechi v. Ahsanullah*, 12 A. 461 (F. B.) (13 C. 266 dissented from).

An appellant by which the respondent loses cross-objections heard affords no sufficient cause for the cross-appeal which he might have presented.—*Chuaasama v. Isnwargar*, 16 B. 249.

After admission and registration of appeal by District Judge, whether Sub-Judge can dismiss it on the ground of limitation.—See notes under rule 9.



The time during which an appellant was prosecuting his application under S. 108, C. P. Code, 1882 (Or. IX, r. 13), should not be excluded in computing the period of limitation for presenting an appeal. Section 14 of the Limitation Act does not apply to appeals but only to suits.—*Ardha Chandra v. Matangini*, 23 C. 325.

The words "sufficient cause" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputable to the appellant. Where the appellants being themselves pleaders and well acquainted with the facts of the case preferred the appeal to a wrong Court, they had not acted in good faith, but with gross negligence and carelessness and were not entitled to extension of time under S. 5 of the Limitation Act.—*Sarat Chander v. Saraswati Debi*, 34 C. 216: 5 C. L. J. 380. See also *Gabinda Lal v. Shiba Das*, 33 C. 1323: 10 C. W. N. 986: 3 C. L. J. 545.

When the time for appealing is once passed, the Court must be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time.—*Karsandas v. Gungabai*, 30 B. 329: 7 Bom. L. R. 965. See also *Bhimrao v. Ayyappa*, 31 B. 33: 8 Bom. L. R. 858.

When owing to the mistake of the clerk of the appellant's pleader, certain percoos were not added as respondents till after the period for preferring the appeal had expired, held, that as the omission was not intentional, the appeal should be heard as duly filed.—*Promoda Nath v. Kinoo Mollah*, 13 C. W. N. 167: 8 C. L. J. 135. See also *Rup Chand v. Dasodha*, 30 A. 55.

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## r. I.

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Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of S. 5 of the Limitation Act, for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.—*Jog Lal v. Har Narain*, 10 A. 524 and *Ramjiwan v. Chand Mal*, 10 A. 537.

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Where it is not a sufficient cause for such appeal has passed.—*Ashanulla v. Collector of Dacca*, 15 C. 242.

Where an appellant was misled by his legal advisers as to the course to be followed, he is entitled to the benefit of S. 5 of the Limitation Act.—*Kura Mal v. Ram Nath*, 25 A. 414; 3 A. L. J. 218 (followed in *Anjora Kunwar v. Babu*, 29 A. 638; 4 A. L. J. 515).

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An appellant by which the respondent loses cross-objections heard affords no sufficient cause for the cross-appeal which he might have presented.—*Chudasama v. Ishwargar*, 16 B. 249.

After admission and registration of appeal by District Judge, whether Sub-Judge can dismiss it on the ground of limitation.—See notes under rule 9.

**Time requisite for obtaining copy—Exclusion of time in computing period of limitation for appeals.**—See S. 12 of the Limitation Act (IX of 1908), by which the time requisite for obtaining copies of decree and judgment is excluded.

The time which intervenes between the putting in of stamps and obtaining a copy of the decree should be excluded from the time prescribed for the presentation of an appeal.—*Lal Gopalnath v. Pudum Koonwur*, 5 W. R. Mis. 44; *Gopeenath v. Gopeenath*, 6 W. R. Mis. 106.

Time requisite for copies of decree and judgment should be excluded from the computation of the time. The application for copy need not be made by the appellant or his authorized agent; it is not necessary to show for what purpose the copies were obtained.—*Ram Kishan v. Kashi Bai*, 29 A. 264; 4 A. L. J. 152.

In computing the period of limitation prescribed for an appeal, the appellant is, as a matter of right entitled to deduct the number of days required for taking a copy of the decree only. The word "decrees" in this rule does not include the "judgment"; *Juggunnath v. Shewrutun*, 24 W. R. 105 (F. B.); 15 B. L. R. 272; *Horil Pattuck v. Bhowaneeram*, 15 B. L. R. 273-note; 21 W. R. 308. See, however, *Haji Hassam v. Nur Mahomed*, 28 B. 643.

**Application for copy of decree—Delay in filing the papers and fees for the copy.**—The mode of computing the period of limitation for appeals.—*Nobin Chunder v. Brojendra Coomar*, 12 C. L. R. 541. See also *Ramanuja v. Narayana*, 18 M. 374.

So long as the right of appeal is subsisting, an appellant is entitled, under S. 12 of the Limitation Act, 1877, to apply for the copy of the lower Court's decrees. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal.—*Thukaram v. Pandurang*, 25 B. 584 (19 A. 342 followed). See also *Pandharinath v. Shankar*, 25 B. 586 (19 A. 342 followed).

In computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required under the rules of the High Court to be presented with the memorandum of appeal.—*Fazal Muhammad v. Phul Kuar*, 2 A. 192 (F. B.).

When a decree for possession of immovable property directs an enquiry into the amount of mesne profits under S. 212, C. P. Code, 1882: (Or. XX, r. 12), and an order is finally made determining the amount, and formal decree is necessary to be drawn up; and when the final order or decree is appealed against, the time requisite for obtaining a copy of the decree shall be excluded in computing the period of limitation prescribed for the appeal.—*Gopal Chandra v. Preonath*, 32 C. 175 (6 C. W. N. 283 distinguished). See also *Beer Chunder v. Mohamed Asgur*, W. R. (1864) 145.

Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under S. 12 of the Limitation Act to deduct the time between the delivery

of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal.—*Bani Madhub v. Matungini*, 13 C. 104 (F. B.) (10 C. 652 overruled; 18 W. R. 512 referred to). But see *Bechi v. Ahsanullah*, 12 A. 461 (F. B.).

The "time requisite for obtaining a copy of the decree" appealed against which under S. 12 of the Limitation Act, is to be excluded in computing the period of limitation for an appeal, is determined when the copy is ready for delivery.—*Gopal Chunder v. Brojo Behary*, 9 C. L. R. 293.

In computing the period of limitation for an appeal, a party is not entitled to deduct the period during which the lower Court was closed, when he could have made such application before the Court closed and where on the day he actually applied, the period limited for appeal had expired.—*Venkata Row v. Venkata Chella*, 28 M. 452 (25 B. 534 and 586 distinguished).

Where a decree was passed on the 22nd September, an application for a copy was not made until the 29th, and then with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it re-opened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th, held, that the appeal was out of time, the appellant not being entitled to a deduction of the time occupied in ascertaining what the requisite number of folios was.—*Gunga Dass v. Ram Joy*, 12 C. 30. But see *Dulal Bewa v. Saroda Kinkar*, 3 C. W. N. 55; *Siyadatunnissa v. Muhammad*, 19 A. 342; *Kali Sankar v. Baikanta Nath*, 7 C. W. N. 109; *Nawab Syed Amir Hossain v. Tuls Dass*, 8 C. W. N. 141; and *Saminatha v. Venkatasubba*, 27 M. 21.

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March, if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period. Held, that the petition was barred by limitation.—*Lakshmanan v. Peryasami*, 10 M. 373.

Sections 5 and 12 of the Limitation Act, 1908, under S. 596 of the O. P. Code, 1883, do not apply to appeals to His Majesty in Council.—*Shib Singh v. Ganu*, 169 (see S. 5 of the Limitation Act, 1908, as amended).

The provisions of S. 12 of the Limitation Act do not apply to appeals under S. 69 of the Madras Rent Recovery Act (VIII of 1865).—*Kumara v. Sithala*, 20 M. 476.

The provisions of S. 5 of Limitation Act do not apply to the Registration Act.—*Baban Sahai v. Udit Narain*, 5 C. L. J. 188. But see *Suraj Bali v. Thomas*, 28 A. 48; 2 A. L. J. 714.

An *ex parte* order admitting a time-barred appeal is subject to reconsideration at the hearing of the appeal at the respondent's instance; but Indian Courts should not, as they are apt to do, leave the question of limitation open in that way but should determine it before the appeal is registered.—*Krishnaswami v. Ramaswami*, 41 M. 412 (P. C.); *Shrimat Sundarabai v. Collector*, 43 B. 376 (P. C.).

How far mistake or negligence of a legal adviser would entitle the party to the benefit of S. 5 of the Limitation Act has been elaborately discussed in

*Surendra Mohan v. Mohendra Nath*, 36 C. W. N. 420 (all authorities discussed).

**Exclusion of time occupied in seeking review of judgment.**—An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred.—*Govinda v. Bhandari*, 14 M. 81. See also *Nobokissen v. Kaminee*, B. L. R. Sup. Vol. 349 : 2 W. R. Mis. 35; *Vasudeva v. Chinnasami*, 7 M. 584. But see *Kuller Singh v. Jewan Singh*, 22 W. R. 79; *In the petition of Brojendro Coomar*, B. L. R. Sup. Vol. 728 : 7 W. R. 529; and *Poresh Nath v. Gopal Kristo*, 15 W. R. 61. Though, under certain circumstances, the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.—*Pundlik v. Achut*, 18 B. 84. The mere presentation of an application for review, where it is not shown that the grounds therefor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed.—*Ashanulla v. Collector of Dacca*, 15 C. 242.

The general rule for extending the time to prefer an appeal and for excluding the time taken up in prosecuting an application for review is, that the delay may be excused if the applicant can show that he had reasonable grounds for applying for review instead of preferring an appeal.—*Gobinda Lal v. Shiba Das*, 33 C. 1323 : 3 C. L. J. 545 : 10 C. W. N. 986. (See the cases referred to in this case).

What is or what is not sufficient cause within the meaning of S. 5 of the Limitation Act, depends upon the circumstances of each particular case. *Bona fide* application for review is a sufficient cause for not presenting an appeal within the prescribed period. An application for review made without any good reason is not made *bona fide* merely because it was admitted in the first instance.—*Haradhan v. Prankrishna*, 10 C. L. J. 39 (33 C. 1323 : 3 C. L. J. 545 : 10 C. W. N. 986 referred to).

**Other sufficient cause for delay.**—Two suits brought at the same time by executors raising same questions of construction in respect of the same will—Similar decisions in both suits—On appeal in one suit the decree of the lower Court was reversed—Subsequent application for leave to appeal in the second after expiry of time. *Held*, that there was no sufficient cause for the delay.—*Thucker Vussonji v. Canji*, 14 B. 365.

A mistake in law is under no circumstances a sufficient cause within the meaning of S. 5 of the Limitation Act.—*Krishna v. Chathappan*, 13 M. 269 (referred to in *Gobinda Lal v. Shiba Das*, 33 C. 1323 : 10 C. W. N. 986 : 3 C. L. J. 545).

But where the guardian of a minor neglected to appeal, leave to appeal was granted to the minor under S. 5 of the Limitation Act after attaining majority.—*Cursandas v. Ladkavahoo*, 20 B. 104. See, however, *Thurai Rajah v. Jainilabdeen*, 18 M. 484.

**Stamp on memorandum of appeal.**—The Court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value

of the relief which he claims and the relief granted by the decree appealed against.—*Lukhun Chunder v. Khoda Buksh*, 19 C. 272

The Deputy Registrar has no authority to return an insufficiently stamped appeal. The right course for that officer is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time.—*Ambur Ali v. Enli Chand*, 24 W. R. 258.

The subject-matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal, and not of the suit which has led to it. For the purpose of jurisdiction, a claim under S. 331, C. P. Code, 1882, is a fresh suit, and not a continuation of the suit in which the claim is made.—*Muttummal v. Chinnana*, 4 M. 220.

Petitions of appeals in cases to obtain an order for measurement may be written on the stamp used for miscellaneous petitions.—*Smith v. Nundan Lal*, 6 W. R. Act X, 13

Where a zemindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation and not upon a stamp used for miscellaneous petitions.—*Ooma Churn v. Shub Nath*, 8 W. R. 14.

Court-fee payable on a memorandum of appeal from an order of reference under the Land Acquisition Act is that prescribed by Art. 11 of Sch. II of the Court-fees Act.—*Hurriah Chandra v. Bhoob Tarani*, 8 C. W. N. 321.

In an appeal is a suit for recovery of profits under S. 93 (h) of the North-Western Province Rent Act in respect of several years, the proper court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed and not one calculated separately on the amount of profits claimed for each year.—*Muhammad Malik v. Nirhni Bibi*, 7 A. 761.

An appeal to the District Court from the rejection of a claim by a forest settlement-officer, under Cl. 2 of S. 10 of the Madras Forest Act of 1882, falls under Art. 17, Cl. 6, and not under Art. 11 (n) of Sch. II of the Court-fees Act, 1870.—*Kamarnya v. Secretary of State*, 8 M. 22.

The court-fee payable on a memorandum of appeal from an order under S. 523, C. P. Code, 1882, disallowing an application to file an agreement to refer to an arbitration, is *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.—*Dayn Nand v. Bakhtawar*, 5 A. 333 (F. B.).

An appeal from the decision of a dispute under S. 332-B, C. P. Code, 1882, falls directly within the exception of Art. 11, Sch. II of the Court-fees Act, and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad valorem* stamp.—*Ahmad Khan v. Madho Das*, 7 A. 565 (4 M. 420 dissented from).

The stamp-fee payable on appeals to the High Courts in suits asking for "partition, the separation of a share, and for *khas* possession of that share after separation," is that leviable under Art. 6, Cl. 17, Sch. II

of the Court-fees Act. For the purposes of jurisdiction, the Court should be guided by the value of the property in suit, but the amount of the stamp-fee should be governed by a different principle.—*Kirty Churn v. Aunath Nath*, 8 C. 757 : 11 C. L. R. 95.

A memorandum of appeal from a decree directing ejectment and awarding mesne-profits is chargeable with court-fees calculated both on the land and on the mesne-profits.—*Brahmayya v. Lakshminarasimham*, 16 M. 310.

For the purposes of determining the stamp-fee payable on an appeal, a suit for possession and mesne-profits is to be taken as one entire claim and not two distinct subjects.—*Kishori Lal v. Sharut Chunder*, 8 C. 593 (F. B.) : 10 C. L. R. 359. See also *Reference under the Court-fees Act, 1870*, 16 A. 401 and *Bunwari Lal v. Daya Sunker*, 13 C. W. N. 815.

In a suit in the Court of a Sub-Judge to redeem certain land on payment of Rs. 1,625, being a quarter of a debt for which it had been mortgaged together with other land, a decree was passed for redemption of part of the land, but the Court held the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court, paying *ad valorem* court-fees computed on the value of the land exonerated only. Held, that the *ad valorem* court-fee should be computed on one-fourth of the mortgage-debt, and that the appeal lay to the District Court.—*Vasudeva v. Madhava*, 16 M. 326.

Memorandum of appeal to lower appellate Court was insufficiently stamped—Up to the date of hearing the special appeal, the deficit court-fee was not paid. Held, that the proper procedure was not to dismiss the appeal in the lower appellate Court but to stay issuing of the decree until the deficit court-fee was paid.—*Mohan Lal v. Nand Kishore*, 28 A. 270 (F. B.) (20 A. 362 followed).

Refund where memorandum of appeal is overstamped.—Where on an appeal to the High Court the memorandum of appeal is overstamped that Court has no power to direct a refund of the amount paid in excess. Such a refund can only be granted by the Collector of the district on an application to him made in this behalf.—*In re Lalta Prasad v. Sheoraj Singh*, 57 I. C. 26.

Form of memorandum of appeal.—For Form of Memorandum of Appeal, see App. G, Form No. 1.

2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule :

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. [S. 542.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 542, C. P. Code with some alterations. Some of the words and phrases of the old section have been changed, but no change seems to have been made in the meaning. The language of the present rule has been made more clear by substitution of some appropriate words and phrases.

The words "except by" have been substituted for the word "without"; the words "any ground of objection not set forth in the memorandum of appeal" have been substituted for the words "any other ground of objection"; the words "grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule" have been substituted for the words "grounds set forth by the appellant."

In the proviso the words "unless the party who may be affected thereby" have been substituted for the word "respondent." The other changes are merely verbal.

**Grounds of objection.**—The grounds of objection must be such as are necessary for the decision of the case and arise from the pleadings and evidence.—*Nawab Sidhee Nuzur Ally v. Ojoodhyaram*, 10 M. I. A. 540, 558.

In an appeal the applicant must not be permitted to make out a new case or a case different from and inconsistent with the case set up by him in the lower Court.—*Indur Chunder v. Radhakishore*, 19 I. A. 90 : 19 C. 507 (P. C.); *Gajapati v. Vasudeva*, 19 I. A. 179 : 15 M. 503 (P. C.); *Naik Khan v. Sher Ali*, 26 A. 331; *Furan Mal v. Krant Singh*, 20 A. 8, 10; *Ram Chand v. Ramanand*, 3 L. L. J. 392 : 68 I. C. 227; *Basant Ram v. Muhammad*, 4 L. L. J. 293; *Dyal v. Hirde Ram*, 29 I. C. 895 : 80 P. W. R. (1915). A litigating party can only succeed *secundum allegata et probata* and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.—*Nathu v. Umedmal*, 33 B. 35 : 1 I. C. 456. A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary before the appellate Court, more especially when he thereby places his opponent at a great disadvantage; in such a case the doctrine of estoppel owing to the conduct of the litigant applies.—*Maharaja of Vizianagaram v. Secretary of State*, 53 I. A. 64 : 49 M. 249 (P. C.) : 94 I. C. 501 : A. I. R. 1926 P. C. 18 : 43 C. L. J. 378 : 28 Bom. L. R. 865.

**Grounds not set forth in the memorandum of appeal.**—Although, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, yet, where a decree comes before it which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.—*Poran Sookh v. Parbutty*, 3 C. 612 : 1 C. L. R. 404. See also *Vemi Reddi v. Nallappa Reddi*, 11 L. W. 611.

It has been held that, in disposing of a second appeal, the High Court is competent under this rule to consider the question whether the plaintiff has any cause of action or not although such question has not been raised by the plaintiff in the first appeal. . . . memorandum of second such appeal.—*Lachman*



Where on the pleadings the basic question is what is the relationship between the parties, the appellate Court can consider an extra ground of appeal to the effect that the relationship between the parties being that of partnership the suit does not lie.—*A. Minck v. Roshan Lal*, 130 I. C. 644: A. I. R. 1931 Lah. 390: 32 P. L. R. 235. See also *Ramdas v. Panna Devi*, 5 L. L. J. 117: 84 I. C. 1039: A. I. R. 1921 Lah. 201.

It has been held that not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal under this rule but that even when such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands or after a remand for findings of facts.—*Muhammad Ismail v. Chatter Singh*, 4 A. 69 (F. B.). See also *Koylashnauth v. Monmoheenu*, Marsh Rep. 276: 2 Hay 154; *Mugno Moe v. Hur Chunder*, 3 W. R. Act X, 146.

The principle that an appellate Court should not go beyond the subject-matter of the appeal applies to an objection, called a cross-appeal, which enables the respondent to take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal. An appellate Court was held to have acted without authority, and to have contravened the Court-fees Act, in having voluntarily suggested what it thought to be an error of the Court below, and allowed the respondent to take it as an objection, giving effect to the objection subject to the payment of the court-fee stamp.—*Sharada Sconduree Debee v. Gobind Monee*, 24 W. R. 179.

This rule was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging a matter of which he had no notice.—*Bansidhar v. Sita Ram*, 13 A. 381.

An additional ground of appeal, filed after the time for filing the appeal, of which the respondent had had sufficient notice can be argued with the leave of the Court express or implied; and where the Court under a mistaken impression that leave had already been obtained for filing of the additional ground, allows the argument on that ground without objection being taken, it can be assumed that permission to argue is impliedly given.—*Maung Ba v. Maung Tha Yin*, A. I. R. 1931 Rang. 314: 135 I. C. 328.

Where during the pendency of the appeal in the High Court, one of two ~~defendants~~ <sup>parties</sup> . . . . . come forward to . . . . . rely on grounds on . . . . . actually resist the . . . . . by the surviving defendant himself.—*Kalachand v. Jatindra*, 56 C. 497: 33 C. W. N. 150.

Where the parties to the insolvency petition agreed to be bound by the findings of the Court and in the memorandum of appeal there was no suggestion that there was no such agreement, the appellant cannot be heard to challenge the agreement.—*Somasundaram v. Kannoo*, 118 I. C. 494: A. I. R. 1929 Mad. 573: (1929) M. W. N. 262.

Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the case under S. 562 of the C. P. Code, 1883.—*Tilak Raj Singh v. Chakardhar Singh*, 15 A. 119.

Where non-joinder of parties in a mortgage suit is brought to the notice of the Court, the Court will give effect to the objection and dismiss the suit even though such objection be raised for the first time in appeal.—*Ghulam Kodir v. Mustakin Khan*, 18 A. 109.

A question relating to the validity of the lease which was not raised in the lower Court or set forth in the memorandum of appeal, which is a pure question of law, is not allowed to be raised in appeal.—*A. I. R. 1931 Bom.*

An objection to jurisdiction under S. 21 of the Code may be taken under this rule although it was not specifically set forth in the memorandum of appeal.—*Manoj Ram v. Jogor Nath*, 131 I. C. 603. A. I. R. 1931 All. 556.

Where the finding of the lower appellate Court against the factum of adoption was not questioned in the grounds of second appeal, held the validity of the adoption could not be allowed to be urged at the further proceedings; *Rajombal Ammol v. Shonmugha Mudaliar*, 70 I. C. 653.

An objection to the jurisdiction of the Court was allowed to be taken for the first time in appeal.—*Ronchod Morar v. Bezorji Edulji*, 20 B. 86. See also *Ramoyyo v. Subbarayudu*, 13 M. 25 and *Ajodhya Noh v. Keshub Chondro*, 11 C. W. N. 1127.

Where a document was admitted in evidence by the first Court without any objection by the parties, but the appellate Court rejected it on the ground that it was insufficiently stamped, although no objection was made to it in the memorandum of appeal. Held, that the appellate Court ought not to have rejected it.—*Kastur Bhavani v. Appo*, 5 B. 621.

An objection to the form of the notice of sale under S. 8 of Bengal Regulation VIII of 1819 was allowed to be taken for the first time in the appellate Court.—*Ashanulla Khan v. Hari Charan*, 19 I. A. 191: 20 C. 96 (P. C.)

**Objection upon the question of limitation**—Though an objection upon the question of limitation was not raised in the memorandum of appeal, leave should yet be given to argue it when the point arose on the face of the plaint, and no question of fact had to be enquired into to enable the Court to dispose of it and when the point was thus taken, the Court was bound to give effect to it, the provisions of S. 3 of the Limitation Act being mandatory.—*Balaram v. Mangta Dass*, 34 C. 941 (S. B.): 11 C. W. N. 959: 6 O. L. J. 237 (13 A. 580, 15 A. 123, and several other cases referred to in the order of reference). But where the decision on the question of limitation depends upon an enquiry into facts and the question has not been raised in the written statement, it cannot be taken up in appeal.—*A. I. R. 1929 Lah.*

An appellant in a second appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondents' appeal to the lower Court (where they had been appellants) had been barred by limitation when it was presented. *Held* that, even though the plea proposed to be raised was one involving a question of limitation, the appellant was not entitled as of right to be heard in support of it without the leave of the Court granted under this rule.—*Ahmad Ali v. Waris Husain*, 15 A. 123 (8 B. 535 followed). See also *Rani Kishen v. Dipa*, 13 A. 580; *Deo Narain v. Webb*, 23 C. 86; *Venkata v. Bhashyakarl*, 29 I. A. 76; 25 M. 367 (P. C.); 6 C. W. N. 641; 4 Bom. L. R. 543; *Bhadai v. Shaikh Manowar*, 4 P. L. J. 645, 649-59.

An appellant in regular appeal may not, at one hearing raise a contention of law expressly abandoned by him in the Court below, and not contained in the memorandum of appeal.—*Pabitra Dasi v. Damodar*, 7 B. L. R. 697; 24 W. R. 397-note. But see *Abdulullah v. Asraf Ali*, 7 C. L. J. 152, where it has been held that the question of limitation, raised in the written statement but abandoned in the Court of the first instance, can be raised in the Court of Appeal, as it is a clear question of law.

Court competent to raise question of limitation not raised by the parties—Time requisite for obtaining copy of decree—Exclusion of time between delivery of judgment and signing of decree—Exclusion of time between furnishing of estimate of costs of copy and compliance with estimate.—*Bechi v. Ahsanullah*, 12 A. 461 (7 W. R. 337, 13 C. 104 dissented from).

Effect of not raising or waiving an objection in the lower Court.—As a general rule, objections not taken in the lower Court ought not to be allowed to be set up in the appellate Court; but where the Judge in appeal had allowed such an objection to be taken, and had overruled it, the High Court allowed it to be raised in special appeal, and being of opinion that it was a valid objection, reversed the decision of the Court below.—*Dindyal v. Surendranath*, 3 B. L. R. A. C. 78-note; 10 W. R. 77.

The errors of procedure of the Court of first instance are not to be remedied when they have not been made a ground of complaint before the lower appellate Court.—*Anurup Chandra v. Hiramani*, 3 B. L. R. Ap. 38; 11 W. R. 418.

An objection which if taken might have been cured and which has not been taken in the Court below, cannot be taken in the Court of appeal.—*Dhurm Das v. Shama Soondri*, 6 W. R. P. O. 43; 3 M. L. A. 229. See also *Nurul Hossein v. Sheosahas*, 19 I. A. 221; 20 C. 1 (P. C.).

A plaintiff will not be allowed to raise any objection as to the defendant's setting up alternative defences at the appellate stage of the suit, where no such objection was raised in the first Court.—*Purnendu Narain v. Dwijendra Narain*, 8 C. L. J. 289.

An objection as to the plaintiff having no cause of action may be taken at any stage of the suit.—*Parbati Charan v. Kali Nath*, 6 B. L. R. Ap. 73. See also *Lachman v. Bahadur Singh*, 2 A. 884. But see *Kalicoomar v. Birmomaye*, 1 W. R. 23; and *Soodukhina v. Raj Mohun*, 11 W. R. 350.

An objection as to non-joinder and defect of parties cannot be allowed to be raised in appeal. Such objection should be taken at the first hearing.—*Paramasiva v. Krishna*, 14 M. 498. But see *Ghulam Kadir v. Mustakim Khan*, 18 A. 109 (13 A. 432, 16 A. 478, and 17 A. 537, referred to). An objection as to misjoinder of causes of action cannot be taken for the first time in appeal.—*Maula v. Gulzar*, 16 A. 130 (5 B. 554 followed).

An objection to the jurisdiction of the Court may be taken for the first time in appeal.—*Ranchod Morar v. Bezanti Edulji*, 20 B. 86. But the objection cannot be taken in appeal, where the question is not a pure question of law, but depends upon facts.—*Biru Mahata v. Shyama Churn*, 22 C. 483.

An objection not raised in the lower Court cannot be raised for the first time in appeal.—*Magantal v. Govindlal*, 15 B. 697.

Question of permanent tenancy cannot be raised for the first time in the appeal.—*Mahabir Persad v. Fox*, 9 C. L. J. 457.

An objection not taken in cross-appeal before the lower appellate Court cannot be taken in special appeal; but, if the case be remanded for new trial, such objection may then be taken before the Court of first instance.—*Durgaram v. Narsing Deb*, 2 B. L. R. A. C. 254; 11 W. R. 134.

An objection that an attachment under S. 240 of Act VIII of 1859 was invalid, because the formalities required by S. 239 had not been complied with, was not allowed to be taken on appeal, it not having been raised in the Courts below.—*Ramkrishna v. Surfunnissa*, 7 I. A. 157; 6 C. 129 (P. C.).

Where objection to the validity of the award, on the ground that it was made beyond the time allowed, was not taken by the defendant in the first Court, held, that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that, in the first Court, he was aware of the defect or had done anything to imply consent to extension of the time.—*Chuha Mal v. Hari Ram*, 8 A. 548.

If no objection is taken in the Court of first instance to the reception of a document in evidence, it is not within the province of the appellate Court to raise or recognize it in appeal.—*Chimnaji Govind v. Dinkar Dhonde*, 11 B. 320. No objection should be allowed to be taken in the appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection.—*Kishori Lal v. Rakhal Das*, 31 C. 155 (26 C. 53 dissented from); *Hriday Krishna v. Prasanna Kumari*, 28 C. 142 (23 I. A. 106; 19 A. 76 (P. C.) distinguished). See also *Shahzadi Begum v. Secretary of State*, 34 C. 1059 (P. C.); 34 I. A. 194; 6 C. L. J. 678; 9 Bom. L. R. 1192; and *Ram Prasad v. Sham Narain*, 6 C. L. J. 22.

It has been held that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.—*Basava v. Kalkapa*, 2 B. 489; *Oomatool Fatima v. Ghunnoo*, 19 W. R. 22. But see *Girish Chandra v. Amina Khatun*, 3 B. L. R. Ap. 125.

Where a point is taken on appeal, the appellate Court should consider and decide it, although the vakil may omit to argue it.—*Dada Valad v. Bavasha Valad*, 6 B. H. C. R. 9.

Where a judgment of the appellate Court contained a statement that a particular point had been abandoned, which statement was challenged, the Judicial Committee considering the surrounding circumstances, held that the point was not abandoned.—*Kalka Parshad v. Mathura Parshad*, 35 I. A. 166; 13 C. W. N. 1 (P. C.); 8 C. L. J. 447; 30 A. 510; 10 Bom. L. R. 1086; 18 M. L. J. 424; 1 I. C. 175.

Appellate Court shall not rest its decision on any ground not set forth in the memorandum of appeal.—The appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal nor taken by leave of this Court under this rule.—*Thakuri v. Kundan*, 17 A. 280. This power is however to be exercised by the Court alone and neither party can claim it as of right.—*Bansidhar v. Sita Ram*, 13 A. 381.

The appellate Court has no power to rest its decision on a ground not set forth in the memorandum of appeal if a particular point taken in the pleading has been deliberately abandoned by a party at the trial of the suit before the lower Court.—*Govindrao v. Balu*, 16 B. 586.

A Judge is not permitted to make, on appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance.—*Kachubhai v. Krishnabai*, 2 B. 635, *Irangowda v. Seshapa*, 17 B. 772; *Nathu v. Umedmal*, 33 B. 35.

An appellate Court should not ordinarily travel beyond the record or take up points which are not the subject of appeal before it.—*Kashinath v. Roy Dwarkanath*, 7 W. R. 61. See also *Gourmoni v. Jagat Chandra*, 17 C. 57 (64).

A lower appellate Court is not justified in determining an appeal on an issue which was not raised between the parties in the Court of first instance.—*Ustoorun v. Mohun Lall*, 21 W. R. 333. See also *Pran Kishore v. Mahomed Ameer*, 21 W. R. 338; *Bukmini v. Foodun Koomares*, 23 W. R. 408; *Sookhanundamoyee v. Baney Modhub*, 1 W. R. 73; *Ramrav Khanderav v. Govind Pandshet*, 6 B. H. C. R. 63.

A finding of the first Court not appealed against cannot be interfered with by the appellate Court.—*Kalee Das v. Khiroda*, 16 W. R. 300; *Wadhawa Singh v. Sundar Singh*, 59 I. C. 689; 21 P. W. R. 1921.

In a suit for ejectment in which neither party set up a tenancy, the lower appellate Court found that the defendant was a yearly tenant and hence dismissed the suit for want of notice to quit. Held, that the lower appellate Court could not make for the defendant a case which was different from and inconsistent with that set up by him.—*Sujjad Ahmed v. Ganga Choron*, 9 C. W. N. 460; 8 C. L. J. 116 (13 C. 248, 17 M. 218, 15 B. 407, distinguished).

Where a plaintiff has rested his case upon fraud, and the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground.—*Ghurphekar v. Purneshwar*, 5 C. L. J. 653 (8 C. 631, 6 B. 110, 7 C. 381, referred to).

An appellate Court can *suo moto* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit is barred.—*Mozoffur Ally v. Girish Chandra*, 1 B. L. R. 25; 10 W. R. 71.

Power of appellate Court to take cognizance of facts which have happened since the date of judgment of the lower Court.—*Ratan v. Bishun*, 11 C. W. N. 732 6 C. L. J. 74. *Hari Lal v. Prosad*, 6 C. L. J. 92; *Ramya v. Bindersan*, 6 C. L. J. 192; *Chobey v. Rashika*, 6 C. L. J. 662.

3. (1) Where the memorandum of appeal is not amended or up in the manner hereinbefore prescribed, or amendment of may be rejected, or be returned to the appellant memorandum. for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment. [S. 543.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 543, C. P. Code of 1882, with some alterations of verbal character.

The word "where" has been substituted for the words "if" and "when"; and the words "shall sign or initial" have been substituted for the words "shall attest by his signature," which occurred in the old section. No change seems to have been made in the meaning.

Other grounds of rejection.—Under S. 107, sub-rule (2), read with O. VII, r. 11, a memorandum of appeal if it does not supply the deficit VII, r. 11.

Under S. 3 of the Limitation Act (IX of 1908), an appellate Court can reject a memorandum of appeal if it is filed after the prescribed period of limitation. As to the discretionary power of the appellate Court to excuse delay, see the cases cited under r. 1 of this order.

Returned for Amendment.—A memorandum of appeal containing language disrespectful to the Court of the first instance and containing allegations of bias and partiality against that Court should be returned for amendment.—*Zamindar of Tuni v. Benaya*, 22 M. 155.

Where a memorandum of appeal is returned for the purpose of being corrected, the appellate Court should specify a time for such correction.—*Jagannath v. Lalman*, 1 A. 260. When an appellate Court returns an order that it may be which the deficiency is to be (1 A. 260 referred to).

"May be rejected."—Wherever a memorandum of appeal is rejected under the discretionary power vested in the Court, a judicial order to that effect, and the reasons for the same, ought to be recorded.—*Lalla Jugesh v. Kassenauth*, 1 Ind. Jnr. O. S. 121.

An appellate Court should state its reasons for rejecting an appeal as barred by limitation.—*Raghunath v. Nilu*, 9 B. 452 (454).:

When a memorandum of appeal is summarily rejected, under this rule, the reason for such rejection should be recorded.—*Rudr Prasad v. Baijnath*, 15 A. 367.

The time for rejecting an appeal is when it is presented, and not after it has once been admitted.—*Gopee Bullab v. Goluck Proshad*, W. R. 1864, (135). But the registration of an appeal is a ministerial act, so it can be rejected after registration.—*Jafer Hossein v. Mahomed Amir*, 4 B. L. R. App. 103: 13 W. R. 351.

There is no limitation as to the time when a memorandum of appeal may be rejected or returned for amendment.—*Damodar Das v. Gokal Chand*, 7 A. 79 (85) (F. B.).

**Appeal.**—A decision rejecting a memorandum of appeal on the ground that it is barred by limitation has the force of a decree and is therefore appealable.—*Gulap Rai v. Mangli Lal*, 7 A. 42; *Raghunath v. Nilu*, 9 B. 452; *Gunga Dass v. Ramjoy*, 12 C. 30. For the same reason, a decision that a memorandum of appeal is insufficiently stamped or that it was not duly presented, is appealable as a decree.—*Rup Singh v. Mukhraj*, 7 A. 887; *Ayyanna v. Nagabhooshanam*, 16 M. 285.

An order rejecting a memorandum of appeal for deficient court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memorandum on proper court-fee.—*Jnanadasundari v. Madhab Chandra*, 59 C. 388.

**4.** Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. [S. 544.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 544, C. P. Code, with the substitution of the words “*appealed from*” for the words “*appealed against*,” and of the word “*vary*” for the word “*modify*,” which occurred in the old section. No other alteration has been made in this rule.

This rule is to be read with r. 33 of the Order which has been taken from English Or. LVIII, r. 4, and which has been inserted with the object that the appellate Court should have the fullest power to do complete justice between the parties.

Any one of the plaintiffs or defendants may appeal.—This rule relates only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases

where either of two opposite parties appealed from a part of the decree upon a point, the appeal may be allowed on the whole.—*Cheda Lal v. Badullah*, 11 M. I. A. 157, 10, and 12 M. I. A. 157 referred to).

Where one of the plaintiffs, whose suit is dismissed, appeals, the appellate Court can decree the appeal in favour of all, especially when the non-appealing plaintiffs are joined as respondents.—*Madhorao v. Mt. Laxmi Bai*, A. I. R. 1927 Nag. 406; 99 I. C. 1041; *Saru Khan v. Jan Muhammad*, 106 I. C. 313; A. I. R. 1929 Lah. 43; *Fazal Hussain v. Ghulan Rasul*, 110 I. C. 250.

Where a preliminary decree was passed in favour of two appellants jointly, in ignorance of the fact that one was dead, the Court allowed the heirs of the deceased appellant to be substituted as parties in the final decree.—*Gantuku Appanna v. Jellepalli Gavarappadu*, 48 M. L. J. 601; 87 I. C. 748; A. I. R. 1925 Mad. 910.

One of several defendants who appeals in respect only of the sum decreed against her is not entitled to take advantage of this rule and question the full amount claimed.—*Sheero Comaree v. Mahatab Chund*, W. R. 1864, (380).

One of two defendants may appeal as respects the whole, and not only half, of the property in dispute, in the absence of proof that they owned the property in two equal shares.—*Katyane v. Madhub*, 4 W. R. 68.

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, Or. XLI, r. 4 does not authorize him to proceed with the appeal without making the other plaintiffs parties thereto.—*Ambika Prasad v. Jhinak Singh*, 45 A. 236; 21 A. L. J. 91; 71 I. C. 321; A. I. R. 1923 All. 211.

In a suit for arrears of rent, an intervenor who alleged that he was in receipt of the rents from the ryots was made a party. The first Court passed a decree in favour of the plaintiff, but the decree was reversed on appeal and the suit dismissed. On appeal to the High Court, held, that the intervenor was properly made a defendant to the suit, and that he could prefer an appeal from the decree of the Court of first instance, and that the Court of appeal could, on his appeal, set aside the whole decree.—*Dayal Chand v. Nabin Chandra*, 8 B. L. R. 180; 16 W. R. 235.

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights.—*Bhagirathibai v. Baya*, 5 B. 264.

In a suit in which the defence of two defendants was a common one to the extent of denying that the plaintiff was entitled to the property, the Court held that the appeal of one defendant was not a ground for setting aside the decree of the Court of first instance.—*Mahomed Safoollah v. Anwar Ali*, 21 W. R. 113.

Reversal or modification of decree on ground common to all.—This rule applies as well to *ex parte* decrees as to other decrees, the only question being whether the decision of the lower Court proceeded on a ground common to all the defendants.—*Sreenath v. Grey*, 13 W. R. 114; *Ram Tahal v. Sukeswar*, 1 P. L. J. 143.



A decree against several defendants, one of whom alone appeals, can be reversed as against the rest when it proceeds on any ground common to all.—*Ram Kamal v. Ahmad Ali*, 30 C. 429 (17 M. 265, *dissented from*); *Annamalai Chettiar v. Pitchu Ayyar*, 28 M. 122; 15 M. L. J. 28; *Dhuttaloor v. Paidigantam*, 30 M. 470 (F. B.); 17 M. L. J. 119; *Kali Pada v. Mati Lal*, 9 C. L. J. 461 (20 A. 8, 28 A. 95, and 30 M. 470 followed); *Asibunnessa v. Wali Ahamed*, 1 C. L. J. 144; *Semasundaram v. Vaithilinga*, 40 M. 846 (867); *Ambika Prosad v. Pardip Singh*, 19 C. W. N. 233; *Salaludin v. Afzal Begum*, 39 C. L. J. 590; 28 C. W. N. 963; 84 I. C. 68; A. I. R. 1925 Cal. 23; *Durga Kunwar v. Balwant Singh*, 23 A. 478 (481); *Nagamma v. Subba*, 11 M. 197; *Seshadri v. Krishnan*, 8 M. 192; *Ram Sundar Das v. Shajidur Rahman*, 60 I. C. 460. If however, the appealing defendant values the appeal at a sum which represents the amount decreed against him alone, the appeal cannot be regarded as being against the entire decree so as to bring the case within Or. XLI, r. 4.—*Jogendra Nath v. Rajendra Nath*, 63 I. C. 95.

Suit decreed both against mortgagor and the purchaser of the equity of redemption, overruling the plea of valid tender. The purchaser appealed against the decree, impleading the mortgagor as a respondent. The appellate Court on setting aside the decree can set it aside as against the mortgagor also.—*Venkatrama v. Gopalakrishna*, 52 M. 322; 116 I. C. 844; A. I. R. 1929 Mad. 230; 56 M. L. J. 255.

Suit for redemption based on a mortgage was dismissed by the trial Court on the ground that the mortgage was not proved. The lower appellate Court decreed the suit. The High Court, in second appeal by an alienee of some of the items comprised in the mortgage from the mortgagee, reversed the decree of the lower appellate Court and held that the trial Court's decision that the mortgage was not proved was correct and should be confirmed. It was open to the High Court under this rule to reverse the decree for redemption not only against the alienee who had actually preferred the appeal but also as against the alienees of other items who had not preferred the appeal.—*Ahmad Haji v. Mayan*, 57 M. L. J. 789; 124 I. C. 301; A. I. R. 1930 Mad. 65.

The word "may" in this rule shows that the appellate Court is given a discretion in the matter. It may, therefore, reverse the decree in favour of some only of the plaintiffs or defendants. It is not bound to do so in favour of all of them.—*Narain v. Binaik*, 36 A. 510; *Kaka v. Kartara*, 133 I. C. 556; 32 P. L. R. 787; A. I. R. 1933 Lah. 71. An appellate Court can reverse or alter a decree on appeal by one party only when it finds that the lower Court had no jurisdiction to try suit.—*Nagamma v. Subba*, 11 M. 197.

A decree was passed for the plaintiff in a suit to redeem a *kanom* brought against various persons most of whom disclaimed all interest. An appeal was preferred by one of the defendants who claimed to be the *jennm* of the premises comprised in the *kanom* from him. The first-mentioned appellant withdrew from the appeal, which, however, was prosecuted by the others and the appellate Court reversed the decree. Held, that since the appellants were the only substantial defendants, the appellate Court was right in allowing the appeal to proceed.—*Sri Manavikraman v. Rayan*, 16 M. 293.

## r. 4.

In 1880, Z leased certain property to defendant; in 1892 the successor of Z leased the same property to plaintiff, who sued the defendant and Z's successor and obtained a decree for possession. The defendant gave up possession. The successor of Z appealed making defendant a party. The High Court reversed the decree and dismissed the plaintiff's suit, holding that defendant's lease was valid. *Held* that, under this rule, the decree of the High Court enured for the benefit of the defendant also and that he was entitled to restitution.—*Erat Madhavan v. Venganat*, 18 M. L. J. 39.

Where parties who have been made co-defendants do not appear, and the Court deals with the case under S. 116, C. P. Code, 1859, the decree is in favour of the absent defendant in favour of defendants not before the appellate Court.—*Doorga Churn v. Shamanund*, 12 W. R. 376.

Two suits brought by different parties claiming different interests in a certain share to set aside the sale of that share having been dismissed, one of the plaintiffs appealed, and the sale was set aside. *Held*, that the decision must be considered as setting the sale aside as to the whole of that share, although the other parties did not appeal.—*Nagar v. Shurutoollah*, 20 W. R. 77.

Under Or. XLI, r. 4, C. P. Code, an appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it in which the surviving defendant or defendants were particularly interested.—*Subbaraya Mudaliar v. Kandasami*, 16 L. W. 330: (1922) M. W. N. 674.

Where certain tenants appealed, making only some of the co-sharers landlords respondents, *held*, that as the respondents alone could not have sued for rent, the appeal impleading them without joining the other landlords as respondents, was unsustainable. Under Or. I, r. 9, C. P. Code, a person who is a necessary party to the suit is a necessary party to the appeal.—*Jatindranath v. Jhaku Mandar*, 66 I. C. 780: 3 P. L. T. 456.

Decree against some of the defendants—Alteration of decree by appellate Court.—When a decree has been given against one defendant only, an appellate Court can alter the decree so as to render liable another defendant against whom the plaintiff has preferred no appeal.—*Rup Jain v. Abdul Kadir*, 31 C. 643 (F. B.): 8 C. W. N. 496 (25 C. 565 approved); 26 C. 109, and 18 B. 520 referred to; 7 W. R. 49 and 366 impliedly overruled). Dissented from in *Farzand Ali v. Bismillah Begam*, 27 A. 23 (following 2 A. 487, and 5 A. 266), and also in *Kulai Kada v. Viswanatha*, 28 M. 220: 15 M. L. J. 212 (7 M. 215, 18 B. 520, 26 C. 109, 31 C. 643, distinguished). In these latter cases it has been held that an appellate Court is precluded from modifying the decree of the lower Court in favour of a party who filed neither an appeal nor a memorandum of objection under r. 22 Order. These cases seem to have been overruled by the new provisions in r. 33 of this Order. See notes under that Rule, *post*.

Where it is necessary for a proper decision of an appeal, the Court is competent to an appellate Court to take into account the facts and circumstances of the case.

filed under S. 561, C. P. Code, 1882 (r. 22), by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly.—*Abdul Ghani v. Muhammad Fasih*, 28 A. 95 : 2 A. L. J. 667 (26 O. 114 followed : 21 W. R. 338 referred to ; 23 A. 93 distinguished).

If, in a mortgage suit, in which the plaintiffs ask for relief against two sets of defendants in the alternative, the first Court gives a decree against one set of defendants and dismisses the suit as against the other, the appellate Court has, on appeal by one set of defendants in which the other set of defendants is made a party respondent, power to alter the decree, so as to make the latter liable, the real contest in the case being between the defendants.—*Iswardhari Singh v. Sahebzadi*, 35 C. 538 : 12 O. W. N. 720 (25 O. 565, 26 O. 109, 31 C. 643 followed ; 26 O. 114 does not lay down any different principle). In this connection, see r. 33 of this Order, which virtually supersedes 27 A. 23, 28 M. 229, and other cases, in which a similar view has been taken.

In a suit against A and B for recovery of possession of property, the Court gave a decree against A and in favour of B. The plaintiff appealed from that part of the decision which was in B's favour. Held, that the Judge on appeal had no jurisdiction to reverse the decision of the Court below against A, he being no party to the appeal.—*Huroochunder v. Lalchand*, Marsh Rep. 256 : 2 Hay. 48. See also *Lalla Ram Surun v. Lokebas Kocer*, 18 W. R. 39.

A and B were sued on a joint liability to pay rent. A did not defend. B did ; and a decree was passed against both. B appealed. Held, that it was competent to the Judge on appeal to reverse the decree on the ground that there was no joint liability, but that B occupied a separate estate at a separate rent.—*Lukhee Kant v. Ram Dayal*, Marsh 281 : 2 Hay. 288.

Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other co-plaintiffs although not parties to the appeal—Procedure.—*Babaji Dhondhet v. Collector of Salt Revenue*, 11 B. 596.

Altering decree against defendant on co-defendant's appeal. It was considered, under the circumstances of this case, not consistent with the principles of equity and good conscience to refuse a clearly proved right on the technical ground that on one co-defendant's appeal no decision adverse to another co-defendant can be come to.—*Oodoy Singh v. Paluck Singh*, 16 W. R. 271.

The Court of Appeal has power, under S. 544, C. P. Code, 1882 (this rule), to draw up what would be a fair decree as regards all the parties to a suit although some of them may not have appealed.—*Joykisto v. Nittyanund*, 3 C. 738 : 2 O. L. R. 440.

Where the decree does not proceed on any ground common to all.—A decree against several defendants, one of whom alone appeals, cannot be reversed as against the rest when it did not proceed on a ground common to all.—*Doyamoyee v. Eshur Chunder*, 1 W. R. 203 ; *Woomesh Chunder v. Matumginee*, 2 W. R. 170 ; *Abdool Ali v. Banoo*, 2 W. R. 287 ; *Boydonth v. Ojan Bibee*, 11 W. R. 238 ; *Koolada Pershad v. Goura Chand*, 17 W. R. 353 ; *Chunder Monce v. Modhoo*, 23 W. R. 166 ; *Amir Chand v. Kahan Das*, 106 I. C. 876 : A. I. R. 1923 Lah. 279.

A suit by a sister and sister's daughter of a deceased Hindu against an alieness from the widow of the deceased on the footing that they were the heirs of the deceased was dismissed and on appeal by the sister's daughter

daughter were not identical and the judgment of the lower appellate Court not having proceeded upon a common ground the provisions of this rule were inapplicable and therefore the decree of the lower appellate Court was unsustainable.—*Jang Bir v. Mt. Jamma*, 12 L. 534; 32 P. L. R. 798.

Section 544, C. P. Code, 1882 (this rule), does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants.—*Puran Mal v. Krant Singh*, 20 A. 8 (14 W. R. 130 referred to). See also *Chajju v. Umrao Singh*, 22 A. 386; and *Protab Chunder v. Koorbanissa*, 14 W. R. 130.

Whereas one of several defendants appeals not against the whole decree but only against that portion of it which affects him, and his defence in the lower Court is not a defence common to the other defendants, the decree of the lower Court cannot be reversed in favour of those defendants who have not appealed.—*Ram Chunder v. Omara Churn*, 18 W. R. 26. See also *Nakur Chunder v. Judoo Nath*, 24 W. R. 389.

Appeal by *pro forma* defendants, by making the real defendants, who did not appear, respondents as between themselves, cannot open out that portion of the case which, as between the plaintiff and the non-appealing defendant, has not been appealed against.—*Gudadhur v. Mun Mohunee*, 7 W. R. 366. See also *Kharmukuree v. Nilambur*, 2 W. R. 227. But see *Soiru v. Narayanrao*, 18 B. 520 (7 W. R. 366 and 5 A. 266 distinguished).

Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of the appellants stating reasons personal to himself—Appeal admitted—Variation of the decree on a point affecting other appellants, but not the appellant who made the affidavit—Variation not allowed—*Vishwanath v. Vasudev*, 25 B. 699 (27 C. 57, 22 B. 849 cited).

Persons not parties to proceedings in appeal not bound by the result of those proceedings. Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his co-respondent, and against whom therefore no decree could have been made on a point common to the two, or any point at all.—*Dev Gopal v. Vasudev*, 12 B. 371.

Death of one of several joint appellants or respondents does not cause the appeal as a whole to abate.—See the cases noted under Or. XXII, rr. 1–4 and 11.

When one of several plaintiffs appealing against a decree which proceeded on grounds common to them all, died pending the appeal and substitution was

not made in time, the other appellants were not entitled to the benefit of this rule.—*Protap Chandra v. Durga Charan*, 9 C. W. N. 1061.

... one of the ... in the record, ... the deceased defendant could have resisted and did actually resist the plaintiffs' claim, although these grounds were not taken by the surviving defendant himself.—*Kalachand v. Jotindra*, 56 C. 487: 33 C. W. N. 150.

This rule enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all; and it does not provide that the plaintiffs or defendants who do join with the appellant should be considered to be appellants for any purpose. Therefore when one of several defendants having a common interest appeals making the others *pro forma* respondents and his legal representatives are not brought on the record within time, the *pro forma* respondents are not entitled to continue the appeal; and Or. XXII, r. 2 which applies only to a case of several appellants can have no application to such a case.—*Gobind v. Anar Kunwar*, 53 A. 521: 131 I. C. 877: A. I. R. 1931 All. 349.

Where a preliminary decree had been passed in favour of two appellants jointly, in ignorance of the fact that one was dead, the Court allowed the heirs of the deceased appellant to be substituted as parties in the final decree.—*Apanna v. Gavarappadu*, 48 M. L. J. 601: 87 I. C. 748: A. I. R. 1925 Mad. 910.

**Application for execution by non-appealing parties and the time from which limitation runs.**—A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded under S. 526, C. P. Code, 1882. One of the defendants appealed to the High Court against the order of remand, and the High Court set aside the remand order and restored the decree of the first Court. *Held*, that the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them, by the first Court, notwithstanding that they were not parties to the decree of the High Court.—*Mul Chand v. Ram Ratan*, 20 A. 493.

Where only some of several persons affected by a decree have appealed against it, the date of the appellate decree forms the basis from which the period of limitation should be computed, even in the case of those who have not appealed against the original decree.—*Shivram v. Saktharam*, 33 B. 39: 10 Bom. L. R. 939. But where a decree for possession was passed, not jointly but severally, as against all the defendants individually, and specifically stated the portions of which they were severally in possession, as also the costs separately payable by each of them; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellants' hands. *Held*, by the Full Bench, that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years

after the date of the decree was barred by limitation.—*Mashiatunnissa v. Rani*, 13 A. 1 (10 W. R. 30, 6 C. 191; 6 C. L. R. 573 and 8 A. 573 approved and followed).

A suit having been dismissed by the first Court, which ordered that the costs of all contending defendants were to be borne by the plaintiff, the plaintiff appealed to the High Court which reversed the decree. One of the defendants appealed to the Privy Council, which reversing the decree of the High Court restored that of the first Court. *Held*, that the decree of the first Court by being restored was re-affirmed in its integrity, and the defendants generally were entitled to execute it, though only one had appealed to the Privy Council.—*Luchmeeput Singh v. Khoobunnissa*, 14 W. R. 280.

A District Court gave the plaintiff a decree against all the defendants. All the defendants except one, *B*, appealed to the High Court, which reversed the decree. The plaintiff appealed to the Privy Council, all the defendants except *B* being respondents. Her Majesty in Council reversed the decree of the High Court, and restored that of the District Court. *Held* that, notwithstanding that *B* was not a party to the appeals to the High Court and to the Privy Council, the decree was a valid decree, and could be executed against *B*.—*Kishen Sahai v. Collector of Allahabad*, 4 A. 137.

Where a decree for possession of certain property is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself and not against the whole decree, and the decree does not relate to property in respect of which the defendants have a common interest and a common defence, so that an appeal by one would imperil the whole decree, then the fact of one defendant having appealed will not prevent limitation running in favour of the others against the execution of the decree.—*Hur Proshaud v. Enayet Hossein*, 2 O. L. R. 471.

See also the cases noted under Or. XXI, r. 11.

## STAY OF PROCEEDINGS AND OF EXECUTION.

5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Stay by appellate Court.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

Stay by Court which passed the decree.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application. [S. 515.]

### COMMENTARY.

Alterations in the rule.—This rule corresponds to S. 545, C. P. Code, 1882, with some additions and alterations.

In sub-rule (1) the words "*an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order,*" have been added, adopting the law as laid down in the Full Bench case; *Balkishen v. Khugnu*, 31 C. 722 : 8 C. W. N. 572. Before the Full Bench case was decided there was a diversity of judicial opinion as to whether an appellate Court has power to stay proceedings under a decree or order. In *Basanto v. Bhut Nath*, 1 C. W. N. 264, it was held that there is no provision in the C. P. Code which authorizes a Court to which an appeal is preferred against a preliminary decree, to stay proceedings pending the hearing of the appeal; S. 545 of the old Code (this rule), only authorizes the appellate Court to stay execution of decrees, but there is no provision in it to stay interlocutory order in a proceeding in the suit, previous to the passing of the final decree. In *Brij Coomares v. Ramrick Dass*, 5 C. W. N. 781 a contrary view was taken. Then the question was referred to a Full Bench, which (overruling 1 C. W. N. 264) held that apart from S. 545 (this rule), the appellate Court has inherent power to stay such proceedings. Thus the above addition has been made adopting the law as laid down in the Full Bench case quoted above empowering the appellate Court to stay proceedings after an appeal is preferred against a preliminary decree. The object of the amendment will be clearly understood from the following report of the Special Committee:—

"The Committee have added words to S. 545 in order to make it clear that proceedings under a decree as well as execution can be stayed by an appellate Court; the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an inherent power.—*Balkishen Saku v. Khugnu*, 31 C. 722 (F. B.). The Committee have introduced express words authorizing an *ex parte* stay, as the need for such order constantly arises in practice."

Sub-rule (4) is new and the object of its introduction has been explained in the above report of the Special Committee.—It has been inserted to meet

the case of *Multan Chand v. Khan Sahab Kharsedji*, 15 B. 536, where it was held that a final order staying execution should not be made without giving notice to the decree-holder. But the application should be supported by an affidavit as pointed out in the Bombay case above referred to.

The other changes introduced in this rule are merely verbal changes.

"Shall not operate as a stay of proceedings."—Rule 5 (1) of Or. XLI provides that an appeal shall not operate as a stay of execution; so that where a decree is under appeal, a Court may proceed with its execution and may, in the course of execution, do all such things as may be legal and just as it might do if on appeal had been preferred.—*Balkrishna Chettiar v. Krishnamurthi Aiyar*, A. I. R. 1927 Mad. 416: 100 I. C. 841.

The proceedings relating to the passing of a final decree in a mortgage suit must be held to be included in the words "proceedings under a decree", and therefore the jurisdiction of the trial Court to pass a final decree is not ousted as soon as an appeal is filed against a preliminary decree.—*Sat Prakash v. Bahal Rai*, 53 A. 233 (F. B.) A. I. R. 1931 All. 386: 29 A. L. J. 508. When a preliminary decree passed in a mortgage suit is the subject-matter of an appeal the proper procedure is to stay the passing of a final decree.—*Diran Chand v. Nank Chand*, 136 I. C. 729 33 P. L. R. 123: A. I. R. 1932 Lah. 271. But though the Court before which an appeal from the preliminary decree is pending has not the power to stay execution of a final decree under Or. XLI, the powers of the High Court as regards stay of proceedings pending in the Court below are not exhaustively defined by Or. XLI. If having regard to the ends of justice, it is expedient that the execution of the final decree should be stayed pending the appeal from the preliminary decree, the High Court has got ample power to stay it under S. 151.—*Jankidas v. Sheo Prasad*, 136 I. C. 75: 30 A. L. J. 43: A. I. R. 1932 All. 238. It is generally expedient that proceedings for the preparation of the final decree should not be stayed pending an appeal from the preliminary decree because the mere passing of the final decree will not in any way affect the rights of the parties to the appeal from the preliminary decree.—*Ibid.*

did not apply the Court could order stay under S. 151.—*Hirambho v. Sarojini*, 30 A. L. J. 582: A. I. R. 1932 All. 655: 141 I. C. 612.

**Stay of execution by appellate Court.**—When an appeal is pending in the High Court against a preliminary order made in a Subordinate Court in an account or partition suit, the High Court can make an order staying proceedings pending its hearing.—*Balkishen Sahu v. Khugnu*, 31 C. 722 (F. B.): 8 C. W. N. 572 (1 C. W. N. 264 overruled; 5 C. W. N. 781 approved). See also *Panchanan v. Dwarka Nath*, 3 C. L. J. 29; *Chhote Lal v. Sultan Singh*, 111 I. C. 383; 29 P. L. R. 262; *Rup Narain v. Shibbu Mal*, 107 I. C. 486; *Karam Elahi v. Amirunnisa*, 119 I. C. 489: A. I. R. 1930 Lah. 108.



Order XLI, r. 5 provides in-express terms under what conditions the proceedings under a decree can be stayed. The Privy Council which has seisin of the appeal and not the High Court which passed the decree, has power to stay proceedings in a partition suit after a preliminary decree. Under Or. XLV, r. 13, the High Court which passed the decree may stay execution of the final decree on special cause being shown.—*Laliteswar v. Bhabeswar*, 9 C. L. J. 561: 13 C. W. N. 690.

Sections 545 and 546, C. P. Code, 1892 (Or. XLI, rr. 5 and 6), clearly imply that an appeal incapacitates the inferior Court from dealing with the litigation since even the power of staying execution is, once an appeal is made, taken away from the Court and is exercisable by the appellate Court only.—*Ramanadhan v. Narayanan*, 27 M. 602, (606). See, however, *Sarat Chandra v. Damodar*, 12 C. W. N. 885 (on appeal, 13 C. W. N. 846); *Firm Gobindram Ramchandrar v. Firm Rularam Naurtaram*, 76 I. C. 174.

Section 545, C. P. Code, 1892 (Or. XLI, r. 5), has no application where no appeal has been preferred against the decree in the original suit. An appellate Court cannot stay proceedings in execution of a decree of a subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under S. 103, C. P. Code (Or. IX, r. 13).—*Bhagwat Rajkoer v. Sheo Golam*, 31 C. 1081: 9 C. W. N. 123 (28 C. 734, 8 C. W. N. 572, and 5 C. W. N. 781, distinguished).

An appellate Court has no jurisdiction under Or. XLI, r. 5, to grant a stay of execution of a decree of a Subordinate Court unless it has seisin of an appeal against such decree. Where no appeal has been preferred, the Court which passed the decree alone has power to grant a stay, on sufficient cause being shown during the time provided by law for presenting an appeal.—*Purshottam Saran v. Hargu Lal*, 43 A. 198: 18 A. L. J. 1121.

Where the defendants in an original suit applied to the appellate Court for stay of execution of the decree pending the appeal held, that the applicant who asked for the indulgence must pay the costs of the application.—*Chuni Lal v. Anantram*, 25 C. 893.

An order of an appellate Court under S. 545, C. P. Code, 1892 (Or. XLI, r. 5), to stay execution of a decree pending appeal, is in the nature of a prohibitory order, and, as such, would only take effect when communicated. If a property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity.—*Bessesswari v. Horro Sundar*, 1 C. W. N. 226 (4 N. W. P. H. C. R. 398, 6 N. W. P. H. C. R. 354, and 3 A. 686, distinguished).

An appellate Court has authority under this rule to take security from a decree-holder even after execution of the decree under appeal has been completed.—*Hukum Chand v. Kamalanand*, 33 C. 927: 3 C. L. J. 67.

Where an application on behalf of the appellant for stay of delivery of possession was dismissed by the High Court as premature on the respondent's representing that he had taken no steps for delivery of possession, and immediately thereafter he applied to the executing Court and obtained delivery of possession through that Court, the High Court held that it was in the nature of overreaching of the Court on the part of the respondent.

and so the High Court recon- . . . . . nd  
directed that the delivery of . . . . . v.  
*Sri Thakurji Ramji*, 106 I. C.

An application for restitution can be made as soon as a decree is varied or reversed and the execution ought not to be stayed under this rule because an appeal has been filed.—*Mulchand v. Tarachand*, 117 I. C. 288 : A. I. R. 1929 Nag. 138.

A stay of execution cannot be directed where there is no application for execution pending before the executing Court.—*Nawab v. Hukam Din*, 63 I. C. 837.

**Stay of execution in appeal against order refusing to set aside an award**—The High Court has inherent jurisdiction to grant a stay of execution under an award where the application to set aside the award has been refused and there is an appeal . . . . . Or. XLI, r. 5 and see that the conditions laid . . . . . with.—*Mahomedalli v. Dharamsey*, 55 B. 301 : 133 I. C. 864 : A. I. R. 1931 Bom. 384 : 33 Bom. L. R. 702.

**Stay of execution by revisional Court.**—This rule is confined in its application to appeals and does not apply to applications for revision.—*Shree Darbar Sahib v. Central Bank of India*, 117 I. C. 815 : A. I. R. 1929 Lah. 167.

**Effect of uncommunicated order staying execution.**—Where an order is made by an appellate Court staying execution of a decree, but before the order is communicated to the Court executing the decree, the property of the judgment-debtor is sold in execution, the sale is invalid and cannot stand, the reason being that when an unconditional order for stay of execution is made, the order becomes operative the moment it is made and suspends the power of the lower Court to continue the proceedings in execution.—*Hukum Chand v. Kamalanand*, 33 C. 927 : 3 C. L. J. 67; *Sati Nath v. Ratanmami*, 16 C. L. J. 335; *Sahu v. Shadi Ram*, 24 A. L. J. 519 : 96 I. C. 137 : A. I. R. 1926 All. 457. It has, however, been held by the Madras High Court in *Muthukumarasami v. Kuppusami*, 33 M. 74; *Venkatachalapati v. Kameswaramma*, 41 M. 151 (F. B.) : 43 I. C. 214 : 33 M. L. J. 515, that such sale is valid. See also *Parsotam v. Barkhmanand*, 50 A. 41 (F. B.) : 102 I. C. 665 : A. I. R. 1927 All. 401 : 25 A. L. J. 530; *Lakshmi-chand v. Phulchand*, 125 I. C. 53 : A. I. R. 1930 Lah. 17 : 11 L. L. J. 457. The Bombay High Court has held that it is difficult to lay down a principle as to the moment of operative effect or otherwise of the order of an appellate Court for stay of sale, and whether the operativeness of the order dates from the time it is signed or from the time it is communicated, a great deal depends upon the nature of the order, the question of good faith and other facts.—*Rudrappa v. Bashettappa*, 52 B. 290 : 110 I. C. 710 : A. I. R. 1928 Bom. 189 : 30 Bom. L. R. 465.

**All proceedings by executing Court after communication of stay order by appellate Court, void.**—When an appellate Court orders stay of execution pending an appeal, the Court before which the execution proceedings are pending has no power to proceed with the execution after the receipt of the order. It would be opposed to all principles to hold that,

because the stay order was not perused by the Court executing the decree or that it had no time to pay any attention to it, the attachment and other proceedings subsequent to the receipt of the order are good. Anything done during the trial when the stay order is in force is not only irregular, but is altogether void, as the Court has no jurisdiction to do anything after it is prohibited from doing it.—*Venkatappayya v. Venkatachalapathi Rao*, 99 I. C. 989 : A. I. R. 1927 Mad. 450.

**Rule 5, Cl. (a)—substantial loss.**—In order to obtain a stay of execution of a decree directing payment of money, the applicant must satisfy the Court by affidavit that substantial loss may result to him unless execution is stayed.—*H. H. The Gaikwar Sirkar v. Ghandi*, 25 B. 243. See *Nazar Ali v. Ojoodharam*, 1 Ind. Jur. N. S. 185; *Dhera Mal v. Haidar Shah*, 2 L. 61; 61 I. C. 77; *Harihar Prasad v. Keshva Prasad*, 61 I. C. 9; *Rajendra Singh v. Umrao Singh*, 61 I. C. 827; *Arjamand Khan v. Shankar Lal*, A. I. R. 1922 Lah. 364. What amounts to sufficient cause depends upon the facts of each particular case.—*Mahomed Hossein v. Lutf Ali*, 20 W. R. 393; *In re Ahmed Reza*, 13 W. R. 281.

That the decree-holder is a woman possessed of no property is no ground for stay of execution as the appellant's interests can be amply safeguarded by taking security for restitution from the respondent.—*Johnstone v. Jan Bibi*, A. I. R. 1923 Lah. 329 : 107 I. C. 780.

Where arrest of the judgment-debtor was applied for pending his appeal and he applied for stay of execution, the loss would be irreparable if the appeal succeeded ; and therefore execution should be stayed regarding arrest only.—*Mahomed Ishaq v. Wahiduddin*, 31 P. L. R. 216.

When the judgment-debtor has sold his properties, the transferee and not the judgment-debtor can apply for stay of execution.—*Har Narain v. Govind*, 139 I. C. 847 : 30 A. L. J. 603 : A. I. R. 1932 All. 551.

In cases relating to immovable property where the decree is under appeal, the disturbance of the *status quo ante* does result in substantial loss to the party in possession. In a suit for pre-emption, the defendant-vendee is in possession of the property under a perfectly valid title obtained for consideration from the original owner. Such possession should not be disturbed till the plaintiff has finally established his title and the vendee has exhausted all his remedies for retaining such possession.—*Fateh Khan v. Daim*, 9 L. L. J. 130 : A. I. R. 1927 Lah. 169 : 99 I. C. 767.

The Court declined to stay the execution of a decree : (1) because the applicant has not shown, as he was bound to show, something beyond the mere fact of an appeal having been preferred against it ; and (2) because there seemed to have been great delay on his part.—*Leslie v. Land Mortgage Bank of India*, 17 W. R. 160.

It is not open to the Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired.—*Ishan Chunder v. Ashanoolah*, 10 C. 817.

If the execution is so protracted and the expense involved to be great, the appellate Court will stay the proceedings.—*Nena Ojha v. Sarbhoj*

r. 5.

Section 647, C. P. Code, 1892 (S. 141), provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with Ss. 545 and 546, give no power to the Court after the passing of final unappealable decree and before the granting of an application for review of judgment, to order a stay of execution of the decree.—*Amir Hasan v. Ahmad Ali*, 9 A. 36.

A decree directing the issue of a probate to the propounder of a Will is one that is capable of execution and stay of execution of such decree can be granted under S. 545, C. P. Code, 1892 (this rule).—*Brij Coomarse v. Ramrick Dass*, 5 O. W. N. 781.

The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation.—*Srinibash Prasad v. Kesho Prasad*, 38 C. 754 (775).

"That the application was made without unreasonable delay."—Applications for stay of execution in the original side of the High Court pending an intended appeal must ordinarily be made to the Judge who tried and made without unreasonable delay.—

Where decree has been executed.—Execution completed by appointment of manager. Held that, under this rule, the Court had power only to stay execution, and that the words "stay execution" could not be extended to a case in which execution was completed, as in the case before it.—*Dharram Singh v. Kishen Singh*, 12 C. L. R. 532.

Notice to decree-holder.—A final order for staying the execution of a decree should not be made without giving the decree-holder notice of the judgment-debtor's application. The application should be supported by an affidavit.—*Multanchand v. Kharsedji*, 15 B. 536. But see *Mulchand v. Tarni Prasad*, 4 P. L. J. 642, in which a different view has been taken.

Security for due performance of decree or order.—A sum of money deposited by a co-respondent in a divorce suit is a security given for the due performance of the decree or order of the Court and so it is within the competence of the Court to direct that the money so deposited should be awarded towards the payment of costs, and a third party who attaches in execution of his decree against the co-respondent the said money in Court has no right to prevent payment of the cost to  
*Horst Guderian*, 58 C. 1

Order accepting or rejecting security not appealable.—An order for accepting security to stay execution is not an order determining the rights of the parties. It is neither an order under S. 47 nor is it a decree within the meaning of S. 2 (2) and therefore not appealable.—*Saraswati v. Golap*, 41 O. 160; 17 C. W. N. 1240; *Sri Krishan v. Satnarain*, 32 P. L. R. 806. An order rejecting a security bond for stay of execution is also not appealable.—*Firm of Dittu Ram v. Firm of Dalchand*, 102 I. C. 621; A. I. R. 1927 Lah. 527.

Obligation of surety and his right of appeal.—The nature and extent of the liability of a surety under this rule depends on the words of the surety bond.—*Ameer Ali v. Kassim Ali*, 13 W. R. 403.

On the reversal of the decree, the liability of the surety ceases, and the surety bond becomes a dead letter.—*Ameer Ali v. Kassim Ali*, 13 W. R. 403.

Where a judgment-debtor asks for stay of execution-proceedings pending appeal, and his request is granted on condition of his giving security, he is entitled to have a reasonable opportunity for showing that the sum demanded as security is considerably more than the amount awarded by the decree.—*Bahooria Deohma v. Lalla Jumahur Lall*, 20 W. R. 52.

When immoveable property is given by a judgment-debtor as security for the due performance of a decree under Or. XLI, r. 5 (3) (c), it can be realised in execution without attachment. The provisions of Or. XXXIV, r. 14, do not apply to such a case, and, further, the matter being one relating to execution within S. 47, a separate suit does not lie.—*Subramaniam v. Raja of Ramnad*, 41 M. 327; *Shyam Sundar v. Bajpai*, 30 C. 1060; *Mukta Prasad v. Mahadeo*, 38 A. 327.

The liability of a surety is co-extensive with that of the judgment-debtor and the surety is liable with the judgment-debtor jointly and severally for the satisfaction of the decree unless a contrary intention appears from the security bond; and where the decree is affirmed in appeal the decree-holder is not bound to make a demand from the judgment-debtor or exhaust his remedies against him before proceeding against the surety.—*Har Narain v. Dhana Mal*, 117 I. C. 65.

The sureties who would be considered parties to the suit with reference to it, are sureties who have rendered themselves liable for the amount of the decree whether during the course of the suit or an application under this rule for stay of execution.—*Banna Mal v. Jamna Das*, 15 A. 183 (184).

When the bond was to perform all orders and decrees passed in appeal, it was held that the obligation of the sureties to fulfil the decree of the appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.—*Shivlal v. Apaji*, 2 B. 654 (on appeal, 3 B. 204).

A security bond executed in consideration of temporary stay is binding on the surety for the period during which it is allowed to operate for the benefit of the principal. It is binding pending the discharge of the rule and its operation during the period cannot be cancelled by the Court.—*Pandu Lazman v. Balu Mahadu*, 8 Bom. L. R. 557.

The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court, and was successful, and he went to recover the amount from the decree-holder. The High Court's decree had no jurisdiction.—*Hardeo Das v. Zaman Khan*, 8 A. 639.

**Mode of enforcement of security-bond.**—See notes under S. 145 and Cr. IV, r. 6.

**Form.**—For Form of security-bond, see App. G, Form No. 2.

A bond executed by a surety for judgment-debtor hypothecating property as security for loss which the decree-holder may sustain for the judgment-debtor's default is chargeable under Art. 40 and not Art. 57 of the Stamp Act.—*Stamp Reference by the Board of Revenue*, 52 A. 844 (S. B.) ; 131 I. C. 675: A. I. R. 1931 All. 189: 29 A. L. J. 41. A security-bond given under this rule does not require registration.—*Jayappa v. Shivangouda*, 52 B. 72: 107 I. C. 710: A. I. R. 1929 Bom. 42. But see *Nagaruru v. Tangatur*, 31 M. 330: 3 M. L. T. 317.

**Costs.**—The costs of the application to stay execution should as a rule, be paid by the applicant who prays for such stay even if the application is successful.—*Chuni Lal v. Anantram*, 25 C. 893.

In the absence of special circumstances, the general rule is that costs of an application for stay of execution pending an appeal should be costs in the appeal.—*Yeshwant v. Genajee*, 56 B. 276 (F. B.): 137 I. C. 375: 34 Bom. L. R. 230: A. I. R. 1932 Bom. 127.

**Appeal from orders staying or refusing to stay execution.**—An order refusing to stay execution of a decree under this rule is not appealable, as such an order is not "a decree," within the meaning of S. 2, Cl. (2).—*Ram Chandra v. Balmukund*, 29 B. 71; *Malamal v. Kevalappara*, 27 M. L. J. 171. The Calcutta, Madras and Bombay High Courts have held that an order is a "judgment" within the meaning of S. 2, Cl. (2) and is therefore appealable as such.—*Patent and 5 C. W. N.* 781; *Sonachalam v. Kumaravelu*, 47 M. 316: 79 I. C. 109: A. I. R. 1924 Mad. 597; *Tuljaram v. Alagappa*, 35 M. 1 (F. B.); *Pedda Jeeyanaravaru v. Krishnamacharlu*, 50 M. 389: 109 I. C. 157: A. I. R. 1927 Mad. 398; *Gokalchand v. Sanwal*, 1 L. 348: 55 I. C. 933. *Contra*: *Mooljee v. Moolla*, 3 R. 255: 88 I. C. 740: A. I. R. 1925 Rang. 225.

Where the amount of security demanded under this rule is excessive, an appeal lies from the order.—*Udeyadeta Deb v. Gregson*, 12 C. 624.

Where an order for stay of execution is made on security being furnished by the judgment-debtor and such security is furnished, no appeal lies from the order at the instance of the decree-holder, as such an order does not come within S. 47 and S. 2, Cl. (2).—*Saraswati v. Golap Das*, 41 C. 160: 17 C. W. N. 1240.

**Review.**—An order under this rule may be cancelled or varied at any time by the Court making such order.—*Amir Hasan v. Ahmad Ali*, 9 A. 36.

**6. (1)** Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such

Security in case of order for execution of decree appealed from.

property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. [S. 546.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 546, C. P. Code, 1882, with some additions and alterations.

Sub-rule (1) corresponds to paras. 1 and 2 of the old Code with the following modifications. The word "*where*" has been substituted for the word "if" in the beginning; the word "*from*" has been substituted for the word "against"; and the words "*or has been taken*" have been added after the words "may be," to give effect to the case of *Hukum Chand v. Kamalanand*, 33 O. 927: 3 O. L. J. 67, where it has been held that the Court has inherent power, notwithstanding that the decree has been executed and the property has been taken in execution, to call upon the respondent to furnish security for the due performance of any decree which may be made on such appeal. By the above addition, *Mansukhlal v. Janardanji*, 7 B. H. C. R. 122, and *Joynarain v. Russeck Mohun*, 8 W. R. 144, have been overridden. In *Hukum Chand v. Kamalanand*, 33 O. 927: 3 O. L. J. 67, all the cases on the point have been referred to and fully discussed.

Sub-rule (2) corresponds to the last para. of S. 546, C. P. Code, 1882, with some additions and alterations. The words "*for money*," which stood after the word "decree" in the old section, have been omitted, and the effect of the omission is that the provisions of this sub-rule are no longer confined to money-decrees only. The words "*to the Court which made the order*" have been added after the word "judgment-debtor," in order to make it clear that the application under this sub-rule is to be made to the Court which made the order for the sale of immoveable property. It would appear from the Full Bench case of *Tribeni v. Bhagwat* reported in 34 O. 1037: 6 O. L. J. 298: 11 C. W. N. 1030, that there was a difference of opinion with regard to the terms of S. 546, para. 3 of the Code, as to whether the power for staying the sale of immoveable property was exercisable by the Court which passed the decree, or whether the appellate Court had similar power, as the words of that clause were not very explicit and were somewhat vague. In the third clause no Court was specified as the Court which is empowered to pass the order under that clause. Hence the words "*to the Court which made the order*" have been added, and by the above addition, an ambiguity which hitherto existed has been removed. The object of the addition will clearly appear from the Full Bench case above referred to.

"The Committee have modified this rule in order to make it clear that security may be required, though the property has previously been taken in

r. 6.

execution (*Hukum Chand v. Kamalanand*, 33 C. 927; 3 C. L. J. 67).—*See the Report of the Special Committee.*

The whole of r. 6 must be held to be complementary to r. 5. Hence r. 6 (2) does not impose upon the Court which ordered the sale an obligation to stay the sale merely because the property to be sold is immoveable property.—*Har Narain v. Gorind*, 133 I. C. 847; 30 A. L. J. 603; A. I. R. 1932 All. 551.

Security in case of execution of decree appealed from.—The appellate Court having seisin of the appeal, has an inherent power over the subject of litigation, and can, in the exercise of the power and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made on such appeal (7 B. H. C. R. 122; 8 W. R. 141 *dissented from*). An order for stay is made on the day that it is pronounced, and not on the day on which it is drawn up or communicated.—*Hukum Chand v. Kamalanand*, 33 C. 927; 3 C. L. J. 67

Before staying execution of a decree and preventing the decree-holder from receiving the fruits of his decree, or before requiring him to give security for its restitution, probable cause must be shown of the judgment-debtor's liability to recover the money if the decree be reversed.—*Sukhee Monee v. Brojoraj*, 17 W. R. 69.

An appellate Court cannot pass an order under this rule, for a stay of execution of a decree under appeal until an order has been made for the execution of the decree.—*Janardan v. Nilkanth*, 25 B. 583.

It is only the decree, against which an appeal is pending, of which execution may be stayed. A Court has no power to restrain a decree-holder from executing his decree merely on the possibility of the appellate Court reversing its decision.—*Gossain Money Purce v. Gurn Pershad*, 11 C. 146.

An application, under this rule, to stay the sale of immoveable property, in execution of a decree for money against which an appeal has been filed, must be made to the Court which passed the decree, and not to the appellate Court.—*In the matter of Muradunnissa*, 15 A. 196 (11 C. 146 *referred to*). Followed in *Kunj Lal v. Bahutram*, 8 C. W. N. 381. But see *Tribeni Sahu v. Bhagwat Bux*, 34 C. 1037 (F. B.); 11 C. W. N. 1030; 6 C. L. J. 298, where it has been held that where an appeal has been preferred against a decree for money, the appellate Court has jurisdiction to pass an order staying the sale of judgment-debtor in execution of the decree (8 C. W. N. 381 *overruled*). See also *Lakshmanan v. Palaniappa*, 41 M. 813; 34 M. L. J. 470, where the same view has been taken.

A party appealing against a decree, which directs him to pay money may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted.—*Dhunjibhoy Cowasji v. Lisbon*, 13 B. 241.

Section 326, C. P. Code, 1882 (S. 72), does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract



specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under that section.—*Bhagwan Prasad v. Sheo Sahai*, 2 A. 856.

A decree for arrears of rent is a "decree for money" within the meaning of this rule.—*Banku Behary v. Syama Ghurn*, 25 C. 322. By the omission of the words "decree for money," this ruling has been rendered obsolete.

Under sub-rule (2) the Court is bound to stay the sale on such terms as to giving security or otherwise as it thinks fit.—*Har Karan v. Anant Ram*, 108 I. C. 272; *Gian Chand v. Manohar Lal*, 108 I. C. 605; A. I. R. 1929 Lah. 68 (in which it has also been held that this rule applies to a case where the sale has been held but the sale has not been confirmed).

Proceedings taken in pursuance of an order for sale of immoveable property by virtue of a decree under Or. XXXIV of the Code are to be deemed proceedings relating to execution of a decree within the meaning of this rule and a sale of property in execution of such a decree can be stayed under this rule.—*Rup Narain v. Gokal Chand*, 117 I. C. 88; A. I. R. 1929 Lah. 552; 30 P. L. R. 371.

See notes under rule 5.

Effect of stay of sale.—An order under this rule, directing stay of sale of immoveable property, does not bar the decree-holder from proceeding against the moveables of the judgment-debtor.—*Firm Sukhdayal Gopichand v. Jawahir Singh*, 93 I. C. 897; A. I. R. 1926 Lah. 463.

Mode of enforcement of security-bond.—The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.—*Jamsedji v. Bawabhai*, 25 B. 409; *Kusaji v. Vinayak*, 23 B. 478; *Janki Kuar v. Sarup Rani*, 17 A. 99; *Thirumalai v. Ramayyar*, 13 M. 1; *Venkapa v. Baslingapa*, 12 B. 411. But see *Radha Pershad v. Phuljuri Koer*, 12 C. 402, *Kali Charan v. Balgobind*, 15 C. 497; *Tokhan Singh v. Udwant Singh*, 22 C. 25; *Subjoo Das v. Balmakund*, 23 C. 212; and *Arunachellam v. Arunachellam*, 15 M. 203, where it has been held that a surety-bond cannot be enforced in execution, but a separate suit must be brought against the surety. But where the surety waives his right then the surety-bond may be enforced in execution.—*Kazimuddi v. Fauzdar Khan*, 10 C. W. N. 830 (8 C. W. N. 672 relied on). These latter cases have been overriden by S. 145.

The relationship between a decree-holder and a judgment-debtor who has executed a security-bond under S. 545, Cl. (c), C. P. Code, 1882 (Or. XLI, r. 5), mortgaging certain properties for the due performance of the decree or order that may ultimately be passed by the appellate Court, is not that of a mortgagee or mortgagor; and in the event of the appeal being dismissed the decree-holder is entitled to realize his decretal money by sale of the properties given in security without instituting a suit under S. 67 of the T. P. Act (IV of 1882).—*Shyam Sundar v. Bajpai Jainarayan*, 30 C. 1060; 7 C. W. N. 914, and *Janki Kuar v. Sarup Rani*, 17 A. 99 (101).

See also the cases noted under S. 145.

Registration and attestation of security-bond.—A security-bond accepted by a Court does not dispense with the necessity for registration.—

*Nagaruru v. Tanjatur*, 31 M. 330; 3 M. L. T. 317 (32 C. 494 followed).  
See the cases noted under S. 145.

**Appeal.**—It has been held by the Lahore High Court that an appeal lies against an order under this rule.—*Mahammad Fazal v. Mutsadi Mal*, 102 I. C. 25; A. I. R. 1927 Lah. 915 (relying on A. I. R. 1924 Lah. 631; 75 I. C. 615, where it has been held that “an order relating to execution of a decree” under S. 47 is comprehensive enough to include an order relating to stay of execution thereof as was held in *Srinivas Prosad v. Kesho Prosad*, 14 C. L. J. 489; 12 I. C. 745). See also *Shankar v. Kasturi Lal*, 75 I. C. 789; A. I. R. 1925 Lah. 69; *Musst. Zohra Jan v. Haveli Shah*, 32 P. L. R. 756. The Calcutta High Court has held that where the lower Court refuses to stay a sale, the High Court may on the judgment-debtor’s application under Or. XLI, r. 5 stay execution provided that the conditions (a), (b) and (c) of that rule are fulfilled; or may deal with an order of refusal under S. 115 of the Code and direct the execution to be stayed on the judgment-debtor’s furnishing security in terms of Or. XLI, r. 6 (2).—*Ram Nath v. Kambeshwar*, 15 C. W. N. 432.

**7.** No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. [S. 547.]

## COMMENTARY

**Alterations.**—This rule exactly corresponds to S. 547, C. P. Code, 1882, with the substitution of the word “rules” for “sections,” which occurred in the old Code.

**Exercise of powers in appeal from order made in execution of decree.** **8.** The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree. [New.]

## COMMENTARY

**Scope and object of the rule.**—This rule is new. It has been framed to give effect to the cases noted below.

“The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree, but appeals from an order passed in execution of that decree.”—*See the Report of the Special Committee*. In such a case this rule gives the appellant the power to apply for a stay of execution of the decree under r. 5 or for security for restitution under r. 6.

Pending the determination of the 'appeal against an order passed in execution of decree, the appellate Court has power to stay execution.—*In the matter of Harshankar Parshad*, 1 A. 178 (F. B.); *Pasupati Nath v. Nanda Lal*, 28 C. 734

The Registrar of the Patna High Court has no power under the High Court Rules, to hear an application under this rule.—*Narku v. Kamakhya*, 13 P. L. T. 254.

## PROCEDURE ON ADMISSION OF APPEAL.

**9. (1)** Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of  
memorandum of  
appeal

Register of  
Appeals.

(2) Such books shall be called the Register of Appeals. [S. 548.]

## COMMENTARY.

**Alterations** —This rule exactly corresponds to S. 545, C. P. Code, 1882, with the substitution of the word "where" for "if" in the beginning.

**Registry of appeal.**—The registration of a petition of appeal is a proceeding of a purely ministerial character.—*Jafer Hossein v. Mahomed Amir*, 4 B. L. R. Ap. 103: 13 W. R. 351.

An appeal filed out of time should not be registered without the Court deciding the question as to whether the appellant was entitled to the extension of time under S. 5 of the Limitation Act.—*Jnanadasundari v. Madhab Chandra*, 59. C. 386. See cases noted under rule 1, ante.

**Admission of appeal by District Judge ex-parte—Power of Sub-Judge to dismiss it on the ground of limitation.**—Where a District Judge by an *ex parte* order admitted an appeal filed after time and transferred it to the Sub-Judge for disposal. Held, that the Sub-Judge had power to dismiss the appeal on the ground of its presentation after time.—*Manick Dukandar v. Naibulla Sircar*, 2 C. W. N. 461 (5 C. 1 not followed; 8 C. 251 and 14 B. 594 approved). See also *Krishna Bhatta v. Subraya*, 21 M. 228, and *Sarat Chandra v. Saraswati*, 5 C. L. J. 380: 34 C. 216 (9 A. 11 and 13 W. R. 245 referred to).

An order, made *ex parte* under S. 5 of the Limitation Act, permitting an appeal to be registered although filed beyond time, may, on proper cause being shown, be set aside by the Court which made it; but such an order made by a District Judge cannot be afterwards cancelled by a Sub-Judge upon the appeal coming on for hearing before him.—*Jhotee Sahoo v. Omesh Chunder*, 5 C. 1. See also *Dubey Sahai v. Ganesh Lal*, 1 A. 34 (F. B.); *Venkatrayudu v. Nagadu*, 3 M. 450; *Moshaullah v. Ahmedullah*, 13 C. 78; *Bishendut v. Nandan Pershad*, 12 C. W. N. 25. But see *Mulna Amad v. Krishnaji*, 14 B. 594.

**10.** (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Where appellant resides out of British India. Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal. [S. 549.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 549, C. P. Code, 1882, with some verbal changes only. The last para. of the old section which contained provisions regarding enforcement of the security-bond, has been omitted in view of S. 145 of the Code, as that section, as amended, prescribes the mode of enforcing all surety-bonds.

**Application of the rule.**—The application of the rule is not confined only to appeals from substantive decrees, but also to appeals from interlocutory orders under S. 104 and to appeals from orders in execution under S. 47.—*Dagdu v. Chandrabhan*, 24 B. 314. In *Sesha Ayyar v. Nagarathna*, 27 M. 121, it was held that this rule does not apply to appeals preferred to the High Court under Cl. 15 of the Letters Patent from the judgment of one of its own Judges. In *Debendra Nath v. Bibudhendra*, 43 C. 90, it was held that neither this rule nor any other rule of this order has any application to a decree passed by a single Judge of a Chartered High Court in the exercise of Ordinary Original Civil jurisdiction, because "the Code makes no provision for an appeal from a single Judge of the High Court. This right of appeal depends on Cl. 15 of the Charter."—*Per Jenkins, C. J.* The Privy Council have, however, recently decided that it applies also to appeals under Cl. 15 of the Letters Patent.—*Sabitri v. Savi*, 48 I. A. 76 : 48 C. 481 (P. C.) : 60 I. C. 274 : 19 A. L. J. 281 : 23 Bom. L. R. 681 : 40 M. L. J. 308.

The mere fact that a plaintiff is a poor man and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him, it is otherwise, where he is not the real litigant but a mere puppet in the hands of others.—*Khajah Assenoolajoo v. Solomon*, 14 C. 533 ; *Lakhmi Chand v. Gatto Bai*, 7 A. 512 (3 B. 341 followed ; and 3 M. 66 and 18 W. R. 102, referred to). See also *Jivan Ali v. Basa Mal*, 8 A. 203 (F. B.) ; *Hewetson v. Deas*, 31 C. 526 ; *Mahant*

Pending the determination of the 'appeal against an order passed in execution of decrees, the appellate Court has power to stay execution.—*In the matter of Harshankar Parshad*, 1 A. 178 (F. R.); *Pasupati Nath v. Nanda Lal*, 28 C. 734.

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Registry of memorandum of appeal.

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Register of Appeals.

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An appeal filed out of time should not be registered without the Court deciding the question as to whether the appellant was entitled to the extension of time under S. 5 of the Limitation Act.—*Jnanadasundari v. Madhab Chandra*, 59. C. 388. See cases noted under rule 1, ante.

**Admission of appeal by District Judge ex-parte**—Power of Sub-Judge to dismiss it on the ground of limitation.—Where a District Judge by an *ex parte* order admitted an appeal filed after time and transferred it to the Sub-Judge for disposal. Held, that the Sub-Judge had power to dismiss the appeal on the ground of its presentation after time.—*Manick Dukandar v. Naibulla Sircar*, 2 O. W. N. 461 (5 C. 1 not followed; 8 C. 251 and 14 B. 594 approved). See also *Krishna Bhatta v. Subraya*, 21 M. 228, and *Sarat Chandra v. Saraswati*, 5 C. L. J. 380; 34 C. 216 (9 A. 11 and 13 W. R. 245 referred to).

An order, made *ex parte* under S. 5 of the Limitation Act, permitting an appeal to be registered although filed beyond time, may, on proper cause being shown, be set aside by the Court which made it; but such an order made by a District Judge cannot be afterwards cancelled by a Sub-Judge upon the appeal coming on for hearing before him.—*Jhotee Sahoo v. Omesh Chunder*, 5 C. 1. See also *Dubey Sahai v. Ganesh Lal*, 1 A. 34 (F. B.); *M. 450; Moshanullah v. Ahmedullah*, 13 C. 78; 13 C. W. N. 25. But see *Mulna Amad v.*

**10.** (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to furnish security for costs.

Where appellant resides out of British India.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

[S. 519.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 519, C. P. Code, 1882, with some verbal changes only. The last para. of the old section which contained provisions regarding enforcement of the security-bond, has been omitted in view of S. 145 of the Code, as that section, as amended, prescribes the mode of enforcing all surety-bonds.

**Application of the rule**—The application of the rule is not confined only to appeals from substantive decrees, but also to appeals from interlocutory orders under S. 104 and to appeals from orders in execution under S. 47.—*Dagdu v. Chandrabhan*, 24 B. 314. In *Sesha Ayyar v. Nagarathna*, 27 M. 121, it was held that this rule does not apply to appeals preferred to the High Court under Cl. 15 of the Letters Patent from the judgment of one of its own Judges. In *Debendra Nath v. Bibudhendra*, 43 C. 90, it was held that neither this rule nor any other rule of this order has any application to a decree passed by a single Judge of a Chartered High Court in the exercise of Ordinary Original Civil jurisdiction, because "the Code makes no provision for an appeal from a single Judge of the High Court. This right of appeal depends on Cl. 15 of the Charter."—*Per* Jenkins, C. J. The Privy Council have, however, recently decided that it applies also to appeals under Cl. 15 of the Letters Patent.—*Sabitri v. Savi*, 48 I. A. 76 : 48 C. 481 (P. C.) : 60 I. C. 274 : 19 A. L. J. 291 : 23 Bom. L. R. 681 : 40 M. L. J. 308.

The mere fact that a plaintiff is a poor man and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him, it is otherwise, where he is not the real litigant but a mere puppet in the hands of others.—*Khajah Assenoollajoo v. Solomon*, 14 C. 533 ; *Lakhmi Chand v. Gatto Bai*, 7 A. 542 (3 B. 241 followed ; and 3 M. 66 and 18 W. R. 102, referred to). See also *Jivan Ali v. Basa Mal*, 8 A. 203 (F. B.) ; *Hewelson v. Deas*, 21 C. 526 ; *Mahant*

*Raghunath Das v. Sheo Kumar*, (1921) P. 359; *Konammal v. Annadana Jadaa*, (1922) M. W. N. 801.

Where in a suit by a wife for a declaration that certain properties mortgaged by her husband were her own properties and the mortgage was invalid, the trial Court found that the properties were her husband's and the suit had been brought in collusion with him and it appeared that the lady had no properties besides those in suit and the defendants were unable to recover from her the costs awarded against her by the trial Court: *held*, that it was a proper case for an order for security for the amount of the costs in the trial Court together with a further sum as the estimated cost of the appeal.—*Birendranath v. Sultan Munoayyid Zada*, 58 C. 117: 34 C. W. N. 495: 127 I. C. 669: A. I. R. 1931 Cal. 40.

The discretion under r. 10 (1) is confined to demanding security for costs only and not for an order to deposit the whole of the decretal amount.—*Afeak v. Kanhayya Lal*, 139 I. C. 866 (F. B.): 30 A. L. J. 722: A. I. R. 1932 All. 511.

Where a Court, acting under this rule, orders an appellant to give security for costs, it is not necessary that any specific sum for which security is required should be named in the order for security.—*Lekha v. Bhauna*, 18 A. 101 (F. B.) (9 A 164 overruled on this point).

The taxing officer's decision as to the amount of the security is subject to revision by the High Court.—*Rajrajeshwarashram v. Svarupanandtiritha*, 29 Bom. L. R. 1031: 103 I. C. 637: A. I. R. 1927 Bom. 499.

As a general rule a Court is loth to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further.—*Gulab Rao v. Vinayak*, 25 Bom. L. R. 195: 72 I. C. 285: A. I. R. 1923 Bom. 264. See also *Bhagwan Devi v. Bhagwan Devi*, 114 I. C. 708: A. I. R. 1930 Lah. 384: 31 P. L. R. 602; *Atri v. Harnani*, 129 I. C. 121: A. I. R. 1930 Lah. 629; *Sat Bharat v. Barkhurdar*, 120 I. C. 538: A. I. R. 1930 Lah. 382: 31 P. L. R. 601.

An appellant (residing within the jurisdiction), who has been ordered to pay the costs of the original hearing, and has not done so, cannot be required to furnish security for such costs before he is allowed to prosecute his appeal, unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious.—*Ahmed v. Essa*, 13 B. 458; *Bamsing v. Balubhai*, 5 Bom. L. R. 661. See also *Hari Ram v. Jowala Mal*, 130 I. C. 771: A. I. R. 1931 Lah. 70: 31 P. L. R. 950.

The Court is not bound as a matter of law, to order security to be furnished, as it is a matter absolutely in the judicial discretion of the Court. In special circumstances the Court may direct the furnishing of security but where highly penal consequences will be entailed upon the appellant by the order, the Court would not be bound to make the order for security.—*Chhugantul v. Govind Ram*, 121 I. C. 61: A. I. R. 1930 Nag. 23.

**Restoration of appeal.**—An appeal although it may have been rejected by the appellate Court upon failure by the appellant to furnish security demanded under this rule, may be restored, on sufficient grounds at the Court's discretion.—*Balwant v. Deulat*, 8 A. 315 (P. C.): 13 I. A. 57; *Srinivasam v. Rukmani*, 117 I. C. 791: A. I. R. 1928 Mad. 964: 55 M. L. J. 330 (1928) M. W. N. 701. Where an appellant failed to furnish the security in time and the application for extension of time had been rejected, the appeal which had been dismissed could not be restored.—*La Tone Koke v. S. A. R. M. Firm*, 7 R. 445: A. I. R. 1929 Rang. 289: 120 I. C. 140. An application for restoration of an appeal dismissed under r. 10 (3) is governed by Art. 168 of the Limitation Act.—*Sirur v. Mythili Ammal*, (1931) M. W. N. 1124: 61 M. L. J. 688: 34 L. W. 783. But no appeal lies from an order refusing to restore it.—*Firozi Begam v. Abdul Latif*, 30 A. 143.

**When should application for security be made.**—An application for security for costs already incurred and estimated costs of appeal should be made promptly.—*Dhobonath v. Radhaprosad*, 5 C. W. N. 119; *Wise v. Jugbundoo*, 7 M. I. A. 431; *Thakur Das v. Kishori Lal*, 9 A. 164; *Sachindra v. Secretary of State*, 129 I. C. 319: A. I. R. 1930 Cal. 520. See also *Atri v. Harnam Singh*, 129 I. C. 121: A. I. R. 1930 Lah. 629. But where no prejudice has been occasioned to the appellant by the delay in making the application for security for costs, and the charges paid or expenses incurred would not have been made earlier, the delay by the appellant in making the application for security.—*Subbiah v. Balasubramani*, . . . . .

**"The Court shall reject the appeal."**—Where security is not furnished within the time fixed by the Court, the appeal should be rejected.—*Parma Nand v. Ram Parkash*, 2 L. L. J. 391. The provisions of Or. XLI, r. 10 (2) are mandatory and if security is not furnished within the time allowed, the Court is bound to reject the appeal.—*Sirur v. Mythili Ammal*, (1931) M. W. N. 1124: 61 M. L. J. 688: 34 L. W. 783. Where the security bond has been accepted by the Registrar but at the time of the final hearing of the appeal, the respondent took the preliminary objection that the bond was not properly executed in as much as it had not been proved that the party executing the bond on behalf of the appellant had authority so to do, the Court cannot forthwith dismiss the appeal without affording a proper opportunity to the appellant (if necessary) to remedy the defect, if any, . . . . . v. *Atta Fua*, 47 C. L. J. 328 (P. C.): 10 . . . . . 264. An order directing a certain sum of money to be paid into Court on an application for security for costs, is an order under r. 10, the non-compliance with which entails the dismissal of the appeal.—*Shum Shee Bibi v. Muhammad Rashid Ali*, 126 I. C. 110: A. I. R. 1930 Mad. 355. See also *Lekha v. Bhauna*, 18 A. 101 (F. B.). But if the order for security has been made without notice to the appellant, the appeal should not be rejected.—*Timmu v. Deva Rai*, 5 M. 265; *Sirajulhaq v. Khadim*, 5 A. 380.

**When appellant resides out of British India.**—A plaintiff, who resided out of India, paid a sum of money into Court as security for costs. He subsequently obtained a decree against the defendant, and the defendant appealed against that decree. *Held*, that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been



paid in.—*Fleming v. Shearman*, 1 B. L. R. O. C. 93; *In re Ditta Harakman*, 3 B. L. R. 45 (F. B.) · 13 W. R. 16 (F. B.).

*Quere*—Whether in a case in which the appellant is not residing out of the British territories in India, the High Court has authority to demand security for costs from the appellant after the issue of notice of the appeal.—*Hufaznoollah v. Humeedhur Rohman*, 6 W. R. Mis. 123.

**Power of Court to extend time fixed for furnishing security.**—The Court cannot lay down a hard and fast rule that in no case after the time for giving security has expired can an appellant be allowed further time. In exceptional circumstances, the Court can extend the time for furnishing security.—*Junnabai v. Vissondas*, 31 B. 576.

Once an appeal has been dismissed for failure of the appellant to give security for costs within the time fixed, it is not thereafter open to the Court to extend the time for giving security.—*Srimati Hari Bhabai v. Narendra Nath*, 67 I. C. 883.

Where the appellate Court demands from an appellant security for costs, the Court may extend the time for furnishing such security; but if no application is made for extension of time, and such security is not furnished within the time ordered, it is imperative on the Court to reject the appeal.—*Haidri Bai v. E. I. Ry. Co.*, 1 A. 687. See also *Budri Narain v. Sheo Koer*, 11 C. 716, and *Shrajudin v. Krishna*, 11 M. 190.

Where the High Court under this rule has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal if the security is not in the end furnished.—*Budri Narain v. Sheo Koer*, 17 I. A. 1: 17 C. 513 (P. C.) (1 A. 687 overruled).

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under this rule; and refused to receive other security offered, in lieu, after the time fixed by the order had expired. This was affirmed by the High Court. *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing.—*Rajab Ali v. Amir Hossain*, 17 O. 1 (P. C.) (1 A. 687; 8 A. 315 cited).

The security for the respondent's costs which the High Court had demanded under this rule not having been furnished within the time fixed and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected. *Held*, that this was not a case for interference.—*Modhusudan v. Krishna Prapanna*, 17 I. A. 9: 17 C. 516 (P. C.).

See S. 148 of the Code, which expressly empowers Courts to extend time.

**Applicability of this rule to appeals in forma pauperis.**—The provisions of this rule, which make it discretionary for the appellate Court to demand security for costs, are not applicable to appeals in *forma pauperis*.—*Nusseeroodeen v. Ujjul Biswas*, 17 W. R. 68; *Nazim v. Abdul Hamid*, 3 L. 30: 67 I. C. 256.

The provision in Or. XLI, r. 10, to reject an appeal where the security is not furnished, is mandatory, the Court could not after that stage grant permission to withdraw the appeal *in forma pauperis*.—*Sabitri Thakurain v. Sari*, 48 C. 481 (F. C.) : 19 A. L. J. 281 : 48 I. A. 76 : 60 I. C. 274 : 23 Bom. L. R. 681 : 40 M. L. J. 308.

A suitor in *forma pauperis* may be called on to give security for costs under this rule but every special ground must be shown to support such an application.—*Seshayyengar v. Jainulabidin*, 3 M. 66; *Maneckji v. Goolbai*, 3 B. 241. See also *Seldanna v. Hart*, (1920) M. W. N. 534; *Srinivasa v. Subramania*, 17 M. L. J. 583; *Chagan Lal v. Govind Ram*, 121 I. C. 61; A. I. R. 1930 Nag. 28, in which it has been held that in the absence of special circumstances showing that the pauper is a mere creature in the hands of persons well able to furnish security, an order directing the pauper to furnish security would be improper and inconsistent with the order granting him leave to appeal in *forma pauperis*; *Subbiah v. Balasubramania*, (1931) M. W. N. 1157. The High Court of Calcutta, in *Nusseeroodeen v. Ujjul*, 17 W. R. 68, and *Mussamat Hafizan v. Abdul Karim*, 12 C. W. N. 163, and the Bombay High Court, in *Khemraj v. Kisanlala*, 42 B. 5, have held that this rule does not apply to appeals in *forma pauperis*.

**Applicability of this rule to appeals from insolvency orders**—In an appeal against a judgment passed by the High Court in its insolvency jurisdiction, the appellate Court has power under S. 117 and Or. XLI, r. 10 of the Code read with S. 8 (2) (b) of the Presidency Towns Insolvency Act to entertain and adjudicate an application by the respondent demanding security for costs.—*Lakhipriya v. Rai Kishori*, 43 C. 243 : 20 C. W. N. 140 : 23 C. L. J. 24 : 32 I. C. 3 (*Sesha Ayyar v. Nagarathna*, 27 M. 121 : 18 M. L. J. 362).

**Mode of enforcement of security-bond.**—See the cases noted under S. 145, where the overridden rulings have also been noted.

**Appeal from orders under this rule.**—An order rejecting an appeal under this rule is not appealable either as an order or as a decree.—*Lekha v. Bhauna*, 18 A. 101 (F. B.) (5 A. 380 overruled); *Ramesh v. Sarada*, 49 C. 355 : A. I. R. 1922 Cal. 246 : 35 C. L. J. 131.

No appeal lies against an order refusing to re-admit an appeal on the ground of the failure of the appellant to furnish security for the costs of the respondent under this rule.—*Firoz Begam v. Abdul Latif*, 30 A. 143 : 5 A. L. J. 109 (18 A. 101 (F. B.) followed); *Sundar v. Habib*, 42 A. 626 : 18 A. L. J. 888.

As there is no provision in this rule similar to that contained in S. 381, C. P. Code, 1882 (Or. XXV, r. 2), permitting an appellant whose appeal has been rejected under this rule to apply for an order setting the dismissal aside, application for restoration of the appeal does not lie.—*Sankaralinga v. Annama Lal*, 4 M. L. T. 416 (30 A. 143 followed; 18 A. 315 considered).

Although no appeal has been given by Or. XLIII against an order under this rule, yet S. 145 gives an appeal from any order passed against a surety, who shall be deemed a party within the meaning of S. 47.

**Form.**—For Form of security for costs of Appeal, see App. G, Form No. 4.

**11. (1)** The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.  
[S. 551.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 551, C. P. Code, 1882, with some additions and alterations.

In sub-rule (1), the words "after sending for the record" and the words "so to do" have been added.

In sub-rule (2), the words "does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed" have been substituted for the words "does not attend in person or by his pleader, the appeal shall be dismissed for default," which occurred in the old section. The substitution of the word "may" for the words "shall" is material. The other changes are mere changes of words and phrases.

In sub-rule (3), the alterations are merely verbal.

This rule applies to appeals which have been admitted and registered.—*Rudr Prasad v. Baynath*, 15 A. 367.

"May dismiss the appeal."—If a memorandum of appeal is drawn up in proper form, it cannot be rejected under Or. XLI, r. 3 of the C. P. Code, but if the appeal is barred by limitation, it has to be dismissed under Or. XLI, r. 11. The rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof, and such order of rejection is appealable.—*Farzand Ali v. Abdul Hamid*, 60 I. C. 493.

Where the case is a fairly arguable one and there is a reasonable prospect of success the Court has to order notice to issue and not to impose conditions on the appellant. The order for notice conditional on the appellant depositing the entire decretal amount was bad in law.—*Afzali Begum v. Kanhayya Lal*, 139 I. C. 866 (F. B.)—30 A. L. J. 722; A. I. R. 1932 All 511.

It is imperative to hear the appellant before passing the final order on appeal.—*Faqir Mahomed v. Mahomed Sarwar*, 11 L. L. J. 32.

Whether Court should write judgment on dismissal of appeal.—Under sub-rule 1, by a Court whose decision may does not relieve the Court from the necessity of according to Or. XLI, r. 31, should show the points raised, and the reasons for deciding them.—*Rani Deka v. Broje Nath*, 25 C. 97; *Mag Saw v. Ma Bin Byu*, 4 R. 18; 95 I. C. 521; A. I. R. 1926 Raag. 129; *Hari Dasi v. Gadadhar*, 43 C. L. J. 499; 96 I. C. 136; A. I. R. 1926 Cal. 992; *Surendranath v. Raghu Nath*, 27 C. W. N. 501; *Hanmant v. Annaji*, 37 B. 610 (F. B.); *Pachi Dass v. Bala Das*, 13 C. W. N. 1037. See, however, *Samir Hasan v. Piran*, 30 A. 319; 5 A. L. J. 300 (disseating from 25 C. 97) where it has been held that the provisions of S. 574, C. P. Code, 1882 (r. 31), are not applicable in their entirety to the case of an appeal dismissed under this rule. But in *Dharam Dass v. Shankar Ahir*, 53 A. 528; 132 I. C. 200; A. I. R. 1931 All. 589, it has been held that an order under this rule is governed by r. 31, and therefore where the judgment of the appellate Court was in these words, viz., "The facts are laid out in the judgment of the lower Court. The decision is a reasonable one and as a Court of appeal I am not justified in going against it.—Rejected summarily", it should be set aside because it contained no reason.

The order of adjudication made under this rule is a decree, and the procedure authorized under that rule does not dispense with the necessity of drawing up a judgment.—*Royal Reddi v. Langa Reddi*, 3 M. 1. See also *Puttappa v. Yellappa*, 5 Bom. L. R. 233; *Rakhal Chunder v. Satindra Deb*, 5 C. L. J. 348; *Altap Ali v. Jamsur Ali*, 30 C. W. N. 334; 93 I. C. 909; A. I. R. 1926 Cal. 688.

In some cases it may be desirable to give full reasons for an order of dismissal under this rule, e.g., when the order is likely to be attacked in second appeal but it is not obligatory on a Judge to write a judgment when the appeal is dismissed under this rule.—*Mt. Gawarejabai v. Hariram* 115 I. C. 168; A. I. R. 1929 Nag. 68; 25 N. L. R. 55.

Dismissal of appeal under this rule is a decree.—The dismissal of an appeal under this rule is a decree within the meaning of S. 2 (2), and the expression of opinion dismissing the appeal is a judgment.—*Altap Ali v. Jamsur Ali*, 30 C. W. N. 334; 93 I. C. 909; A. I. R. 1926 Cal. 638; *Umasundari v. Bindu Bashini*, 24 C. 759; *Munisami v. Munisami*, 22 M. 293; *Chandra Kanta v. Lakshman*, 21 C. W. N. 430; 24 C. L. J. 517.

Amendment of the decree on dismissal of appeal.—The dismissal of an appeal under this rule leaves the decree of the lower Court untouched, and it remains the decree of the lower Court, which can amend it under S. 206, C. P. Code, 1882 (S. 152).—*Bapu v. Vajir*, 21 B. 548; *Batuk Prasad v. Ambica*, 11 P. 409 (not following 24 C. 759). But see *Umasundari v. Bindu Bashini*, 24 C. 759, where it has been held that the High Court can amend such a decree. See also *Munisami Naidu v. Munisami Reddi*, 22 M. 293 (18 M. 214 followed). Followed in *Asma Bibi v. Ahmad Husain*, 30 A. 290; 5 A. L. J. 534, where it has been held that the dismissal of an appeal under this rule is a decree and supersedes the decree of the Court below; and the Court which has taken action under this rule is the only Court which has jurisdiction to amend the decree (21 B. 548 dissented from).

**Summary dismissal of appeal—Effect on mortgage decree.**—Where an appeal from a mortgage decree is summarily dismissed under Or. XLI, r. 11, the time for payment of the mortgage money is not extended, as the decree appealed from cannot be taken to have been confirmed under Or. XLI, r. 32.—*Dattatraya Pitthal v. Wasudeo*, 47 B. 956: 25 Bom. L. R. 990.

Where the High Court dismissed a second appeal under this rule but re-framed one of the issues for decision by the trial Court, it was held that the irregularity as to the absence of notice to the other party when the judgment of remand was first noticed did not render it ineffectual.—*Shariful Hasan v. Lachhmi Narain*, 29 A. L. J. 858.

**Reference.**—The proceeding under this rule is a trial of an appeal, and any question arising in the course of such trial may be properly referred to the High Court.—*Thakur of Masuda v. The Widows*, 2 A. 819 (F. B.).

**Applicability of this rule to S. 476-B. of the Criminal Procedure Code.**—Order XLI, r. 11 has no application to an appeal under S. 476-B, Cr. P. Code, preferred before the District Judge against an order passed by Munsif, under S. 476 of the Code, and therefore the District Judge cannot summarily dismiss such an appeal, but he should comply with the provisions of S. 476-B and after sending for the record he should examine the case himself and come to an independent finding of his own view.—*Saratchandra v. Haricharan*, 51 C. L. J. 45: 127 I. C. 265: A. I. R. 1930 Cal. 282.

**Sub-rule 2.—Dismissal of appeal for default.**—When an appeal is dismissed for default, it is only the decree of the lower Court which can be enforced in execution.—*Shyam Mandal v. Satinath*, 44 C. 954.

**Review.**—Dismissal of an appeal under this rule bars a review of the judgment appealed against. See notes under Or. XLVII, r. 1. The order under this rule dismissing the appeal, is itself subject to review, and the practice of the Calcutta High Court is to grant a review and order the rehearing of the appeal *ex parte*.—*Official Trustee v. Benode*, 51 C. 943: 84 I. C. 147: A. I. R. 1925 Cal. 114. When a second appeal is dismissed under this rule, the High Court has no power to review its judgment on the ground of the discovery of new and important matter.—*Rajani v. Kali*, 41 C. 809: 26 I. C. 281, *Sailabala v. Gadadhar*, 36 C. L. J. 76: 70 I. C. 408: A. I. R. 1922 Cal. 165.

**Re-admission of appeal dismissed for default under sub-rule (2).**—An appeal dismissed under sub-rule (2) may be re-admitted under r. 19.

**Dismissal after issue of notice whether legal.**—After issue of notice on respondent, an appeal cannot be dismissed under this rule. This rule empowers an appellate Court to dismiss an appeal without and before, but not after, sending notice of the appeal to the Court against whose decree the appeal has been made, and without service of notice on the respondent.—*Hamid Husain v. Bholanath*, (1906) A. W. N. 186.

Day for hearing  
appeal.

**12. (1)** Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day. [S. 552.]

### COMMENTARY.

No alteration.—This rule exactly corresponds to S. 552, C. P. Code, 1882.

Appellate Court  
to give notice to  
Court whose decree  
appealed from.

13. (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Transmission of  
papers to Appellate  
Court

(2) Where the appeal is from the decree of a Court; the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits  
in Court whose decree  
appealed from

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant. [S. 550.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 550, C. P. Code, 1882, with the change of some words and phrases. No alteration seems to have been made in the meaning.

Sub-rule (3).—If the appellant desires to bring before the appellate Court any part of the record not sent up, it is his duty to ask the Court to send for it before the date fixed for trial.—*Buksh Ali v. Joyanut Khan*, 11 W. R. 248.

Form.—See Appendix G, Form No. 5, for Form of intimation to lower Court of admission of appeal.

Publication and  
service of notice  
of day for hearing  
appeal.

14. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons

to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to. [S. 553.]

### COMMENTARY.

**Alterations**—This rule corresponds to S. 553, C. P. Code, 1882, with some alterations of a verbal character. Only some words have been changed and replaced by more appropriate words.

**Service of notice.**—When a notice of appeal is transmitted by the High Court to a Court below with instruction to make a return within a specified time, the appellant is entitled to the whole of the time allowed, and may deposit his *adubano*, and cause service of the notice any time within the period limited—*Runjo Debee v. Hurce Narain*, 11 W. R. 133.

Service upon a respondent's pleader is good service upon himself, so far as notice of the appeal is concerned.—*Ishur Dutt v. Shib Pershad*, 15 W. R. 290.

In a case where there has been a guardian ad-litem appointed by the Court on behalf of the minor, service of notice on the guardian ad-litem is sufficient. The language of the Code does not admit that there should be service on both these persons, and therefore, notice to the minor need not be given.—*Rasik Moral v. Kumar Jyotish Kantha*, 30 C. W. N. 949. See 97 I. C. 614. A I R 1926 Cal. 1106

Where a respondent resides in Chandernagore, i.e., out of British territory, the summons or notice of appeal should be forwarded to him by post, under a registered cover; and if he does not appear, a verified statement should be put in to show that he is at present, or has recently been, residing there.—*Sonatun Bukshee v. Gopal Chunder*, 15 W. R. 31.

Where an appellant to the High Court was unable to serve notice on the plaintiff (respondent), because of inability to trace the plaintiff in the place given as his place of residence, when he (plaintiff) commenced the suit, <sup>the case</sup> <sub>under</sub>

Where an appellant failed for twelve months to serve notice of appeal upon his respondent, the Court refused to allow him the opportunity to have a fresh summons issued and served. Where the party serving a notice of appeal finds the respondent absent from home, and is told where he is, and yet affixes the notice to the door of his house, such service is void and of no effect.—*Doolas Okund v. Nirban Singh*, 20 W. R. 62.

No appeal against an order made in the matter of the winding up of a company under the Indian Companies Act of 1882, shall be heard by an

appellate Court unless notice of the same is given within three weeks after any order complained of has been made.—*Prosanna Kumar v. Bani Kanta*, 30 C. 759. See also *Anand Sarup v. Sultan Singh*, 27 A. 509: 2 A. L. J. 311 and *Lalah Barroomul v. Official Liquidator*, 4 C. 704.

Form.—See Appendix G, Form No. 6, for Form of notice to respondent.

**15.** The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.  
[S. 554.]

### COMMENTARY.

No alteration.—This rule exactly corresponds to S. 554, C. P. Code, 1882.

### PROCEDURE ON HEARING.

**16.** (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply. [S. 555.]

### COMMENTARY.

No alteration.—This rule exactly corresponds to S. 555, C. P. Code, 1882.

Right to begin — The respondent has no right to begin simply because he disputes the right of the appellant to appeal.—*Rustomji v. Kessowji*, 8 B. 287.

It is the duty of the appellant to satisfy the Court of appeal that the decision of the trial Court is erroneous.—*Secretary of State v. Bejoy Kumar*, 40 C. L. J. 303: 84 I. C. 732: A. I. R. 1925 Cal. 224. In every appeal it is incumbent upon the appellant to show some reason why the judgment appealed from should be disturbed. There must be some balance in his favour to justify the alteration of the judgment as it stands.—*Musst. Fakrunissa v. Moulvi Izarus*, 25 C. W. N. 866: 63 I. C. 898 (P. C.).

Hear the respondent against the appeal.—Though a respondent has not appeared on the date specified in the notice to him, he can appear on the date on which the appeal is notified for hearing on the Court's board.—*Hanmantihal v. Basappa*, 28 Bom. L. R. 738: 96 I. C. 326: A. I. R. 1926 Bom. 424.

The Court is bound, under this rule, to hear the argument, if any, addressed and not to permit written argument.—*Trimbak v. Krishna Rao*, 115 I. C. 173: A. I. R. 1929 Nag. 89.

Procedure—Whether counsel for one party can be heard in the absence of counsel for the other party.—A Court heard counsel for one of the parties after the case had been closed and in the absence of the counsel for the other party. Held, that the Court acted illegally, and its judgment was not valid.—*Kesho Das v. Ram Narain*, 63 I. C. 945.



For the procedure to be adopted in hearing appeal of a case in which the records of the original Court had been almost wholly destroyed, see *Hara Kumar v. Sheikh Asiatullah*, 3 O. W. N. xxiii (Notes).

**17.** (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*. [S. 556.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 556, C. P. Code, 1882, with some alterations. The word "*where*" has been substituted for the word "*if*"; the words "*appellant does not appear*" have been substituted in sub-rule (1) for the words "*if the appellant does not attend in person or by his pleader*"; the word "*appear*" has been substituted for the word "*attend*"; and the words "*in his absence*," which stood after the word "*ex parte*" in the second para. of the old section, have been omitted. The words "*the Court may make an order that the appeal be dismissed*" have been substituted for the words "*the appeal shall be dismissed for default*."

The words "*appear*" and "*appearance*" have been substituted for the words "*attend in person or by pleader*" in view of Or. III, r. 1, which provides that appearance may be in person, by recognized agent, or by pleader.

**Dismissal of appeal for default.**—Where neither the appellant nor his pleader was present, but the Court, after considering the appeal for default, disposed of it, held, that the dismissal was in accordance with the course was to apply under S. 558, C. P. Code, of the appeal.—*Kanahi Lal v. Naubat Rai*, 3 A. 519; *Zainab Begam v. Manawar Husain*, 8 A. 377. This rule authorises the Court to dismiss the appeal for the appellant's default or to adjourn it to some other date or pass other order, but it does not authorise the Court to decide the appeal on the merits in the absence of the appellant.—*Taher Sheikh v. Otaruddi*, 56 C. 412; 119 I. C. 129; A. I. R. 1929 Cal. 475. a decision on the merits under such circumstances is illegal.—*Basudev v. Bideshi*, 6 R. 612. *Contra*: *Daulat Singh v. Srinivas*, 57 I. C. 75, which has held that the appellate Court can decide the case on the merits.

As to appeals it is not absolutely necessary that the parties should be present in person when there are constituted agents in the shape of pleaders. The ordinary practice of sending for the pleaders when the appeal is called on for hearing should not be discontinued as it is conducive to good work, although the peon's calling at the door very often proves sufficient.—*Ajay-verma v. Baldeo Prasad*, 52 A. 536; 127 I. C. 523; A. I. R. 1930 All. 217; 28 A. L. J. 632.

Where, when an appeal is called on, the pleader is not absent, but is unprepared to go on with the case, the dismissal is a dismissal for default within the meaning of this rule, and the appeal can therefore be re-admitted under S. 558, C. P. Code, 1892 (Or. XLI, r. 19).—*Shibendra Narain v. Kinoo Ram*, 12 C. 605 (15 W. R. 143 followed). But see *Ramchandra v. Madhav*, 16 B. 23; *Chiranjil Lal v. Kundan Lal*, 20 A. 294; and *Robert Watson & Co. v. Ambica Dan*, 37 C. 529: 4 C. W. N. 237; *Trimbak v. Krishna Rao*, 115 I. C. 173: A. I. R. 1923 Nag. 89, where it has been held that the mere unpreparedness of the appellant's counsel to argue the appeal is no ground for the Court to dismiss the appeal for default.

An application by a counsel or pleader, who is instructed only to apply for an adjournment, which is refused, is not an appearance within the meaning of the C. P. Code. When such an application is dismissed, the dismissal is not for default, and the appellant is not precluded from applying for re-admission (Or. XLI, r. 19).—*Satish Chandra v. Ahara Prasad*, 34 C. 403 (F. B.): 11 C. W. N. 329: 5 C. L. J. 217 (27 C. 529: 4 C. W. N. 237 overruled; 8 C. W. N. 621 approved); *Nagendra Kumar v. Nabin*, 36 C. 189, *Mensee Devjee & Co. v. Maung Than*, 62 I. C. 57; *Musalirakath v. Manavikrama*, 43 M. L. J. 317: 16 L. W. 434, *Firm of Jainarain Ramjash v. Sitaram Afarwari*, (1923) P. 175, *Pashaniandi v. Naku*, 51 M. L. J. 634. In the above Full Bench case, all the rulings regarding the meaning of the word "appearance," have been referred to, discussed and explained.

Appellant's pleader appeared and asked for an adjournment. He did not withdraw from the case but merely urged that, as the records were in possession of his leader (counsel) who was absent, he was unable to argue the appeal. The appellate Court refused to grant the adjournment and dismissed the appeal. Held, that although it was open to the Judge to refuse the adjournment, he was bound to write a judgment and dispose of the appeal. He could not dismiss the appeal for default.—*Patinhare Tarkatt v. Vellur Krishnan*, 26 M. 267 (16 B. 27 followed).

Where a Judge on the non-appearance of the appellant in person or by pleader, instead of observing the direction of the law, goes into the merits and gives a judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under this rule.—*Mohesh Chunder v. Thakoor Dass*, 20 W. R. 425.

On the day of hearing the Court and states that the appellant is not an appearance within the meaning of Or. XLI, r. 17.—*Ramdhan v. Bishun Pragash*, 5 P. L. J. 17: 1 P. L. T. 156 (30 M. 274 followed).

The dismissal of an appeal for default, does not apply to a case in which the appellant had any notice that his appeal would be heard on the day to which the case was adjourned, and on which the Judge disposed of it.—*Shib Chunder v. Allad Monee*, 5 W. R. Mss. 22.

One of the pleaders for the appellant opened the case, and then he went to another Court. The other pleader for the appellant refused to address the Court, and the Court dismissed the appeal under this rule. *Held*, that the Court below had acted illegally in dismissing the appeal for default.—*Jawahir Singh v. Debi Singh*, 18 A. 119.

An appellate Court has power in an appeal in which the appellant has failed to appear, to enter into the merits of the case and to decide the appeal upon the merits.—*Daulat Singh v. Sirinivas*, 57 I. C. 75: 2 P. L. T. 36.

Where both parties make default in appearance at the hearing of an appeal, the Court must dismiss the appeal, and not go into the merits and reverse the decree.—*Muncka Ram v. Roopnarain*, Marsh, 5: 1 Ind. Jnr. O. S. 36.

Dismissal of appeal for default.—Compromise thereafter.—Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and the respondent within a month of the dismissal file a petition of compromise settling their disputes, with an additional application for restoration of the appeal. *Held*, that in the circumstances of the case, the Court ought to have restored the appeal and passed a decree in terms of the compromise.—*Aswini Kumar v. Sukhoda Sundari*, 68 I. C. 448.

Non-appearance of respondent.—The absence of the respondent on the day of hearing is no justification by itself for decreeing the appeal.—*Mussammatt Raj Rani v. Ram Kishore*, 56 I. C. 386.

For the meaning of the word "appearance," see the cases noted under Or. IX, r. 13.

Appeal from order of dismissal for default.—No appeal lies from an order of dismissal for default.—*Rukminimayi v. Paran Chandra*, 39 O. 341.

Where no date was fixed for the hearing of an appeal and the Court purported to dismiss the appeal for default, *held*, that the dismissal was without jurisdiction and that an application to set aside the dismissal was not governed by Art. 168 of the Limitation Act.—*Ata Muhammad v. Shankar Das*, 69 I. C. 618.

See notes under r. 19 of the Order.

18. Where on the day fixed, or any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

the appeal be dismissed :

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing. [S. 557].

## COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 557, C. P. Code, 1882, with some alterations.

In sub-rule (2) the words "*the respondent appears when the appeal is called on for hearing*" have been substituted for the words "respondent appears in person, or by pleader, or by duly authorized agent." The alteration seems to have been made in view of the provisions of r. 1, Or. III, in which the meaning of the word "*appearance*" is given.

**Dismissal for non-service of notice.**—The order of dismissal should not, as indicated by the language of the rule, be made before the day fixed for the hearing of the appeal.—*Chandra Nath v. Kaliprasanno*, 35 C. 535.

Before dismissing a case under this rule the Court should fix a time within which process fees should be paid into Court.—*Purshodee Lal v. Umbike Pershad*, 11 W. R. 290; 3 B. L. R. App. 25.

Where an appeal is dismissed against one of three respondents for non-service of notice on him, the appellant cannot proceed with the appeal as against the two respondents, if the decree appealed against was a decree for joint possession.—*Baser v. Fazle*, 19 C. W. N. 290; 28 I. C. 703.

An appeal is liable to be dismissed for default in depositing costs for notice to the respondent. The fact of its having been committed by an ignorant *karparadaz* is no excuse.—*Pran Chunder v. Juggessur*, 11 W. R. 417.

An appeal cannot be dismissed under Or. XLI, r. 18, C. P. Code on account of the omission of the appellant to provide a person to identify the respondent.—*Nagendra Nath v. Shambhu Nath*, 3 P. L. T. 498; 65 I. C. 49. See *Ramlal v. Kaliprosad*, A. I. R. 1929 Pat. 609; 10 P. L. T. 589; 120 I. C. 304.

**Appeal.**—No appeal lies from an order under this rule. The proper remedy is by an application for re-admission under r. 19.—*Attar Singh v. Korm Chand*, P. R. (1919) p. 448; but it does not take away any other remedy that might be available.—*Surajdeo v. Partap*, 2 P. L. T. 405.

**19.** Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of  
appeal dismissed  
for default.

[S. 558.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 558, C. P. Code, 1882, with some alterations of a verbal character. The words "to impose upon him," which stood after the words "thinks fit" in the old section, have been

omitted, and the words "*shall re-admit the appeal*" have been substituted for the words "*may re-admit the appeal*" in the old section.

**Prevented by sufficient cause.**—For the meaning of the words "*prevented by any sufficient cause*," see notes under Or. IX, rr. 9 and 13, as the principles laid down in the rulings under those rules will also apply to the rule where the similar expression, "*prevented by any sufficient cause*," occurs.

**Re-admission of appeal dismissed for default.**—The affirmative provisions in this rule, that an appellant may prove that he was "prevented by any sufficient cause" from attending when his appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the appellant's case will form an important element for consideration when the Court is asked to exercise its discretion.—*Somayya v. Subbamma*, 26 M. 599.

**Absence of knowledge of the date fixed for the hearing of the appeal.** due to non-service of notice on the appellants, is a sufficient cause for failure to appear when the appeal is called on for hearing within r. 19.—*Muhammad Sharif v. Din Muhammad*, 101 I. C. 203: A. I. R. 1927 Lah. 365. Where the appellant did not know the date of hearing of the appeal and the Vakil with whom he had entrusted the case had died, and in these circumstances the Subordinate Judge held, that in the absence of the appellant, *Ananthalakshmi v. . . .*

**Appeal dismissed for default—Prevented by sufficient cause from attending when appeal was called on for hearing.**—Judge's discretion to restore appeal.—*Dakshinamoorthy v. Municipal Council of Trichinopoly*, 31 M. 157: 3 M. L. T. 336.

**Revenue Courts should exercise some degree of leniency regarding non-appearance of counsel at the exact time.** A delay of half-an-hour should be excused.—*Dhunda v. Mahomed Din*, 11 L. L. J. 26.

Where the case which was the last in the list was called earlier in order and time and the time given to call the counsel who was absent in another Court was too short, held, that the appeal should have been restored.—*Bhagwan Das v. Mt. Dakhan*, 33 P. L. R. 420.

Where almost immediately after an appeal was dismissed for default under r. 17, the counsel for the appellant came and represented that his absence was not intentional but that he did not expect his case to be called so soon and was therefore busy in another part of the Court, and urged that his client was a *purdanashin* lady whose interests would suffer if the appeal was not restored, it was held that under those circumstances the appeal should be restored.—*Lachhman v. Murari Lal*, 134 I. C. 120: A. I. R. 1932 Lah. 65.

An appeal dismissed on account of failure to pay printing charges cannot be restored under Or. XLI, r. 19.—*Chennarayappa v. Muniappa*, 1 Mys. L. J. 44. But the Court can in the exercise of its inherent power restore the appeal.—*Dhayani v. Ishak*, 134 I. C. 1169: A. I. R. 1931 Sind. 153.

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparing paper-book, can only be set aside by an order under S. 626, O. P. Code, 1882 (Or. XLVII, r. 4) and not by an order under this rule.—*Fatimunnissa v. Deoki Pershad*, 24 C. 350 (F. B.): 1 C. W. N. 21 (23 C. 339 partly overruled); *Anant Poidar v. Mangal*, 4 P. 704: 91 I. C. 483: A. I. R. 1926 Pat 27. But this is no longer the view taken under the present Code, under which it has been held that the court-fee payable on an application to the High Court for the restoration of an appeal dismissed for the non-payment of printing costs is Rs. 2 under Art 1, Cl. (d) of Sch. II to the Court-fees Act—*Nalini Sundari v. Narendra*, 36 C. W. N. 248; *Hari Dasi v. Sajani Mohan*, 36 O. W. N. 564 (in which various cases have been discussed).

Where an appeal is dismissed on account of unpreparedness of the pleader, the dismissal is a dismissal for default under S. 556, C. P. Code, 1882 (Or. XLI, r. 17) and the appeal can therefore be re-admitted under this rule.—*Shibendra Narain v. Kinno Ram*, 12 C. 605 (15 W. R. 143 followed). See, however, *Ramchandra v. Madhav*, 16 B. 23; *Chiranjilal v. Kundan*, 20 A. 294; *Robert Watson & Co. v. Ambica Dasi*, 27 O. 529: 4 C. W. N. 237; and *Jawahir Singh, v. Debi Singh*, 18 A. 119. The Full Bench case of *Salish Chandra v. Ahara Prasad*, 34 O. 403: 11 C. W. N. 329: 5 C. L. J. 247, noted under r. 17, has set at rest all the conflicting rulings on the point, and all rulings have been referred to, discussed, and explained there (overruling 27 C. 539: 4 C. W. N. 237, and following 8 C. W. N. 621). See notes under r. 17.

Where when an appeal was called on in the lower appellate Court, the pleader for the appellant was not present and the appeal was consequently dismissed for default, and subsequently the appellants put in a petition for restoration on the ground that the pleader was, at the time when the appeal was called on, engaged in another Court arguing another appeal, and the application was rejected, held, in second appeal, that under these circumstances, the lower Court ought to have re-admitted the appeal as a matter of course, because there was no wilful default or real carelessness, such as would justify the order refusing to restore the appeal, and that the High Court has ample powers to restore an appeal for sufficient cause.—*Mrigendra v. Dibakar*, 44 C. L. J. 165: 97 I. C. 573: A. I. R. 1926 Cal. 1231.

The fact that the counsel was engaged in another Court when the appeal was called on and had sent word to the Reader of the Court for a short pass-over, is not sufficient to set aside the dismissal for default and re-admitting the appeal.—*Saif Ali v. Chiragh Ali*, 68 I. C. 785. But where the appellant's pleader appeared soon after the appeal was dismissed, it was restored on the ground that the failure to appear was unintentional.—*Balmokand v. Wazir*, 5 L. L. J. 47: 79 I. C. 279.

On an application under this rule for the re-admission of an appeal which had been decided *ex parte* against the applicant, it appeared that he had been misled by reason of the appeal having been transferred from the file of one Court to another, no notice of the transfer having been given to him by the pleaders in the case. Held that, under the circumstances, the applicant was entitled to have the appeal re-admitted.—*Narain Singh v. Bheerab Churn*, 8 C. L. R. 350.

An application for re-admission of an appeal dismissed under this rule should be made to the Sub-Judge or to the Assistant Judge who disposed of it and not to the District Judge.—*Sakharam Lakshman v. Govind Joti*, 15 B. 107.

The carelessness of an advocate's clerk does not constitute "efficient cause."—*Maung Than v. Zainat Bibi*, 3 R. 488; 92 I. C. 208; A. I. R. 1926 Rang. 50.

The excuse that it was raining and hence the appellant's pleader was a little late in coming to Court, is not a sufficient reason within this rule for restoration of appeal dismissed for default; *Kumar Satya Kam v. Mhd. Hamedulla*, 96 I. C. 377; A. I. R. 1926 Cal. 1152.

Where a memorandum of appeal was insufficiently stamped and the deficiency not having been made up within the time allowed, the appeal was wrongly dismissed for default instead of being rejected; *held*, that it could not be restored under Or. XLI, r. 19, which has no application to such a case; *Surajpal v. Utm Pandey*, 63 I. C. 99; 6 P. L. J. 625; *Anant Potdar v. Mangal*, 4 P. 704; 91 I. C. 433; A. I. R. 1926 Pat. 27.

Where at the time of the hearing of a case low down in the list by the trying Judge transferred without notice to the appellant, the appellant's counsel was not present in Court and the appeal was consequently dismissed for default, *held*, that there was no cause for restoration of the appeal; *Nanak Chand v. Sajjad Hussain*, 71 I. C. 813.

"Shall re-admit the appeal."—The word "shall" has been substituted for the word "may," which occurred in the old Code.

An application for restoration under this rule should not be dismissed without giving the appellant an opportunity of being heard.—*Bir Singh v. Humphrey*, 120 I. C. 791; A. I. R. 1930 Lah. 112; 31 P. L. R. 906; *Gopal v. Kanshi Ram*, 132 I. C. 5; 30 P. L. R. 969; *Hemanta Kumar v. Panchanan*, 57 I. C. 762; *Jahindra v. Suradhani*, 105 I. C. 851; A. I. R. 1928 Cal. 102.

Other remedy.—The applicant, if he is still within the period of limitation, may file another appeal and is not bound to confine himself to the remedy of restoration.—*Surajdeo v. Partap Rai*, 2 P. 739; 76 I. C. 284; A. I. R. 1923 Pat. 514. (1923) P. 213.

Appeal.—An appeal lies from an order of refusal to re-admit an appeal under Or. XLIII, r. 1, Cl (i), but an order under this rule re-admitting an appeal is not appealable.—*Gulab Kunwar v. Thakur Das*, 24 A. 464 (22 C. 931 followed).

## 20. Where it appears to the Court at the hearing that

Power to adjourn  
hearing and direct  
persons appearing  
interested to be  
made respondents

any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

[S. 559.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 559, C. P. Code, 1882, with some verbal alterations only.

The word "where" has been substituted for the word "if" in the beginning, and the word "preferred" has been substituted for the word "made," which occurred in the old section.

**Applicability of the rule.**—Two conditions are necessary to enable the appellate Court to exercise the power conferred by this rule: (1) that the person was a party to the suit in the original Court; and (2) that he is interested in the result of the appeal. This rule does not only apply to cases where there is any doubt as to a party being a necessary party but also applies to persons who are admittedly necessary parties; so also it not only applies to cases where the Court itself discovers the defect as to the non-joinder of parties but also the cases where the appellant applies for the addition of a party.—*Chiray Din v. Samanda*, 8 L. L. J. 473: 97 I. C. 223: A. I. R. 1926 Lah. 689.

The provisions of rr. 20 and 33 of Or. XLI should be used sparingly and only in cases where full justice cannot be done or where the appeal anyhow re-opens the whole of the question decided.—*Feroze A. Cooper v. Secretary of State*, 111 I. C. 692: A. I. R. 1928 Lah. 947.

**Adding of parties under this rule.**—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule.—*Amlook Chand v. Sarat Chunder*, 38 C. 913 (919); *Midnapur Zemindary Co. v. Amulya*, 53 C. 752: 95 I. C. 649: A. I. R. 1926 Cal. 893.

A respondent is entitled to attack an adverse finding of the lower Court in support of the decree and the appellate Court must consider the correctness of the finding and for that purpose has power to add a party respondent whose interests are affected by the finding. The powers of the appellate Court to add parties in appeal are not confined to Or. XLI, r. 20, but are also governed by Or. XLI, r. 22.—*Baluswami Aliya v. Lakshmana Aiyar*, 44 M. 605 (F. B.): 41 M. L. J. 129: 29 M. L. T. 386.

Where a defendant has acquired a valuable right under the decree, he cannot be made a party to the appeal after an appeal against him has become barred by limitation.—*Ma Than May v. Mohamed Eusof*, 9 R. 624: 135 I. C. 645: A. I. R. 1932 Rang. 16; *Munir Uddin v. Raisul-Nisa*, 9 O. W. N. 687.

The Court will not under this rule add representatives of a deceased party to save an appeal that has abated.—*Kali Dayal v. Nagendra*, 24 O. W. N. 44: 54 I. C. 832; *Manindra v. Bhagabati*, 30 C. W. N. 45: 90 I. C. 986: A. I. R. 1926 Cal. 335.

"Is interested in the result of the appeal."—These words must be given their natural meaning and cannot altogether be disregarded in construing the rule. A defendant against whom a suit has been dismissed and who has not been impleaded as a respondent within the prescribed time in an appeal is not a person who "is interested in the result of the appeal"



within the meaning of this rule, and in any case, the *onus probandi* rests on the appellant, who moves the appellate Court to exercise its powers under this rule to show what is the nature of the interest of the defendant so sought to be made a respondent to the appeal.—*V. P. R. V. Chokalingam v. Seethai Ache*, 55 I. A. 7: 6 R. 29 (P. C.): 32 C. W. N. 281: 47 C. L. J. 136: 107 I. C. 237: A. I. R. 1927 P. C. 252: (1928) M. W. N. 20: 27 L. W. 1: 4 O. W. N. 1231: 30 Bom. L. R. 220: 26 A. L. J. 371 (on appeal from *V. P. R. V. Chokalingam v. Seethai Ache*, 2 R. 541: A. I. R. 1925 Rang. 108); *Saktiprasanna v. Naliniranjan*, 58 C. 923: 133 I. C. 177: A. I. R. 1931 Cal. 738. See also *Dipan v. Kapil*, 29 A. L. J. 1004: A. I. R. 1932 All. 120: 135 I. C. 553. A person against whom a suit has been dismissed and who is not a party to the appeal is not "interested in the appeal" for the purposes of Or. XLI, r. 20. That rule contemplates a person being made a party to the appeal at the time of the hearing of the appeal, because it contemplates that the Court must be in full possession of the facts so that it may be in a position to say whether or not any person is interested in the result of the appeal. The rule does not contemplate that a person should be made a party to the appeal simply in order to enable one of the respondents to prefer a cross-objection against him.—*Rajendra v. Mahes Lata*, 53 C. 270: 91 I. C. 649: A. I. R. 1926 Cal. 533.

It is not competent to an appellate Court to implead, under Or. XLI, r. 20, a person who had not been made a party to the decree though he had been a party to a suit, as the person is not "interested in the result of the appeal." To hold that an appellate Court can implead a person who has acquired an absolute right by the lapse of time or by the omission of the name from the decree, would amount to denying all finality to litigation.—*Maharaja of Faridkot v. Anant Ram*, 97 I. C. 338: 8 L. L. J. 333: A. I. R. 1926 Lah. 499.

Where neither the appellant nor the respondent derives their claim in respect of the dispute in appeal from a party to a suit but not joined in appeal and from the nature of the appeal itself it is evident that either the success or the failure of the appeal will in no way injure the interest acquired by the party under the decree appealed against such a party is not a necessary party to the appeal.—*Ma On Thin v. Ma Ngwe Yin*, 7 R. 398: A. I. R. 1929 Rang. 265 (*distinguishing* 6 R. 29 (P. C.), *ante*).

**Joinder of respondents in appeal.**—It is quite open to the appellate Court, with reference to the terms of this rule to add a party as respondent to an appeal, when no appeal had been made against him.—*Hudson v. Basdeo Bajpaye*, 26 C. 109: 3 C. W. N. 76; *Bishun Churn v. Jogendra Nath*, 26 C. 114. See also *Upendra Lal v. Girindra Nath*, 25 C. 565: 2 C. W. N. 425 (*approved in* *Rup Jaun v. Abdul Kadir*, 31 C. 643 (F. B.): 8 C. W. N. 496; *Soiru Padmanabh v. Narayanrao*, 18 B. 520; and *Kanagappa v. Sakkalinga*, 15 M. 362). But see *Atha Ram v. Balkishen*, 5 A. 266; *followed in* *Subramanian v. Veerabadran*, 31 M. 442: 18 M. L. J. 452, noted below. This Madras case has been commented on in 13 C. W. N. at p. lxxviii (78).

Where through a mistake on the part of an appellant's legal adviser, the names of certain defendants who are interested in the result of the appeal are omitted from the memorandum of appeal, the Court has power to add them as parties under Or. XLI, r. 20.—*Deokaran v. Nathu*, 63 I. C. 352.

An appellate Court has power to implead only such persons as parties to the appeal as were parties in the trial Court and were not made parties to the appeal but not those who are complete strangers to the suit.—*Musst. Haliman v. Nur Muhammad Khan*, 73 I. C. 136 (18 A 332 relied on); *Monjiram v. Manekial*, 53 B. 598; 119 I. C. 654; A. I. R. 1929 Bom. 353; 31 Bom. L. R. 672.

A Receiver is not a necessary party to an appeal in which the very order of adjudication (as a consequence of which the Receiver was appointed) is in question.—*Moti Ram v. Kewal Ram*, A. I. R. 1928 Lah. 202; 9 L. L. J. 550; 105 I. C. 569.

Where the pleader for plaintiff-appellant did not implead co-plaintiffs in the appeal under a mistaken view of Or. XLI, r. 4, the Court allowed them to be joined as respondents at the hearing.—*Saru Khan v. Jan Mahomed*, A. I. R. 1928 Lah. 43; 106 I. C. 313.

Where owing to the *bona fide* mistake caused by a similarity of names of two persons who were parties to a second appeal, the name of one of these persons was left out in the Letters Patent Appeal filed against a decision in the second appeal, the High Court had power to correct the mistake and allow the memorandum of appeal to be amended by inserting the proper name and bringing on the proper party.—*Kunhauna v. Manakke*, 117 I. C. 796; A. I. R. 1929 Mad. 343; 56 M. L. J. 315; (1929) M. W. N. 374; 29 L. W. 546.

Looking at the language of this rule apart from authority, it would appear to have been inserted to protect parties to the suit who had not been made respondents in the appeal, from being prejudiced by modifications made behind their back in the decree under appeal. The party whom it is sought to bring on should have had an interest in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on: for once he is brought on he may be said to acquire an interest as a result of being brought on. When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any of the parties to a suit as he is no party to such appeal and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. A decree having been made against a wrong party, it is not competent for the appellate Court, in appeal by that party in which the decree-holder alone is made respondent, to bring on the record those persons against whom the Court of first instance should have made the decree.—*Subramanian v. Veerabadran*, 31 M. 442; 18 M. L. J. 452; 4 M. L. T. 104 (5 A. 266 followed; 25 C. 565 not followed; 31 C. 643 referred to).

In a rent suit one of the tenants had not been joined as a party, but he had received a copy of the summons and had been represented by a pleader after he had filed a written statement. In the appeal also the said defendant was not made a party but the District Judge after he had delivered judgment issued notice to him informing him that his name had been added as a party defendant. *Held*, that no useful purpose could be

served by adding in the appellate stage, a party defendant if he had not been made a party to the appeal and after judgment in the appeal had been delivered, he could not be bound by the insertion of his name on the record as a defendant.—*Burendra Nath v. Aghore Nath*, 25 O. W. N. 525.

Where a mortgagee after obtaining a decree against two out of three mortgagors, appealed against the third mortgagor alone, and the appellate Court held that the appeal was not properly constituted, he cannot thereafter be allowed to implead the other mortgagors as parties.—*Tulsidas v. Ahmed*, 115 I. C. 305; A. I. R. 1929 Sind 120.

Where a party to a suit was not impleaded in the appeal but it appeared that the omission was due to an oversight and that the party whose name was omitted was not a contesting party in the suit, the proper procedure for the Court was not to dismiss the suit on a technical ground but to exercise the powers vested in it under Or. XLI, r. 20.—*Jalal Din v. Karim Bakhsh*, 124 I. C. 692; A. I. R. 1930 Lah. 295; 11 L. L. J. 523.

Joinder of co-respondent.—The appellate Court has jurisdiction under Or. XLI, r. 20 to add a defendant as co-respondent when the plaintiff, the sole respondent in the appeal, preferred a memo. of cross-objections against him.—*Ponnuswami v. Palaniandi*, 11 L. W. 602.

Order XLI, r. 20 and Or. XXII.—Order XLI, r. 20 is not intended to override the provisions of Or. XXII; the right obtained by a respondent when the appeal abates as against him, is a valuable right and should not be lightly treated. Order XLI, r. 20 will only apply where there is an appeal pending in the Court on which a decision may be given by the Court, and there is no power in a Court to revive a dead appeal or to give power to an appellant to present an appeal where there is none at all in the file of the Court.—*Badri Narayan v. E. I. Ry. Co.*, 5 P. 755; A. I. R. 1927 Pat. 23.

Adding of parties in second appeal.—The Court in second appeal is competent to bring on the record per  
the suit, but were not joined in the 1  
v. Kovamel, 19 M. 151; *Durga Charan* joined in  
v. Hitan Singh, 82 I. C. 600. But the Allahabad High Court has taken a  
contrary view in *Chunni v. Lala Ram*, 16 A. 5 and in *Pachkauri v. Ram*  
*Khilawan*, 37 A. 57. *Matathil*  
*Padarath*

Power of appellate Court to add respondent—Limitation.—The power of the appellate Court to make a person respondent under this rule is not affected by the Limitation Act.—*Sohna v. Khalak Singh*, 13 A. 78; *Bindeshri Naik v. Ganga Saran*, 14 A. 151 (F. B.); *Manickya Moyee v. Boroda Prasad*, 9 C. 355; 11 C. L. R. 430; *Upendra Lal v. Girindra Nath*, 25 C. 565; 2 O. W. N. 425 (approved in *Rup Jaun v. Abdul Kadir*, 31 C. 643 (F. B.)); 8 O. W. N. 496; not followed in *Subramanian v. Veerabadran*, 31 M. 442; 18 M. L. J. 452). See also *Maung An Gale v. Ma Min Dun*, 66 I. C. 365; *Municipal Committee, Bhera v. Shivram*, 75 I. C. 80; *Amar Singh v. Kanshi*, 76 I. C. 285; *Wazir Singh v. Janki Das*, 97 I. C. 174; A. I. R. 1926 Lah. 679; *Girish v. Sashi Sekharenwar*, 33 C. 329; *Amlook Chand v. Sarat Chunder*, 38 C. 913 (918-919); *Shahab Din v. Miran Bakhsh*, 25 I. C. 549; 79 P. R. 1914; *Deo Karan v. Nathu*, A. I. R. 1921 Nag. 12; *Mt. Sawami v. Jiwan*, A. I. R. 1923 Lah. 120; 103 I. C. 233; *Moti Ram v. Kewal Ram*, A. I. R. 1928 Lah. 202; 9 L. L. J. 550; 105 I. C. 569.

The Limitation Act does not contract the power of the Court under this rule to allow persons, who were parties to the proceedings in the Court below but were not made respondents at the time when the appeal was made, to bring in those persons as respondents for the ends of justice that they should be added as respondents.—*Girish Chander v. Sasi Sekharieswar*, 33 C. 329 (9 C. 355: 12 C. 642 referred to).

Where in an administration suit the District Court awarded one-fourth share to the second defendant, he has acquired a valuable right, namely, to have the estate distributed on the basis of that decree and he cannot be made a party to the appeal after an appeal as against him has become barred by limitation. The test of the competency of the appeal as against the other parties is whether the effect of the appeal would be to bring into existence two inconsistent decrees, one of the High Court and the other of the District Court, with respect to the subject-matter of the suit; where the result of allowing the appeal would be to vary the decree passed by the District Court which as between the parties to the appeal and the second defendant has become conclusive, the appeal is incompetent even as against the other respondents.—*Ma Than May v. Mohamed Eusoof*, 9 R. 624: 135 I. C. 645; A. I. R. 1932 Raog. 16.

**Inherent power of Court to add parties.**—Powers of a Court to implead parties under S. 151, C. P. Code, are circumscribed by Or. XLI, r. 20, and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked.—*Haliman v. Nur Muhammad Khan*, 73 I. C. 136: A. I. R. 1923 Lah. 490.

**Form.**—For Form of notice to a party to a suit not made a party to the appeal, see Appendix G, Form No. 7.

**21.** Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him. [S. 560.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 560, C. P. Code, 1882, with some alterations.

The words "*in the absence of the respondent*" which stood after the word "*ex parte*" in the old section, have been omitted; and the word "*pronounced*" has been substituted for the words "*is given*," after the word "*judgment*." The other changes are merely verbal.

"Sufficient cause."—For the meaning of the words "*he was prevented by sufficient cause*," see notes under Or. IX, rr. 9 and 13, as the principles laid down in the rulings under those rules, are equally applicable to this rule, in which the similar expression, "*prevented by sufficient cause*" occurs.

**Appeal heard *ex parte*—Application for re-hearing—Sufficient cause.**—Where a respondent had received no intimation of the date of hearing of an appeal from his pleader's clerk who owing to his illness had been compelled to go home, the papers of the case being with him, and who did not give information to the clients of the day fixed for hearing, and the appeal was heard *ex parte* on the date of hearing, *held*, that it was a sufficient cause within the meaning of this rule for the re-hearing of the appeal.—*Kailash Chunder v Rama Nath*, 2 O. W. N. 414.

Where after some infructuous attempts to serve the respondent, substituted service was ordered and the appeal was heard *ex parte*, it is still open to the respondent to show if he can, that he was never duly served in the sense that knowledge of his opponent's claim has been brought to him, even though the formalities of substituted service have been carried through.—*Gyanammal v. Abdul Hussain*, 55 M. 223; 134 I. C 1232; A. I. R. 1931 Mad. 813; 61 M. L. J. 920; (1931) M. W. N. 1069; 34 L. W. 496.

Notice was given to the respondent's pleader of the day fixed for hearing, but he refused to accept service and did not inform his client that such notice was given. The appeal was heard *ex parte* on one appearing for the respondent; *held*, that the laches of the pleader is not a sufficient ground for restoration of the appeal.—*Har Prosad v. Abdul Rahman*, (1905) A. W. N. 44.

An applicant presenting a petition for the re-hearing of an appeal, decided *ex parte*, must, at the time of making such application, be prepared to satisfy the Court that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.—*Anunda Shaha v. Kema Bessa*, 6 C. 518.

Where an appeal has been heard *ex parte*, a re-hearing cannot be granted by the Court on an application under S 563, C. P. Code, 1932, except upon legal evidence produced by the respondent of the facts necessary to entitle him to such re-hearing.—*Mahomed Kalun v. Dinomoyee*, 8 C. L. R. 112.

A respondent engaged two pleaders on the day of hearing; the senior pleader being ill transferred his brief to another pleader, whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue applied for a day's postponement to get himself ready. This was refused and the appeal denied *ex parte*. *Held*, that the Judge ought either to have allowed the pleader who appeared to argue the case or allowed an adjournment, making if necessary an order for costs in favour of the appellant.—*Hari Krishna v. Bishnu Chandra*, 35 O. 799; 12 C. W. N. 838; 7 C. L. J. 426.

Where counsel for respondent was unable to appear at the hearing because the respondent's agent had taken away the papers, it was held that this was not a "sufficient cause" for re-hearing the appeal.—*Baji Lal v. Nawal Singh*, 39 A. 388.

This rule applies to a case in which the respondent has been prevented by sufficient cause from attending when the appeal was called on, whether appearance has been entered for him or not.—*Esab v. Krishna Narayan*, 11 C. L. R. 164.

Where pleaders were engaged on behalf of the respondent, but they were unavoidably prevented from appearing, held that although vakalatnamas had been filed by the defendant's pleaders, the defendant could not be said to have appeared in person or by pleader and the order made under this rule was correct.—*Shoo Churn v. Heera Lall*, 11 C. L. R. 537 (7 W. R. 81 followed).

Held by the Full Bench, that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree under the provisions of S. 584, C. P. Code, 1882, and his remedy is not limited to an application under this rule to the Court which passed the decree to re-hear the appeal.—*Ajudhia Prasad v. Balmukand*, 8 A. 354 (F. B.) (4 A. 387, and 6 B. H. C. R. 161 referred to).

An appeal was heard *ex parte* in the absence of the respondent; he then applied for re-hearing, but his application was refused. Held that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the appellate Court.—*Ramjas v. Dasj Nath*, 2 A. 567.

A defendant who obtains a judgment in his favour in the Court of first instance and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a re-hearing, may present a second appeal against the decree of the lower appellate Court.—*Ex parte Modallath*, 2 M. 75.

An application for re-hearing of an appeal presented originally within the period of limitation but returned for amendment, and presented after amendment, after the period of limitation, cannot be rejected as long out of time.—*Shama Prasad v. Taki Mullik*, 5 C. W. N. 816.

This rule applies to a case where the respondent is absent and not dead at the time of hearing.—*Sowdamini v. Ganga Kumar*, 3 C. L. J. 35-n.

Appeal.—An appeal lies from an order of refusal to re-hear an appeal under Or. XLIII, r. 1, Cl. (i).

22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided, he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule. [S. 561.]

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 561 of the C. P. Code, 1882, with some additions and alterations.

The alterations made in sub-rules (1) and (2) are merely verbal, viz., the word "*from*" has been substituted for the word "*against*," and the word "*cross-objection*" has been substituted for the word "*objection*."

In sub-rule (3) the words "*from the party who may be affected by such objection or his pleader*," have been substituted for the words "*from the appellant or pleader*," which occurred in the old section.

Sub-rule (4) is new. It has been inserted to set at rest the several conflicting rulings on the point.

Sub-rule (5) corresponds to the last para. of S. 561, C. P. Code, 1882, with some verbal changes only.

**Support the decree.**—Though a person who has not appealed from a decree cannot question its correctness he can support the decree on reasons not given by the lower Court under this rule.—*Raj Kumar Jagannath Prasad v. Mirza Ekbal*, 5 P. L. J. 239: 55 I. C. 214. A respondent, although he may not have appealed against any part of the decree, may support the decree on any of the grounds decided against him in the Court below; and it is only when he takes exception to the decree that he is bound to prefer an appeal or take cross-objection. Therefore where the plaintiff sued for money under a mortgage giving credit for Rs. 245 which he declared to be the value of certain grain and cattle delivered to him by the mortgagor

and the defendants alleged that the value was Rs. 350 and not Rs. 245 and also alleged a further payment of Rs. 320, and the trial Court was of opinion that the value was Rs. 245, but it was also of opinion that the plaintiff was not entitled to compound interest claimed by him, and the plaintiff appealed against that decision, the defendants, who did not dispute the correctness of the amount decreed against them, were competent to show to the appellate Court without preferring a separate appeal themselves, that the amount for which credit had been given by the trial Court had been wrongly calculated so far as the value of the grain and cattle was concerned—*Shankar Lal v. Madari Singh*, 7 I. C. 494.

A party who is competent to accept the lower Court's decision can resist the appeal from that decision on the ground that the decree errs in favour of the appellant. In such a case the respondent not having appealed nor filed cross-objections, cannot ask that the decree should be altered in his favour, but he is entitled to urge that if he can show that the decree errs in favour of the appellant, it should not be disturbed.—*Muhammad Ali v. Parma Nand*, 45 I. C. 232; 48 P. W. R. 1918. The two last mentioned cases have been distinguished by the Madras High Court in *Sri Ranga v. Srinivasa*, 50 M. 866; 104 I. C. 472, in which it has been said that in the former case what was really held was that over though an item in an account may be found by the Court of appeal against the respondent, and on that footing the amount for which a decree has been granted by the lower Court may have to be increased, still the decree might be supported by showing that in respect of some other item the Court below made a mistake; but when the relief granted depends upon the adjudication by the lower Court with respect to rights or causes of action, it is inconceivable that such a decision or adjudication shall be sought to be attacked in the appellate Court without any notice whatever. Though the word "decree" has been used in this rule, what the rule contemplates really is the decision by the Court below, and merely enables the decision arrived at to be supported on grounds other than those on which the lower Court proceeded. The same view has been taken in *Kishan Kishore v. Din Mahomed*, A. I. R. 1929 Lab. 684 and *Gangama v. Veerappa*, 131 I. C. 833; A. I. R. 1931 Mad. 513. The High Court of Patna has taken a contrary view and held that the words "support the decree" do not merely mean "support the decision" and it is open to the respondent who has not filed any cross appeal or objection against the decree awarding compensation in land acquisition proceedings to urge in bar of further enhancement a ground which has been decided against him in the lower Court and which if accepted in entirety would have resulted in the dismissal of the plaintiff's suit.—*Gokul v. Secretary of State*, 12 P. 659.

The Privy Council has laid down that where a particular issue is decided against the defendants but the decree is entirely in their favour, it is not necessary for them (in an appeal preferred by the plaintiff) to file a notice of objection; and they can support the decree on the ground that the said issue ought to have been decided in their favour.—*Lala Gauri Sanker v. Janki Pershad*, 17 I. A. 57; 17 C. 809 (813-814) (P. C.). See *Bhagoji v. Bapuji*, 13 B. 75, in which it has been held that where a decree is in favour of the respondent, the appellate Court is not entitled to accept facts found by the Court of first instance as incontestably proved merely because the respondent has not



filed any cross-objections to the decree (followed in *Sheocharan v. Ram-ratan*, 108 I. C. 801 : A. I. R. 1928 Nag. 181). See also *Shrish v. Mungri*, 9 C. W. N. 14, in which it has been held that it is not necessary to entitle a respondent to support a decree upon a particular ground that the ground should have been in express terms decided against him, and if it has not been decided in his favour it must be taken to have been "decided against him" within the meaning of S. 561 of the old Code (i. e. the present rule). It has also been held that this rule in no way prevents an appellate Court from upholding the decree of the lower Court on any ground which in law warrants such upholding, even though that ground may not have been referred to, or disallowed in the lower Court.—*Receiver of Nidadavole Estate v. Vegasena*, 28 M. 427 (435).

An application to file a cross-appeal orally was rejected, (1) because a written memorandum of its grounds had not been filed previously; (2) because the objection, when taken, was not filed on the regulated stamp; and, lastly, (3) because the ground now urged had not been advanced as an objection in a regular appeal previously filed.—*Hoolas Kooeree v. Sufeehun*, 8 W. R. 379.

If no cross-objections are filed at all by a respondent, the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant.—*Kulaikada v. Viswanatha*, 28 M. 229; *Caspersz v. Kishori Lal*, 23 C. 922 (929) (P. C.) : 1 C. W. N. 12 : "the appellate Court the power, in the absence of cross-objections, decree as is favourable to the appellant worse position.—*Obeda Lal v. Badullah*, 1 O. 996; *Shailesh v. Bechai*, 40 C. L. J. 67 : 84 I. C. 124 : A. I. R. 1925 Cal. 94. In any case, the Court cannot record a finding which does not affect the point at issue.—*Sir Prodyat Kumar v. Bal Gobinda*, 41 C. L. J. 31 : 86 I. C. 6 : A. I. R. 1925 Cal. 518.

A respondent, in taking advantage of the provisions of S. 348 of Act VIII of 1859 (this rule), can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties who do not appeal, he must do so by independent appeal.—*Ganesh Pandurang v. Gangadhar*, 6 B. H. C. R. 244.

If a decree is passed partly in favour of, and partly against, a plaintiff, and one of the defendants alone appeals against the decree in favour of the plaintiff, making a co-defendant a respondent, there is no reason why the latter should appear or interest himself in the result, nor why the plaintiff should be allowed at the hearing to raise objections to his suit having been dismissed against the other defendant.—*Goonomonee v. Parbutty*, 10 W. R. 326.

Both parties appealed from the decree of the first Court, and both the appeals were dismissed. The plaintiff preferred a second appeal against the decree dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. Held, that such objections could not be entertained.—*Ganga Prasad v. Gajadha Prasad* 2 A. 651.

r. 22.

Where a plaintiff's suit is dismissed, and a defendant appeals, seeking no relief whatever, but acting in the same interest with the plaintiff, the latter is not entitled by way of cross-appeal, to argue that his suit was wrongly dismissed.—*Saletoollah v. Rohim Dewan*, 9 W. R. 273.

Objections under this rule can only be filed by a party who might have appealed from the decree of the Court below but has not done so. It is not open to a party who has appealed, and where appeal has been dismissed, subsequently to such dismissal, to prefer objections under this rule to the appeal preferred by the opposite party.—*Ramji Das v. Ajudhia Prasad*, 25 A. 628; *Sourindra v. Nirmal*, 32 C. W. N. 863; A. I. R. 1928 Cal. 882. But a person who has filed an appeal from a decree which is still pending, and especially when it has not yet been admitted to a hearing, is not precluded from filing cross-objections on the same grounds when the other party has appealed from the decree.—*Abdul Rahim v. Raghubir Chand*, 112 I. C. 689; A. I. R. 1929 Lah. 161. Where in a suit for accounts a certain sum was

decree against the defendant had become final by the defendant's failure to appeal from the dismissal of his first appeal and that the defendant is not entitled to claim by way of cross-objections what he had claimed in his first appeal.—*Sant Ram v. Ram Manoreth*, 111 I. C. 843; A. I. R. 1929 Oudh 41. Where in the lower appellate Court the defendant filed an appeal and the plaintiff filed a memorandum of cross-objections and the lower appellate Court dismissed both of them, it is not competent, in the appeal filed by plaintiff against the dismissal of cross-objections, for the defendant by way of objections to attack the rejection by the lower Court of his appeal; the proper course for him is to file an independent appeal against the dismissal or rejection of his appeal.—*Ayilu Reddi v. Venkata Reddi*, 130 I. C. 657; A. I. R. 1931 Mad. 133; (1930) M. W. N. 1236.

In an appeal against an award under the Land Acquisition Act (I of 1894), the respondent is entitled to file cross-objections under this rule.—*Raghunathdas v. Secretary of State*, 29 B. 514; 7 Bom. L. R. 569.

**Cross-objections against co-respondents.**—As a general rule the respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions, which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents.—*Bishun Churn v. Joendra Nath*, 26 C. 114 (7 W. R. 39, and 15 W. R. 26 referred to); *Shabiuddin v. Deomoorat*, 30 C. 655; *Abdul Ghani v. Muhammad Abdul Majid*, 28 A. 95; 2 A. L. J. 667; *Jagannath v. Hanuman Singh*, 54 I. C. 332; *Nursey v. Harrison*, 37 B. 511; *Jadunandan v. Deo Narain*, 16 C. W. N. 612, 614; *Mathura v. Ram Kumar*, 43 C. 790 (828); *Musleha v. Ram Narain*, 40 A. 536; *Official Trustee of Bengal v. Smith*, 5 P. L. J. 328; 56 I. C. 262; *Bhuban v. Co-operative Hindusthan Bank*, 29 C. W. N. 784; 88 I. C. 866; A. I. R. 1925 Cal. 973; *Lakshman v. Bhikchand*, 31 Bom. L. R. 1179; *Babu Singh v. Godawari*, 118 I. C. 867:

A. I. R. 1929 Nag. 361; *Bankey-Lal v. Natharam*, 107 I. C. 569; A. I. R. 1929 All. 195. It is the settled practice of the Calcutta High Court not to permit a cross-objection raising a question as between two respondents *inter se* in which the appellant is not concerned or interested. Such a question can only be raised in a substantive appeal by the respondent.—*Co-operative Hindusthan Bank v. Surendranath*, 36 C. W. N. 263. According to the Madras and Lahore High Courts, a respondent may urge cross-objections against a co-respondent in any and every case.—*Kulaikada v. Viswanatha*, 28 M. 229, *Munisamy v. Abbu*, 38 M. 705 (F. B.); *Alagappa v. Chockalingam*, 41 M. 904 (F. B.); 48 I. C. 203; *Chhajju v. Qutab Din*, 5 L. L. J. 92; 69 I. C. 330; A. I. R. 1923 Lah. 39.

As a general rule cross-objections can be urged only against the appellant and not against a co-respondent. No cross-objections can be filed against a defendant who has not filed any appeal from the decree passed against him.—*Sant Ram v. Kidar Nath*, 56 I. C. 469; *Qara Mohammad Shaban v. Bazm Ara Begam*, 70 I. C. 79.

The objections allowed to be urged by a respondent under this rule are limited to the person who has appealed against him, and his (respondent's) rights are not enlarged by the mere addition to the list of such persons of other persons who should not have been put on the list at all.—*Kallu v. Manni*, 23 A. 93. See, however, *Timmaya Mada v. Lakshmana*, 7 M. 215, where it has been held that a party who has been improperly made a respondent in appeal is entitled to take objections to the decree under this rule.

In suit for dissolution of partnership and for accounts, it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them.—*Balgobind v. Ram Sarup*, 36 A. 505.

**Cross-objections against absent co-respondents.**—An objection by way of cross-appeal cannot be taken against a co-respondent who is not present in Court and so unable to answer the objection of the cross-appellant.—*Lall Chand v. Kudmoo Koonwar*, 7 W. R. 532. See also *Mozzunnissa v. Mooraree*, 22 W. R. 314.

An objection by way of cross-appeal cannot be taken against a party who is not present in Court. But if it be considered necessary to have the absent party present, the Court should direct that he should be made a respondent.—*Pran Kishore v. Mahomed Ameer*, 21 W. R. 338.

**Cross-objections against findings embodied in the judgment but not in the decree.**—The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision against a party so as to enable him to appeal or to prefer a cross-appeal against it. Parties have no right to cross-appeal against findings embodied in the judgment but not in the decree.—*Jamaitunnissa v. Lutfunnissa*, 7 A. 606 (F. B.); *Balak Tewari v. Kausil Misr*, 4 A. 491.

**Cross-objections by pauper respondent**—The decisions in *Rashomonee v. Junmojoy*, 9 W. R. 356; *Babaji v. Rajaram*, 1 B. 75; *Narain v.*

*Krishna*, 8 M. 214; *Brojeswari v. Guroo Ohurn*, 11 C. 735, are no longer good law in view of the provisions made in Or. XLI, r. 22 (5). Under this rule the Court may receive a memorandum of cross-objections at any time and it is not prevented from receiving it by the fact that an application to file it *in forma pauperis* was filed in time when the memorandum was filed out of time.—*Gorind Rani v. Radha Ballabh*, 15 C. W. N. 205: 12 C. L. J. 173: 7 I. C. 118. The limitation of 30 days prescribed for applications for leave to appeal *in forma pauperis* is not applicable to applications for leave to file cross-objections *in forma pauperis*.—*Mt. Chander Kala v. Mt. Dulhin Raja Kuer*, 7 P. 827: 119 I. C. 900: A. I. R. 1929 Pat 31 10 P. L. J. 387.

**Applicability of this rule to Letters Patent appeals.**—Order XLI, r. 22 is not applicable to an appeal under Cl. 15 of the Letters Patent, and a memorandum of cross-objection cannot be entertained in these appeals.—*Brojendra Chandra v. Prosanna Kumar*, 24 C. W. N. 1016: 33 C. L. J. 48; *Purna Kuar v. Mangat Rai*, 70 I. O. 488: A. I. R. 1923 All 55 (*Kusalia v. Golab Koer*, 31 A. 297 *folld.*). See also *In the matter of Mirza Himmat*, (1866) B. L. R. (F. B.) 429. But see *Venkatasam Chetty v. Motichand*, 49 M. 291 (F. B.): 50 M. L. J. 190: A. I. R. 1926 Mad. 316, in which it has been held (following 48 I. A. 76: 43 C. 431) that the provisions of Or. XLI, apply to Original Side appeals under the Letters Patent, and r. 22 of that Order expressly provides for cross-objections being raised by respondents.

**Applicability of this rule to revisions.**—This rule does not extend to Civil Revision petitions; but the High Courts' power of revision may be exercised even without any application by an aggrieved party; and when a case is already before the Court and the necessary parties are also before it, it has ample powers to entertain questions which may be raised by the respondent and deal with these questions also if it thinks fit.—*Pattammal v. Krishnasawmy*, 112 I. C. 231: A. I. R. 1923 Mad 794.

**Court-fees on cross-objections.**—The effect of S. 16 of Court-fees Act (VII of 1870) is to place the respondent in the position of a cross-appellant, in so far that he must, before the hearing, specify his matter of objection, and must pay into Court the court-fee attaching thereto. A Court cannot give effect to the cross-objection of a respondent subject to his payment of the court-fee stamp.—*Sharoda Soonduree v. Gobind Monee*, 24 W. R. 179. But see *Reference under Court-fees Act, S. 5*, 25 M. 24, where it has been held that stamp duty on a memorandum of objections filed under this rule need not, under S. 16 of the Court-fees Act, be paid till the time for hearing.

Where the memorandum of cross-appeal was not stamped before by mistake and it was acted upon, the subsequent filing of the stamp makes the memorandum of the appeal as valid as if it were stamped at the first instance.—*Jagabandhu v. Chowdhry Shyama Charan*, 2 C. L. J. 68-n.: 6 C. W. N. cclxxx (280).

The Court has jurisdiction over a memorandum of objections presented under this rule although not stamped or moved by the respondent at the hearing of the appeal, and where it is not so stamped or moved the proper order is to dismiss it with or without costs.—*Palani v. Udayar*, 32 M. 170.

Where the respondent in an appeal from a decree which totally dismissed the plaintiff's suit put in a petition stating the reasons on which

they supported the decree, the respondent need not pay court-fee on the petition.—*Ram Prasad v. Musst. Ajanasia*, 44 A. 577 : 68 I. C. 861.

A cross-objection which relates to costs only should bear *ad valorem* court-fee on the amount claimed.—*Kamakhyia v. Ramraj*, 8 P. 543 : 117 I. C. 166 : A. I. R. 1929 Pat. 286 : 10 P. L. T. 224.

**Time for filing cross-objections.**—The cross-objections referred to in this rule must be filed by the respondent within one month from the date of the service of notice of the appeal. But the time may be extended if sufficient cause is shown.—*Sulleman v. Joosub*, 14 B. 111; *Kuksa v. Dajiba Bhau*, 5 N. L. J. 192 : 66 I. C. 217.

Where the time for filing objection under this rule expired on a day when the Court was closed, the objections were allowed to be filed on the day when the Court re-opened.—*Baghelin v. Mathura*, 4 A. 430.

The withdrawal of the appeal by which the respondent loses his opportunity of having his cross-objections heard, affords no sufficient reasons for enlarging the time for the cross-appeal which he might have presented.—*Chudasama v. Ishwargar*, 16 B. 249. See also *Surbhai Dayalji v. Raghunathji*, 10 B. H. C. R. 397 (2 B. L. R. A. C. 184 : 10 W. R. 178 followed). But see *Hurgovindas v. Jadavahoo*, 23 B. 692, where the withdrawal of the appeal was considered "sufficient cause" within the meaning of S. 5 of the Limitation Act.

An appeal cannot definitely be posted until the Court has ascertained that notice has been served upon the respondent, and a date must then be fixed not less than one month from the date of service and a respondent can file a cross objection within a month from the date of service of notice.—*Sundaram v. Annangar*, 13 M. 492.

**Power of appellate Court to deal with the whole case after return of findings on remand.**—The first Court dismissed the suit as barred by limitation, but the decision was reversed in appeal, and the case was remanded for trial on the merits.—The first Court then gave a decree, but on appeal the appellate Court dismissed the suit on the merits. The plaintiff preferred a special appeal. *Held*, that the defendant was competent on such appeal to raise cross-objections that the suit was barred by limitation.—*In the matter of Himmat Bahadur*, B. L. R. Sup. Vol. 429 : 5 W. R. 91. See also *Raye Kishoree v. Bonomally*, 10 W. R. 209; and *Kishen Chunder v. Sreeshtee Dhur*, 8 W. R. 208.

In a second appeal by the defendant, the plaintiff filed cross-objections under this rule and the High Court remitted an issue under S. 566, C. P. Code, 1882 (Or. XLI, r. 25), with reference to plaintiff's objections expressing their views thereon. *Held*, that, upon the return of the findings on remand, the Court could not treat the appeal as already decided and the objections as the sole matter for the consideration, but must consider both appeal and cross-objections and decide the whole case.—*Lachman Prasad v. Jamna Prasad*, 10 A. 169

*H* sued *B* for arrears of rent at the rate of Rs. 212-1-0 per annum, and obtained a decree at the rate of Rs. 94. He appealed, and the appellate Court gave him a decree at the rate of Rs. 128-12-0. *B* appealed to the High Court. *H* neither appealed nor filed any cross-appeal. The High Court

remanded the case. The lower appellate Court then found that the annual rent payable by *B* was Rs. 212-10-0. *Held*, that the second finding of the lower appellate Court should be accepted, and *H* was entitled to the benefit of the finding in his favour, notwithstanding that he had not appealed or preferred objections under this rule.—*Bikrmajit v. Husaini Begam*, 3 A. 643 (distinguished in *Aqilul v. Dino Nath*, 34 C. 996).

**Insertion of sub-rule (4).**—It would appear from the rulings prior to the insertion of this sub-rule that in some of the cases it was held that where cross-objections are filed by the respondent, the appellant, if he wishes to withdraw his appeal must do so before the *hearing* of the appeal has commenced. In others it was held that where the appeal is withdrawn by the appellant, the cross-objections cannot be heard. By insertion of sub-rule (4), it has now been definitely laid down that even if the appellant withdraws his appeal after receiving notice of cross-objection or if the appeal is dismissed for default, the cross-objection so filed may nevertheless be heard and determined, although the appeal may be withdrawn by the appellant or dismissed for his default. This rule is advantageous to the respondent, as he will have the advantage of his cross-objections being heard, as if he has filed a separate appeal.

Under the old section cross-objections were entirely dependent upon the hearing of the appeal; but by insertion of sub-rule (4) it has been made clear that cross-objections are to be treated as independent and separate appeals; and the difference of opinion which hitherto existed with regard to the meaning of the term "*hearing*" has been set at rest.

Under the present rule, the withdrawal of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. This presupposes a valid filing of an appeal. If the appeal itself is not validly filed, then the memorandum of objection should not be heard.—*Venkatasubamma v. Ramanadhayya*, 139 I. C. 457 : (1932) M. W. N. 949. In the same way, the dismissal of an appeal for default is no bar to the hearing of cross-objections. The dismissal of an appeal upon the appellants' failure to give security for costs is a dismissal for default within the meaning of Or. XLI, r. 22, sub-rule (4).—*Mowar Sheobaksh v. Mowar Thakur Dayal*, 4 P. L. J. 164.

The word 'default' in this sub-rule has been differently interpreted. The Madras High Court has held that the word means default which would amount to non-prosecution of the appeal, and the dismissal of an appeal for non-payment of deficit court-fee is a dismissal for default.—*Ayilu Reddi v. Venkata Reddi*, 130 I. C. 657 : A. I. R. 1931 Mad. 133 : (1930) M. W. N. 1236. The Rangoon High Court on the other hand has held that the provisions of this sub-rule must be interpreted strictly and not extended beyond their obvious meaning, and apart from the two instances excepted, *viz.*, "withdrawal or dismissal for default", cross-objections cannot be entertained if the appeal is dismissed without a hearing on the ground of non-payment of the deficit court-fee, because the Judges' order in such a case that the appeal has abated does not amount to dismissal for default.—*U Shin v. Maung Tha Gywe*, 8 R. 538 : 129 I. C. 500 : A. I. R. 1931 Rang. 39. See also *Ajmer Singh v. Ram Singh*, 29 N. L. R. 25 : 137 I. C. 1156 : A. I. R. 1932 Nag. 41.

**Abatement of appeal owing to death of appellant—Effect upon cross-objections.**—Where owing to the death of the appellant, an appeal abates and is dismissed, the memorandum of cross-objection preferred by the respondent cannot also be heard.—*S. T. M. R. Murugappa Cheltiar v. Ponnusami*, 44 M. 828 : 41 M. L. J. 304 : 13 L. W. 705 : A. I. R. 1921 Mad. 405 ; *Mulchand v. R. M. Downie*, 10 L. 208 : 110 I. C. 910 : A. I. R. 1928 Lah. 596.

**Application of the rule to Second Appeals and Miscellaneous Appeals.**—Under Or. XLII, cross-objections may also be filed in second appeals. They may also be filed in appeals from orders as laid down in Or. XLIII, r. 2.

A memorandum of cross-objections as to costs in the Courts below is not a matter which can be considered on second appeal.—*Madho Prasad v. Firm of Ashan Ilahi*, 5 L. L. J. 108.

**Second appeal.**—A second appeal will lie from a decree of the first appellate Court disallowing the cross-objections of a respondent.—*Ganapati v. Sitharama*, 10 M. 292.

**23.** Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. [S. 562.]

## COMMENTARY.

**Alterations and their effects.**—This rule corresponds to S. 562, C. P. Code, 1882, with some additions and alterations. The old section is reproduced below for comparison and for observing the changes introduced :  
“ If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point and the decree upon such preliminary point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register, and proceed to “determine” the suit on the merits.”

“ The Appellate Court may, if it thinks fit, direct that issue or issues shall be tried in any case so remanded.”

The following report of the Special Committee will explain the object of the addition of the words "*and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand,*" at the end of this rule:—

"After due consideration the Committee have thought it safer not to give legislative sanction to the views unenacted in *Habib Bakhsh v. Baldeo*, 23 A. 167. The power of reversal and remand is liable to be abused, while the procedure under S. 566 is free from this liability and at the same time furnishes an effectual remedy."

"The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used on the trial after remand."—*See the Report of the Special Committee.*

Upon a comparison of the provisions of the present rule with the old section it would appear that the words "*upon such preliminary point,*" which stood after the words "*and the decree,*" in the old section have been omitted

Section 564 of the old Code which ran as follows: "*The Appellate Court shall not remand a case for a second decision, except as provided in S. 562,*" has also been omitted. The effect of these omissions is that the Legislature has withdrawn the restriction which existed under the old Code with regard to the Court's power of remand under this rule, as will appear from the following report of the Select Committee: "We have struck out this rule as in our opinion it is unduly restrictive."

Under the old Code it was held in several cases by all the High Courts that an appellate Court has no power to remand a case under S 562 (now r. 23), except when the lower Court has disposed of it on a preliminary point. But it sometimes happens that a remand is necessary on account of

therefore the Legislature has omitted S. 564 of the old Code, and also the words "*upon such preliminary point,*" which occurred in the old section, and thereby has empowered the appellate Courts to remand a case under this rule where there has not been a proper trial in consequence of an error, omission or irregularity. It is to be noted that the power of remand is not subject to any sanction

But by

of remand in cases similar to those above referred to, where for the ends of justice, a remand would be necessary. In the absence of any express provision for remand where the case is not disposed of upon a preliminary point, but where there are errors, omissions or irregularities in the trial, by which the party complaining has been materially prejudiced, the appellate Court may for the ends of justice remand the case under this rule, as the absolute prohibition contained in S. 564 has now been removed.



When the Legislature has declined to insert any express provision for remand in the cases above referred to on the ground that the power is liable to be abused, the proper course for the lower appellate Courts would be strictly to follow the principles laid down in 23 M. 445, 30 M. 54 (F. B.), 17 A. 29 and 23 A. 167, and in other cases which may hereafter be decided by the High Courts.

**Scope of this rule.**—This rule authorises a remand only where the entire suit and not only a portion of it has been disposed of by the Court below on a preliminary point.—*Gairdo v. Radhe Mohan*, 136 I. C. 559: 33 P. L. R. 54: A. I. R. 1932 Lah. 219.

**Preliminary point—Grounds for remand.**—The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit but comprehends all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. There are many instances of such points such as—(1) that a suit is barred by limitation; that the Court has no jurisdiction under some Act, that evidence tendered was not admissible; that on the plaintiff's evidence there is no evidence for the defendant to answer, in a libel suit that there is no proof of publication; *Malayath Veetil v. Krishnan Nambudripad*, 45 M. 900 (F. B.): A. I. R. 1922 Mad. 505: 43 M. L. J. 354: 31 M. L. T. 208: (1922) M. W. N. 588 (F. B.); *Muhammad Allahdad v. Muhammad Ismail*, 10 A. 289; *Ramachandra v. Hari Kassim*, 16 M. 207.

A preliminary point is one which, when determined in favour of the plaintiff, permits the progress of the suit, but when determined against him concludes the suit.—*Gobind v. Baliram*, 128 I. C. 407: A. I. R. 1930 Nag. 295; *Devorampoodi v. Gopa Raju*, 112 I. C. 1: A. I. R. 1928 Mad. 991: (1928) M. W. N. 164.

Where the suit was brought by the plaintiff for maintenance and the first issue was "Is the plaintiff entitled to maintenance", which was found against the plaintiff by the trial Court, and the lower Court reversed that decision, finding that the plaintiff was entitled to maintenance and sent the case back to the trial Court to decide the other points in issue: held that the order of remand was on a preliminary point and an appeal lay from such order.—*Seenayya v. Mangamma*, A. I. R. 1927 Mad. 1159: 99 I. C. 974.

Where the plaintiff sued on a promissory note executed by the defendant in favour of his step-mother alleging that he was her heir, and on the defendant's objecting he sought to amend the plaint by alleging that his step-mother managed his estate and advanced the money to get the promissory note executed in her name for his benefit, and the trial Court rejected the application and dismissed the suit, but the lower appellate Court held that the plaintiff's application ought to have been allowed and remanded the case, it was held that the remand order was, under this rule, on a preliminary point and therefore appealable.—*Gobind v. Baliram*, 128 I. C. 407: A. I. R. 1930 Nag. 295.

Where in a suit for possession an issue was raised whether the plaintiff was entitled to an unconditional decree for possession or whether the defendants were entitled to redeem and the trial Court held that the defendants

were not entitled to redeem and gave the plaintiff an unconditional decree for possession, and on appeal the appellate Court held that the defendants were entitled to redeem and remanded the case for determining the amount payable on redemption and for disposal of the suit according to law, it was held that the decision was on a preliminary point and the order of remand, being one under this rule was appealable.—*Alagammal v. Sadasiva*, 129 I. C. 47: A. I. R. 1930 Mad. 1017: 60 M. L. J. 72: (1930) M. W. N. 1021: 32 L. W. 843.

"Preliminary point" in this rule means a matter preliminary to the general determination of the suit which the parties bring before the Court for decision. In this case the preliminary point which the District Munsif had to decide was whether there was a valid award which decided the matter in dispute. He found that there was such award, and that he could not, therefore, go into the merits of the dispute. That finding by the District Munsif was a decision on a preliminary point within the meaning of this rule.—*Krishnan Chetti v. Muthu Palandi*, 22 M. 173.

The only connotation of a preliminary point in this rule is, that it should suffice for the disposal of the suit. Any point the decision of which does not enable the Court to decide the suit is excluded from the category of a preliminary point.—*Abdul Gafar v. Muhammad Ziauddin*, 2 P. R. 1909 (F. B.): 12 P. W. R. 1908: 96 P. C. R. 1908.

An appellate Court has no power to remand a case except when the lower Court has disposed of it on a preliminary point, and thereby excluded essential evidence.—*Mudun Mohun v. Bhoggomanto*, 8 C. 923. See also *Deokishen v. Bansi*, 8 A. 172 (F. B.), *Abraham Khan v. Fazlunnessa Bibi*, 17 C. 168, *Lalla Chunilal v. Mohiji Singh*, 1 C. W. N. 340, *Ram Dao Mondal v. Indromoni Das*, 3 C. W. N. 325, *Subba Sastri v. Balachandra Sastri*, 18 M. 421; *Kelu Mulacheri v. Chendu*, 19 M. 157, *Seshan Pattar v. Seshan Pattar*, 23 M. 447 (23 M. 445 distinguished); *Hafiz Abdul Bahum v. Raja Hari Raj*, 22 A. 405; *Rameshwar Singh v. Sheodin*, 12 A. 510 (F. B.); *Mohesh Chandra v. Jamiruddin*, 28 C. 324: 5 C. W. N. 509, *Muschar Hossein v. Mussamat Bodha Bibi*, 22 I. A. 1: 17 A. 112 (P. C.): 5 M. L. J. 20, *Bai Shri Majirajba v. Magan Lal*, 19 B. 303; and *Mani Vikrama v. Gopalan*, 30 M. 203; *Brijmohun v. Deobhanjan*, 5 P. L. J. 146: 55 I. C. 484; *Rahimuddin v. Mannu Lal*, A. I. R. 1930 Lah. 639. But where the main point in a suit is decided by the appellate Court it has no power to remand the case under this rule for disposal of the remaining issues as its decision is net on a preliminary point.—*Ponangi v. Sri Rajah Lakshmi*, 12 L. W. 667: 60 I. C. 609.

Where evidence has been duly placed before the trial Court and that Court has decided the several points involved, the Court of appeal if it cannot agree with the decisions, must come to proper findings of its own; but it is a shirking of duty and entirely wrong to send the case back for a *de novo* trial by delivering a lecture on the points of law to the trial Court where there is no reason to think that either party had not an opportunity of producing all the evidence that it desired to produce.—*Promotha v. Nagendra*, 33 C. W. N. 1211. But if a Court of appeal finds difficulty in determining the question involved on the materials on record, it will be open to it to remand the case to the trial Court for a decision with directions as

in taking further evidence and issue of commission for a correct appreciation of the points in controversy; *Kurtic v. Banomali*, 124 I. C. 385; A. I. R. 1930 Pat. 7: 11 P. L. T. 639. See also *Krishna Sahoo v. Maung Po Than*, 137 I. C. 598; A. I. R. 1930 Rang. 188. The mere fact that the appellate Court remanded the case for taking additional evidence will not however deprive that Court of its jurisdiction to dismiss the appeal at a later stage if it was found to be incompetent—*Manmohan v. Shib Chandra*, 34 C. W. N. 839.

Even if an appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the trial Court, this ought only to be done in exceptional cases, for good cause shown and on payment of all costs thrown away.—*Gopal Krishna v. Abdul Samad*, 34 C. L. J. 319 (43 C. 1104 (P. C.) referred to).

The award of arbitrators in a suit was set aside by the Court on the ground that it seemed so unreasonable and in appeal it was reversed and a remand ordered under Or. XLI, r. 23. Held, it was not a decision on a preliminary point and they should have acted under Or. XLI, r. 25.—*Chandan v. Mt. Bibi*, 75 I. C. 198.

On an appeal from the decision of a Munsif in favour of the plaintiff in a suit for rent, the appellate Court set aside the decree of the lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent. Held that, the order for amendment of the plaint was bad under this rule, since the original Court had not "disposed of the suit upon a preliminary point."—*Krishnaya Navada v. Panchu*, 17 M. 187.

In a suit for partition where the Munsif passed a preliminary decree in favour of the plaintiff for a 5/12th share in the property in suit, and on appeal the appellate Court set aside the decree of the Munsif and finally made an order of remand for re-trial by the Munsif, it was held that in as much as the decree of the Munsif was not founded upon a preliminary point the proper order would have been a remand under r. 25 instead of r. 23.—*Din Dayal v. Ram Dewak*, A. I. R. 1927 Oudh 591: 101 I. C. 89.

Where the trial Court decided all the issues raised in a case except one which related to the amount of compensation to which the plaintiff was entitled and the appellate Court decided the issues which were decided against the plaintiff in his favour, and remanded the case for determining the amount of compensation to which the plaintiff was entitled allowing the parties to adduce fresh evidence, the proper order of the appellate Court should have been an order under r. 25 keeping the appeal on its own file and not an order under r. 23.—*Bepin Behary v. Midnapur Zemindary Co.*, 110 I. C. 444.

Where the trial Court framed seven issues but decided only the first two which went to the very root of the case and dismissed the suit and the appellate Court remanded the case without deciding any of the issues and it could not be said that it was essential to the right decision of the suit upon the merits that the other issues should be decided, it was held that the order of remand was wrong as neither r. 23 nor r. 25 applied.—*Umar Din v. Umar Hayat*, A. I. R. 1927 Lah. 886: 103 I. C. 119.

Where the Court has disposed of the whole suit as it stood before it, to say that it has disposed of the suit on a preliminary point merely because it has not dealt with the further issues which might have arisen if the suit had been framed otherwise originally or if an amendment of the pleadings had been allowed later in the history of the suit, appears to be almost an abuse of language.—*Vaithilingam v. Kandaswami*, 132 I. C. 311: A. I. R. 1931 Mad. 1: 60 M. L. J. 713: 33 L. W. 210.

Where the first Court has framed an issue and tried it, the Court of appeal must then decide it for itself, either on such evidence as is on the record or on additional evidence, if such be considered necessary; but it cannot set aside the first Court's judgment and send the matter back for re-trial.—*Mujibar Rahman v. Isul Surati*, 56 C. 15: 32 C. W. N. 367: 49 C. L. J. 1: 114 I. C. 409: A. I. R. 1928 Cal. 546. See also *Firm of Rochiram v. Firm of Kalachand*, 116 I. C. 586: A. I. R. 1929 Sind 159.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed, the appellate Court cannot remand the case under this rule.—*Ramesh Singh v. Sheodin Singh*, 12 A. 510 (F. B.) (2 B. L. R. S. N. 13, 12 C. 45, 7 A. 345, 8 A. 519, 9 A. 447, 10 A. 97, 11 A. 35, 333 and 488, relied on); *Hafiz Abdul Rahim v. Raja Hari Raj*, 22 A. 405; *Muzhar Hossein v. Bodha Bibi*, 22 I. A. 1: 17 A. 113 (P. C.); *Mallikarjuna v. Pathaneni*, 19 M. 479; *Peri Chirila Suryanarayana v. Ganapathy*, 30 M. L. T. 314; *Nurul Guni v. Kazamaini*, 66 I. C. 922; *Radha v. Kamal*, 35 C. L. J. 345: 70 I. C. 547: A. I. R. 1922 Cal. 456; *Injad Ali v. Mohini*, 27 C. W. N. 1025: 80 I. C. 623: A. I. R. 1924 Cal. 148; *Lakhan Singh v. Babu Ram*, 23 A. L. J. 980: 88 I. C. 1021: A. I. R. 1926 All. 65; *Ganpat v. Raj Kumar*, 1 P. 639: 67 I. C. 494: A. I. R. 1922 Pat. 575; *Maya Ram v. Tulsi Ram*, 91 I. C. 351: A. I. R. 1926 Lah. 184; *Banka Behari v. Birendra*, 55 C. 219: 47 C. L. J. 69; *Sahibji v. Mohammad Sarwar Khan*, 106 I. C. 842: A. I. R. 1928 Lah. 116: 9 L. L. J. 543; *Kalu v. Narayan*, 29 Bom. L. R. 56: 100 I. C. 578: A. I. R. 1927 Bom. 111; *Chaudhary Chandrika v. Mithu Rai*, 6 P. 380: 103 I. C. 722: A. I. R. 1927 Pat. 296.

In a suit by a tenant for ejectment and damages against a trespasser, the first Court dismissed the suit on the ground that the plaintiff had failed to establish his tenancy right, without deciding the issue as to damages. The lower appellate Court found in his favour as regards his title, and remanded the case under this rule. Held, that the order of remand was wrong, as there was no occasion for remanding the whole case, in as much as it had not been decided upon a preliminary point. It ought to have referred an issue as to damages under S. 566, C. P. Code, 1882 (Or. XLI, r. 25).—*Hukam Singh v. Raghubir*, 27 A. 700: (1905) A. W. N. 157.

Where a suit against a Railway Company for compensation for non-delivery of a consignment was dismissed on a preliminary point that there was no "wilful neglect" on the part of the Railway Company and the issue as to the question of damages was left undecided, and on appeal the lower appellate Court held that the "wilful neglect" was proved and remanded the case, it was held that the remand was under this rule and not under

S. 151.—*E. I. Railway Company v. Piyare Lal*, 10 L. 360; 112 I. C. 736; A. I. R. 1928 Lah. 774; 30 P. L. R. 541.

Where a remand order is accompanied by an order for refund of court-fee, the remand should be considered to be under Or. XLI, r. 23.—*Sahibji v. Mohammad Sarwar Khan*, 106 I. C. 842; A. I. R. 1928 Lah. 116; 9 L. L. J. 543. Where a remand is ostensibly under Or. XLI, r. 23, the mere omission of the Judge to mention while ordering refund of court-fee does not make it a remand under any other provision of the Code.—*Gokal v. Lila Ram*, 118 I. C. 393; A. I. R. 1929 Lah. 175.

Where a subordinate Court has not decided a case on a preliminary point, but has dealt with questions arising on the merits of the case, no order of remand can be made by the appellate Court under this rule; but if the appellate Court is of opinion that there should be a finding upon any particular issue, or further evidence should be taken on any such issue, it may make an order of remand under Or. XLI, r. 25.—*Rakhi Mahanta v. Puddo Bauri*, 9 C. W. N. 54. See also *Ambica Churn v. Kala Chandra*, 10 C. W. N. 422.

Where a District Munsif without entering into the merits of the case, dismissed a suit on the ground that the plaintiffs had no cause of action and on appeal the appellate Court reversed his decree and remanded the case, held, that the suit had been disposed of upon a preliminary point within the meaning of this rule and that the remand was right.—*Kanalammal v. Rangachariar*, 20 M. 25.

Where several issues are raised in a suit one of which is that of undue influence, and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues, the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule.—*Mahant Rachu v. Mahant Raghunath*, 2 P. L. J. 398.

Where the trial Court disposed of a suit on three preliminary points, the decision on a ..... ended in the dismissal of t ..... g that all the three points ..... d the suit without reversing the findings but reversing only the decree, it was held that the order of the lower appellate Court was under Or. XLI, r. 23 but in as much as there was no further evidence required in the case, the decree of the trial Court must not have been reversed, but if necessary, fresh evidence might have been admitted under r. 27.—*Srinivasa v. Srinivasa*, 110 I. C. 692; A. I. R. 1928 Mad. 1200

The defendant in a suit on the day fixed for hearing applied for an application was refused and the case ..... versed the decree and remanded On appeal to the High Court— ..... aving been tried on the he case under this rule, 569, C. P. Code, 1882 17 B. 733.

The C. P. Code does not make any provision for an order of remand where all the issues have been settled and tried.—*Injad Ali v. Mohini*, 27

C. W. N. 1025; 80 I. C. 623; A. I. R. 1924 Cal. 148; *Sheoji v. Bamanachari*, 119 I. C. 2; *Sultani v. Munna Lal*, 123 I. C. 542; A. I. R. 1930 Lah. 181. A remand order in such a case should be taken to be under r. 25 of Or. XLI or S. 151 and not under this rule.—*Ram Payara v. Sant Ram*, 33 P. L. R. 487.

Where the first Court had framed all the necessary issues and decided all those issues, and the lower appellate Court reversing the decision on one of the issues remanded the case for trial: *held*, that order of remand was not only irregular but illegal.—*Manager of the Court of Wards v. Ramasami Reddi*, 28 M. 437; 15 M. L. J. 236 (19 M. 479, referred to). See also *Sadak Ali v. Safar Ali*, 56 I. C. 984; *Malayandi v. Bomman*, 17 L. W. 159; 71 I. C. 204; A. I. R. 1923 Mad. 331; and *Munisami Naiker v. Munisami Naiker*, (1923) M. W. N. 11.

Where a District Court reversed the District Munsif's decree, and remanded the case for revised finding on the merits: *held*, that this procedure was *ultra vires* and illegal.—*Mallikarjuna v. Pathaneni*, 19 M. 479.

Where the question whether the plaintiff's alleged right was extinguished by an user for more than 12 years before suit was tried and decided by the trial Court, but the Subordinate Judge was of opinion that the mode in which the question was decided by the trial Court was erroneous and he accordingly remanded the case for a re-trial of the question having regard to the observations made by him in his judgment: *held* that the order of remand was wrong, the Subordinate Judge should have decided the question himself and if he thought further evidence was necessary he might have acted under the provisions of rr. 27 and 28.—*Sashi Mukhi v. Abinash*, A. I. R. 1922 Cal. 279.

An order remanding a case is not legal where all the questions raised between the parties and on which they went to trial were decided and the questions so raised were purely questions of law.—*Arumugam Chetti v. Raja Jagaveera Rama*, 28 M. 444

If from the plaintiff's own case or from his pleadings or from the admitted and proved facts it could be seen that the plaintiff's suit was time-barred, it would be the duty of the Court of second appeal to entertain even for the first time the question of limitation; but it would be in ordinary circumstances entirely wrong upon a suggestion that further investigation would disclose facts which would show that the plaintiff is time-barred, to grant a remand upon this ground in second appeal.—*Baikuntha v. Sheikh Azidulla*, 33 C. W. N. 778; A. I. R. 1928 Cal. 870.

An appellate Court cannot remand a case for making a person defendant in the suit, and to try the question of title between him and the plaintiff. The right of framing new issues arises where the issues framed are insufficient to dispose of the matters raised in the plaint.—*Bhoobun Dass v. Bilash Mony*, 1 C. L. R. 415 (9 B. L. R. 107; 12 W. R. 404 distinguished).

Where a lower Court rejected an application of an intervenor, the appellate Court cannot remand the case with directions to make the intervenor a party.—*Khondkar Kefaeoolah v. Mahomed Kabel*, 9 W. R. 345. See also *Bulaki Singh v. Jaikishen*, 7 N. W. P. 203.

An appellate Court cannot remand a case under this rule for addition of necessary parties. In such case the proper course for the appellate Court is to join the parties, and, if necessary, to refer issues to the Court of the first instance for trial under S. 566, C. P. Code, 1882 (Or. XLI, r. 25).—*Ganesh Bhikaji v. Bhikaji Krishna*, 10 B. 398. But see *Mihin Lal v. Imtiaz Ali*, 18 A. 332.

It is competent for an appellate Court to remand a case when the Court of first instance records evidence on all the issues, and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the other issues.—*Ramachandra Joishi v. Hazi Kassim*, 16 M. 207 (followed in *Mata Din v. Jamna Das*, 27 A. 691: 2 A. L. J. 685; *Meghan Dube v. Pran Singh*, 30 A. 63: 5 A. L. J. 14; *Salim Sheikh v. Nazir Khan*, 8 C. L. J. 159: 12 C. W. N. 167-n.). See also *Kamta v. Parbhu*, 39 A. 165, *Perumbra Nayar v. Subrahmanian*, 23 M. 445; *Habib Bakhsh v. Baldeo Prasad*, 23 A. 167; *Radha Kishen v. The Collector of Jaunpur*, 28 I. A. 28: 23 A. 220 (P. C.): 5 C. W. N. 153: 11 M. L. J. 65: 3 Bom. L. R. 78 (affirming 20 A. 195).

Where the first Court heard the entire suit, and found all issues in favour of the plaintiff except one, namely, whether the suit was maintainable having regard to the provisions of Or. XXI, r. 22, and dismissed the suit on the finding that the suit was not maintainable. Held, that the suit was disposed of on a preliminary point within the meaning of this rule.—*Bhadai v. Shaikh Manowar*, 4 P. L. J. 645.

Where the first Court dismissed a suit on the issue of title without deciding the issue of limitation and the lower appellate Court decreed the suit reversing the finding on the issue of title, without recording any finding on the issue of limitation. Held, that the case must be remanded to the lower appellate Court for findings on the remaining issues.—*Kailash Chandra v. Kunja Behari*, 4 C. L. J. 86.

Where no preliminary point has been wrongly decided by the Court of first instance, and no evidence has been excluded, and the appellate Court considers the issues nevertheless, to have been defective or insufficient, it is the duty of the latter not to remand the case, but to resettle the issues and to determine the case itself.—*Futtehollah v. Oomdanissa*, 14 W. R. 69. But see *Guru Prasad v. Ras Mohun*, 1 C. L. R. 431. See also *Habibullah v. Lalta Prasad*, 34 A. 612.

An application under S. 103, C. P. Code, 1882 (Or. IX, r. 13), was rejected on the ground that there was neither fraud nor suppression of summons. The District Judge remanded the case for trial on the merits. Held, that the case having been tried on the merits, the District Judge had no jurisdiction to remand the case.—*Sonaulla v. Beakul*, 7 C. L. J. 379.

Where the finding of the lower appellate Court on the existence of a custom or usage was mainly based upon irrelevant matters, the High Court in special appeal remanded the case for re-trial, holding that the appeal was not properly tried.—*Palakdhari Rai v. Manners*, 23 C. 179. See also *Womes Chunder v. Chundee Churn*, 7 C. 293.

The lower appellate Court not having decided material issues and having based its decree on a document not recorded in the case, the decree

was reversed and the case remanded for a fresh decision on the merits.—*Nichhabhai Pragji v. Isse Khan*, 2 B. H. C. R. 297; *Dalpatsingh v. Nanabhai*, 2 B. H. C. R. 306; *Bai Vijor v. Fakirbhai*, 2 B. H. C. R. 317; *Chandrabhagabai v. Kasinath*, 2 B. H. C. R. 323; *Balaji Vishvanath v. Dharma*, 2 B. H. C. R. 363; *Luchmee Ram v. Mahani Ram*, 1 Agra 10; *Gooljehar v. Bunno*, 1 Agra 252; *Sajan v. Roopram*, 2 Agra 61; *Shiam Lall v. Narain Dass*, 2 Agra 106; *Shadee Ram v. Surma*, 2 Agra 110; *Lutchman v. Jogal Kishore*, 3 Agra 99; *Muhammad Valad v. Ibrahim Valad*, 3 B. H. C. R. 160; *Pravati v. Bhiku*, 4 B. H. O. R. A. O. 25; *Ajuram Manram v. Kusaji*, 4 Bom. H. C. R. 43; *Goluck Chunder v. Anunt Kishore*, 25 W. R. 38.

The lower appellate Court has no power to remand a case, which has come before it on appeal, to the Court of first instance for a second trial, except where the first Court has decided the case upon a preliminary issue in such a way as to cause an absence of material evidence bearing upon issues on the merits between the parties.—*Lala Shooobh Narain v. Nursingh Narain*, 20 W. R. 148.

An appellate Court is not justified in remanding a case, merely because the lower Court has disposed of it on a preliminary point, unless such point has been so disposed of as to exclude evidence of fact which appears to the appellate Court essential to the rights of the parties.—*Joog Maya v. Ram Ohunder*, 10 W. R. 378. See also *Muniappah v. Iyasamy*, 5 M. H. C. R. 313.

On an application under S. 176 of the C. P. Code asking the Munsif to remand the case, the Court held that the application was not within the jurisdiction under Or. XLI of the C. P. Code to remand the case, because such applications originating in Civil Courts must be dealt with according to the provisions of the C. P. Code.—*Surendra v. Sushil*, 59 C. 68: 35 C. W. N. 775: 134 I. C. 1063: A. I. R. 1931 Cal. 604.

The Judge, after disposing of the case on the only point on which the Munsif had decided it, viz., whether there was a cause of action, and having satisfied himself that there was not sufficient evidence on the record to enable him to pass a proper decision on the merits was held clearly right in remanding the case to the Munsif.—*Brommo Moyee v. Koomodinee Kant*, 17 W. R. 466.

When the decision of a lower Court is not on a preliminary point, the lower appellate Court cannot remand a suit to that Court, with directions to take further evidence and to re-try the case, but the appeal must be kept pending on the file, and the record must be sent to the lower Court, with orders to take the necessary evidence.—*Kallee Sunkur v. Kishto Doolal*, W. R. (1864) 296.

Where a suit instituted in the Revenue Court is dismissed by the Court of first instance, on the ground that it should have been instituted in the Civil Court, and the appellate Court affirms the decisions of the first Court, the appellate Court should, under S. 208 of the N. W. P. Rent Act, 1881, remand the case to the Civil Court competent to entertain it for disposal on the merits.—*Ahmaduddin v. Majlis Rai*, 5 A. 438 (F. B.). But see *Girwar Singh v. Sita Ram*, 11 A. 31.



*Held*, that an appellate Court is not empowered by the Civil Procedure Code to order a plaintiff to amend a case under this rule for the purpose of such amendment.—*Farzand Ali v. Yusuf Ali*, 2 A. 669. But see *Lingammal v. Chinna*, 6 M. 239, where it has been held that when a plea of misjoinder has been allowed and the suit decided and an appeal brought, the appellate Court should dispose of the suit in the mode in which the lower Court might have disposed of it, by returning the plaint for amendment.

Where the evidence is accepted by an appellate Court as sufficient to warrant a decree, and the case is only remanded for a defect of parties, it is justified, when the case is returned by the first Court, in respecting the former judgment and looking upon the evidence as *prima facie* good and sufficient.—*Wise v. Ishan Chunder*, 14 W. R. 380.

This rule authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point.—*Banwari Lal v. Samman Lal*, 11 A. 488 (followed in *Makesh Prasad v. Ranjor Singh*, 27 A. 163 (165)). See also *Vemi v. Nallappa*, 11 L. W. 611; *Jawahir v. Fatch Mahton*, 97 I. C. 1: A. I. R. 1926 Pat. 514.

A case might not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below, and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it.—*Ram Prasad v. Abdul Karim*, 9 A. 513.

A Sub-Judge decided a case on the grounds of *res judicata* and limitation. On appeal the Judge upheld the decision on the point of *res judicata* without deciding the point of limitation. On second appeal, the High Court reversed the Judge's decision on the point of *res judicata*, and remanded the case for trial on the merits. On receipt of the order of the High Court the Judge reversed the decision of the Sub-Judge without giving any decision on the point of limitation, and remanded the case. On appeal to the High Court, *held* that the Judge's order of remand was unauthorized under this rule.—*Raisingji v. Balvantrao*, 11 B. 663.

Where the lower Court had decided a case on the merits, and the appellate Court did not find that there had been any omission to try any issue or determine any question essential to the decision of the case on the merits, or that further evidence was necessary to enable it to determine any such issue or question: *Held*, the appellate Court was in error in remanding the case for a fresh trial.—*Makesh Chandra v. Madhab Chandra*, 2 B. L. R. S. N. xiii: 10 W. R. 388.

**Inherent power of remand**—Remand on the grounds of error, defect or irregularity.—Under Or. XLI, r. 23 no order of remand can be made except when the suit has been disposed of on a *preliminary point*. But it sometimes happens that a remand is necessary in cases where the lower Court has committed any error, omission or irregularity, by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit and the party complaining of such error, omission or irregularity has been materially prejudiced thereby. Section 564 of the old Code, which prohibited the appellate Court from remanding a case except

as provided by S. 663 (Or. XLI, r. 23), having now been omitted as unduly restrictive in its provisions, the appellate Court is free under S. 151 to make an order of remand though the case may not fall either under this rule or r. 25.—*Narottam v. Mohanlal*, 37 B. 289, 293, *Jambulayya v. Rajamma*, 36 M. 493; *Zohra Bibi v. Zobeda*, 12 C. L. J. 368; *Ghuznavi v. The Allahabad Bank*, 44 C. 929 (F. B.); 21 C. W. N. 877; 26 C. L. J. 49; 41 I. C. 598; *Raghunandan v. Jadunandan*, 3 P. L. J. 253, E; *Brij Indar v. Kanshi Ram*, 44 I. A. 218, 220; 45 C. 94 (P. C.); 22 C. W. N. 169; 19 Bom. L. R. 866; 15 A. L. J. 777; 33 M. L. J. 486; 42 I. C. 43; *Bhairab v. Kali*, 37 C. L. J. 491; 74 I. C. 1038; A. I. R. 1923 Cal. 606, *Anthappa Chetty v. Ramanathan*, 37 M. L. J. 536; *Subba v. Krishnamachari*, 45 M. 449; 68 I. C. 869; A. I. R. 1922 Mad. 112; *Umri v. Shah Mohammad*, 5 L. L. J. 269; 74 I. C. 497; A. I. R. 1924 Lah. 36; *Bhup Singh v. Prem Singh*, 5 L. L. J. 384; 76 I. C. 496; A. I. R. 1924 Lah. 362; *Sashi Mukhi v. Abinash*, A. I. R. 1923 Cal. 279; *Atul Chandra v. Sheikh Kobadali*, 64 I. C. 436; *Bisai Nath v. Tara Nath*, 72 I. C. 588; A. I. R. 1923 Cal. 385; *Misri Sahu v. Bishu*, 29 C. L. J. 419; 52 I. C. 985; *Gnanendra v. Prafulla-nanda*, 32 C. W. N. 101; 106 I. C. 542; A. I. R. 1928 Cal. 812; *Sobharam v. Ram Prashad*, 117 I. C. 280; A. I. R. 1929 Nag. 63; *Parma Nand v. Bashir Ahmed*, 122 I. C. 473; A. I. R. 1930 Lah. 224; 11 L. L. J. 507; 31 P. L. R. 50. But the power of remanding a case when Or. XLI, r. 23 does not apply, should be most sparingly used by the Court of first appeal.—*Ghuznavi v. The Allahabad Bank*, 44 C. 929 (F. B.); 21 C. W. N. 877; 26 C. L. J. 49; 41 I. C. 698; *Mani v. Ramtaran*, 43 C. 148, *Banka Behari v. Birendra*, 65 C. 219; 47 C. L. J. 69; *Sobharam v. Ram Prasad*, A. I. R. 1929 Nag. 63; 117 I. C. 280. And this inherent power should not be exercised where the ends of justice would be sufficiently served by taking additional evidence under Or. XLI, r. 27.—*Bansi Lal v. Jhamman Shah*, 122 I. C. 495; A. I. R. 1930 Lah. 441. See *Mallappa v. Alagiri*, 133 I. C. 205; A. I. R. 1931 Mad. 791; 60 M. L. J. 476. (1931) M. W. N. 710. The Allahabad High Court treats the question as unsettled but puts a wide construction on r. 23.—*Gokul Prasad v. Ram Kumar*, 44 A. 176; 64 I. C. 878; A. I. R. 1922 All. 254.

*Ex parte* decision in Court of first instance after hearing plaintiff's

Court has inherent power, in such a case, not only to reverse the decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case.—*Perumbra Nayar v. Subrahmanian*, 23 M. 445.

When a suit is decided *ex parte*, an appellate Court to which an appeal is preferred under S. 540, C. P. Code, 1892 (S. 96), has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing.—*Sadhu Krishna v. Kuppan*, 30 M. 54 (F. B.); 16 M. L. J. 479 (23 M. 445 followed; 23 C. 738, 17 B. 733, and 23 M. 260 dissented from); *K. V. Sundara Rama v. Sathianathan*, A. I. R. 1927 Mad. 1190.

It is competent to the appellate Court on an appeal to reverse a decree and remand the suit to the trial Court quite apart from the provisions of Or. XLI, r. 23, if there has been a defective trial, *e. g.*, a refusal to grant an

adjournment.—*Jethalal v. Varjlal*, 63 I. C. 478 : 23 Bom. L. R. 769 (30 M. 54 followed); a refusal to admit a document.—*Deroram Pondi v. Goparaju*, 112 I. C. 1 : A. I. R. 1928 Mad. 991.

It is competent to an appellate Court to remand a case under this rule where the Court of first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided.—*Mata Din v. Jamna Das*, 27 A. 691 : 2 A. L. J. 685 (16 M. 207 followed; followed in *Meghan v. Pran*, 30 A. 63 : 5 A. L. J. 14). See also *Salim v. Nazir*, 8 C. L. J. 159.

Where the trial Court has disposed of all the issues before it, the appellate Court may frame additional issues and remand the case.—*Suppiah v. Muthia*, 112 I. C. 710 : A. I. R. 1928 Mad. 984 (following 48 M. 713 and (1926) M. W. N. 48; and dissenting from A. I. R. 1923 Mad. 227 and A. I. R. 1923 Mad. 331).

Section 564, C. P. Code, 1882, must be read subject to the other provisions of the Code, for example, those contained in Ss. 27, 32 and 53 of the C. P. Code, 1882. An appellate Court has power to make an order under any of those sections and in order to give effect to the provisions of the section which is applicable, it is necessary that it should in certain cases send back the case to the Court of the first instance. Under such circumstances S. 564, C. P. Code, 1882, will not preclude an appellate Court from remitting a case to the Court of first instance.—*Habib Bakhsh v. Baldeo Prasad*, 23 A. 167 (12 A. 510; 17 A. 29; 18 A. 131, 332 and 396; 10 B. 398; and 19 M. 157 referred to).

The plaintiffs in a suit produced both oral and documentary evidence in support of their claim, but the Court being satisfied with the documentary evidence and without recording the evidence of the witnesses tendered by them passed a decree in their favour. On appeal by the defendants, the appellate Court, without taking any fresh evidence, reversed the decree. On appeal by the plaintiffs to the High Court, it was held that though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was, notwithstanding S. 564, C. P. Code, 1882, warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below, and in directing the Court of first instance to re-try the case admitting all admissible evidence which had been previously tendered to the first Court.—*Durga Dihal v. Anoraji*, 17 A. 29.

Held, that S. 562 of the C. P. Code, 1882 (this rule), applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the present case evidence had been excluded in this broad sense, S. 562 (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues.—*Muhammad Allahdad v. Muhammad Ismail*, 10 A. 289.

When, in second appeal, it appears that the lower appellate Court does not substantially comply with the provisions of S. 574, C. P. Code, 1882 :

(r. 31 of Or. XLI), the decree and remanding the case disposed of according to law.—*Santishwar v. Lakhikanta*, 18 C. W. N. 177. (F. B.): 18 M. L. J. 34 (22 M. 12 not followed and 20 M. 496, 25 C. 97, 17 B. 423, 19 B. 551, referred to). See also *Santishwar v. Lakhikanta*, 18 C. W. N. 177.

An appellate Court can remand a case a second time on account of error, defect, or irregularity of procedure in passing a decree or order, provided the error, defect or irregularity be such as to affect the merits of the case or the jurisdiction of the Court. When a suit has been regularly heard and determined, and on appeal the decree is reversed, the appellate Court has the discretionary power to remand the case only if the decree should have been upon a preliminary point, and have the effect of excluding the consideration of evidence essential to the rights of the parties.—*Munappah Naidu v. Iyasamy*, 5 M. H. C. R. 313.

When an appellate Court is of opinion that a person, not a party to the suit, should be a party to the record, its proper course is to remand the case to the first Court with directions to bring on the particular person as a defendant or as a plaintiff, if he consents, and give him opportunity to file his written statement and to produce his evidence.—*Mihir Lal v. Imtiaz Ali*, 18 A. 332. But see *Ganesh Bhikaji v. Bhikaji Krishna*, 10 B. 393.

Where a case had been decided under the provisions of Ss. 10 and 11 of the Oaths Act (X of 1873) with reference to the depositions of a person appointed by agreement of parties as referee, and where, on appeal, it was found that the said depositions did not fully cover the questions in issue between the parties. Held, that the case should be remanded to the lower Court for disposal according to the usual procedure.—*Mahabir Prasad v. Mahadeo Das*, 13 A. 386.

**Improper or erroneous order of remand.**—A decree in a suit having been passed on the merits by the Court of first instance, the Court of Appeal, being of opinion that an issue not tried by the former Court ought to have been tried, reversed the decree, and under this rule remanded the case for trial upon the issue. Held, that the order reversing the decree and remanding the case for trial of the issue was improper, and that the proper course for the appellate Court should have been to follow the procedure as laid down by Ss. 566 and 567 of the Code, 1882 (Or. XLI, rr. 25 and 26). If a remand was ordered in a case in which it ought not to have so ordered, both the order of remand and all the proceedings subsequent thereto are void and illegal.—*Rameshwar v. Sheodan*, 12 A. 510 (F. B.); *Mokund Lal v. Hurbullubh*, 12 C. L. R. 136.

Where a lower appellate Court instead of remanding a suit under S. 566, C. P. Code, 1882 (Or. XLI, r. 25), as it ought to have done, remanded it under this rule after setting aside the decree of the first Court, and where no appeal was preferred against this erroneous remand order, held, that having regard to the provisions of S. 99, the remand order and the subsequent proceedings were not null and void, as by the remand there was no error affecting the jurisdiction of the Court as to the merits of the case.—*Mohesh Chandra v. Anna*, 11 C. W. N. 509 (12 A. 510 dissented from).

380 and in *Durga Kinkar v. Konchai Ronza*, 5 C. L. J. 71. See also *Debendra Nath v. Prasanna Kumar*, 5 C. L. J. 323. But see *Palani v. Rangiadoss*, 32 M. 83, where it has been held that an erroneous order of remand is not merely irregular but illegal and cannot be validated by S. 578, C. P. Code, 1892 (S. 99). See also *Baikuntha Nath v. Nawab Salimulla*, 12 C. W. N. 590: 6 C. L. J. 547, where it has been further held that proceedings subsequent to an illegal order of remand might be valid under certain circumstances.

Whether upon a remand order being wrongly made, the decree and all the proceedings taken under that order, are *null* and *void*, depends upon the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the Court below fall with it. It would be turning the law into absurdity and would amount to a denial of justice if a proper trial, which has taken place under a remand order made by the appellate Court and in obedience to such remand order, be now held to be invalid, whereas as the result of the High Courts' own decision that remand order turned out to have been perfectly justified.—*Rajkahi v. Gopi Nath*, 44 A. 211: 20 A. L. J. 44.

Where the order of remand was found to be invalid as made without jurisdiction, held, that all proceedings taken by the Court of first instance, after the remand and pending the hearing of the appeal against the remand order, were *null* and *void*, inasmuch as the jurisdiction of that Court to hear the case, upon remand depended upon the validity of the remand order. An appeal, therefore, lay from the order of remand notwithstanding that the Court of first instance had subsequently made what purported to be a final decree in the case.—*Jatinga Valley Tea Co. v. Chera Tea Co.*, 12 C. 45. But see *Madhu Sudan v. Kamini Kanta*, 9 C. W. N. 895: 2 C. L. J. 35n.: 32 C. 1023, dissented from in *Woman Kunwari v. Jarbandhan*, 30 A. 479 (F. B.) (29 A. 659 overruled).

Where an order of remand is illegal no consent of parties can make it valid.—*The Manager of the Court of Wards v. Ramasami Reddi*, 28 M. 437: 15 M. L. J. 236 (19 M. 478). See also *Baikuntha Nath v. Nawab Salimulla*, 12 C. W. N. 590. M. 83: 4 M. L. J. 479, it has been held that an order of remand cannot be validated by consent or waiver, neither the omission of the plaintiff to appeal nor his acquiescing in the trial on remand amounts to such consent or waiver.

**Power of High Court to remand.**—Where an issue has been raised and determined by the first Court and the appellate Court on the evidence adduced, it is not within the competence of the High Court in second appeal to remand the case for re-hearing upon that very issue.—*Gunpat Rao v. Raj Kumar*, 67 I. C. 494.

Where the plaintiff has not come into Court with a definite statement of facts necessary for him to succeed and with all his evidence, he cannot in second appeal ask for a remand so as to give him an opportunity to supplement his case in the Court below.—*Jatindra Mohan v. Bijoy Chand Mahatab*, 71 I. C. 234.

Where the lower appellate Court did not treat certain documents exactly in accordance with the principles of law, and also wrongly cast the onus of proof but it appeared that the conclusion arrived at could be supported on evidence, the High Court in second appeal did not think it desirable or necessary to remand the case for adjudication on the question of fact but decided it itself.—*Rajani v. Bashiram*, 49 C. L. J. 532 : A. I. R. 1929 Cal. 636 : 121 I. C. 409.

If from the plaintiff's own case or from his pleadings or from the admitted or proved facts it could be seen that the plaintiff's suit was time-barred, it would be the duty of the Court at second appeal to entertain even for the first time the question of limitation; but it would be in ordinary circumstances entirely wrong upon a suggestion that further investigation would disclose facts which would show that the plaintiff is time-barred, to grant a remand upon this ground in second appeal.—*Baikuntha v. Sheikh Azidulla*, 32 C. W. N. 778 : A. I. R. 1923 Cal. 870.

**Power of the High Court to go into the merits on appeal from a remand order.**—The Court of first instance dismissed a suit as barred by limitation. In appeal that decision was reversed, and the case was remanded under this rule. Against the order of remand the defendant appealed to the High Court under Or. XLIII, r. 1, Cl. (u). It was contended by the plaintiff that the High Court had no power to decide the point of limitation but could only consider whether the order of remand satisfied the requirements of this rule. *Held* by the Full Bench, that in an appeal against such an order of remand, the power of the High Court is not confined to the question whether that order satisfies the requirements of this rule, but may also determine the correctness of the lower appellate Court's decision on the preliminary point on which the Court of first instance disposed of the case.—*Badam v. Inrat*, 3 A. 675 (F. B.), *Bhanu Bala v. Bapaji Bapuji*, 14 B. 14 (F. B.) (12 B. 589 referred to; 3 A. 675 followed). See also *Chinnasami v. Karuppa*, 21 M. 234; *Abraham Khan v. Fairunnessa Bibi*, 17 C. 168; *Loki Mahto v. Aghore Ajai Lal*, 5 C. 144 : 4 C. L. R. 465; *Hasan Ali v. Siraj Husain*, 16 A. 252; *Sankaran v. Raman Kutti*, 20 M. 152. But see *Sohan Lal v. Azizunnissa*, 7 A. 136; *Noimollah Pramanik v. Grish Narain*, 8 C. 674.

**Decision on question of law already decided by order of remand whether can be re-opened.**—Where an appellate Court remands to the Court below, it is not open to the appellate Court to re-open a question of law already decided by the order of remand when the case again comes on appeal from the final decree after the remand.—*Vastad Mushkir Saib v. Karnam Chowdappa*, 40 M. L. J. 528 : 14 L. W. 236. See also *Gopalrao v. Nemichand*, 61 I. C. 575; *Janki Shah v. Mohammad Abbas*, 70 I. C. 983.

Where the High Court in second appeal differs from the lower Court on an issue of law and remands the case to the Court below, the order of the High Court is binding upon that Court and cannot be questioned in an appeal from the final decree passed after remand.—*Rai Brij Raj Krishna v. Chathu Singh*, 4 P. L. T. 35.

**Powers and duties of succeeding Judge with regard to remand case.**—Disposal of suit by lower Court on preliminary point.—Reversal by appellate Court of such decree on each point and irregular remand of case under this rule for trial of certain issue. *Held*, that the succeeding

Judge or the appellate Court cannot re-try and decide such preliminary point.—*Suraj Din v. Chatter*, 3 A. 755.

Where a case is remanded to a particular Judge merely to record the reasons for his finding, his successor, if the deciding Judge has left the case, when he re-hears the whole appeal *de novo*.—*W. R. 124; Lalla Bhojro Lal v. Lalla*

When a case is remanded by the High Court for re-trial by the Sub-Court, the Sub-Judge can form his own conclusions irrespective of any finding arrived at by his predecessor at the original trial, in respect of matters which were not touched by the High Court.—*Laks*  
7 Luck. 454; 137 I. C. 102; 9 O. W. N. 60:

Where a case is remanded to the lower Court to record the reasons for its judgment, if the Judge who passed the decree is absent, the superior Court should be informed of it by his successor. Under such circumstances his successor has no jurisdiction. Application should be made to the Bench which granted the order of remand for an order for the present Judge to re-try the case *de novo*.—*Manik Selt v. Khetter Mishan*, 1 Ind. Jur. N. S. 101.

If the Judge of the Court to which the case is remanded for not complying with the requirements of S. 574, C. P. Code, 1882 (Or. XLI, r. 31), is the Judge who heard the appeal in the first instance, he is not bound to re-hear the appeal if he considers that the case might be properly disposed of without so doing. In such a case, his writing of judgment satisfying the requirements of that rule will be a sufficient compliance with the order to dispose of the case according to law. But when the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, as also in cases where the Judge, though the same, considers such a course necessary for a proper disposal of the case, a rehearing is necessary for a disposal of the case according to law.—*Saravana Pillai v. Sessa Reddi*, 31 M. 469 (F. B.); 18 M. L. J. 34.

Dismissal of suit by Munsif on preliminary point.—Remand by Sub-Judge on appeal.—Fresh appeal before second Sub-Judge, who disagrees with the finding of the former Subordinate Judge. Where there are two Sub-Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers.—*Kharag Prasad v. Durdhari Rai*, 24 A. 348 (3 A. 755 and 6 A. 269 referred to).

Where a single Judge of the Court remands the case, he may remand it for fresh decision to the lower Court, or he may remand it for fresh decision to the lower Court. High Court to question its own earlier judgment remanding the case to the lower Court.—*Munshi Lal v. Ramasis*, 3 P. L. T. 343; 65 I. C. 175.

An order of remand by a Subordinate Judge is final so far as the purpose of the remand goes, and cannot be set aside by his successor.—*Lulcet Pandey v. Bijnath*, 14 W. R. 285.

A Sub-Judge on appeal, having framed an issue, remanded the case under this rule to the first Court for trial thereof, but instead of directing that the finding should be returned to his own Court, he directed the

Munsif to give the plaintiff a chance for him to might arrive. The Munsif has taken up on appeal to the Additional Judge. The Additional Judge was simply to review the decision of the Court below on the ground that he has no power to go behind the order of the Court. *Bodun Burooah v. Abdool Gunny*, 13 W. R. 303.

Whether  
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But this rule contemplates a remand back to the Court of the suit, and to no other Court—*Bai Shri Majuro*, 13 W. R. 303.

Procedure after remand.—When a case is remanded, the date should be fixed for the re-hearing, giving the parties time to appear and take measures to carry on the suit.—*Haradkum*, 14 W. R. 401.

After a case is remanded on appeal, reasonable time should be given to the parties to appear and conduct their case; and if they fail to do so before the lower Court, the case should be dismissed for default.—*Mohun*, 17 W. R. 70.

Where a District Judge, after transferring a case from the District Judge decided it himself, and on appeal the High Court remanded the suit under this rule to the District Court. Held, that after the remand order, the District Judge had no power to transfer the case to the Sub-Judge, but was bound to try it himself. Section 25 of the O. P. Code, 1882, has no application to a case remanded under this rule.—*Sita Ram v. Nauri Dulaiya*, 21 A. 230. But see the amended S. 24 of the present Code.

Effect of order of remand.—An order of remand to a lower appellate Court implies a reversal of the first judgment of that Court.—*Kebul Kishan v. Ambala*, 7 W. R. 326. But it is not conclusive as to the remarks made by the appellate Court regarding a matter about which there is no evidence and which the lower Court is asked specifically to consider.—*Lingo Raoji v. Secretary of State*, 111 I. C. 278; A. I. R. 1928 Bom. 201; 30 Bom. L. R. 570.

The effect of an order of remand for a new trial is entirely to nullify the first decision, and, to re-open the whole case.—*Tarinee Kant v. Koonji Beharee*, 12 W. R. 112. See also *Gudadhur v. Shushes Monce*, 21 W. R. 7.

A finding arrived at by an appellate Court in an appeal whereby the suit is remanded under this rule becomes conclusive if the remand order is not challenged by an appeal.—*Raghunath v. Ganesh*, 30 A. L. J. 615; 138 I. C. 406; A. I. R. 1932 All. 603.

When a decree is set aside in appeal and the case is remanded under this rule, the appellant is entitled to restitution of the property taken

under S. 10 of the Letters Patent Act, 1853. The Court remanding a case under this rule may also order a party to pay costs.—*Ballai Rai v. Mahabir Rai*, 21 A. 230.

order of remand.—*Bishanath v.*

under this rule.—Under the rule, when a case is remanded, the period of limitation runs from the date of the remand. If a party submits to the order of remand, he cannot dispute the order.—*Mashi-un-nissa v.*

le, even though the first Court in the case is the District Court.—*v. Chera Tea*, 179 (F. B.): 179 (F. B.): V. N. 895; V. N. 895: from an appeal.—*sent*, 659; 659; 659.



possession of in execution of the decree so set aside, although an appeal has been preferred against the order of remand.—*Saroda Prasad v. Saudamini*, 3 C. L. J. 181 (14 C. 484, 21 C. 989, *followed to*).

Where a case is sent back for trial on its merits, the order of remand shuts out objections regarding limitation or *res judicata*.—*Sheo Sahoy v. Ram Pershad*, 24 W. R. 333.

Where a case was remanded for reconsideration of the whole evidence with the exception of one specified point, and the Judge after consideration came to the conclusion that his finding on that point had been erroneous, it was held that he could not, without a miscarriage of justice, allow that finding to remain unchanged.—*Huree Nath v. Issur Chunder*, 24 W. R. 316.

When a case is remanded to the lower appellate Court for decision of a question, *e.g.*, one of title, that Court has no authority to go beyond the order of remand, and re-open a matter already adjudicated upon between the parties.—*Saheb Tewaree v. Kishoree Sahoy*, 24 W. R. 330.

Under an order of remand in a boundary suit in which the Privy Council had made an order in a former appeal, *held* that the High Court had no power to go behind the order of the Privy Council, and that so much of the High Court's decision as re-opened on fresh evidence what had previously been decided, must be set aside, but that the evidence that had thus been brought to bear on the case was entitled to consideration only so far as it bore on those portions of the suit in respect of which the former decision of the Privy Council was not conclusive.—*Court of Wards v. Leelanund*, 25 W. R. 157.

**Rights of parties after remand.**—Where a case is remanded for the trial of an issue which had not been laid down by the Court which tried the case, the parties are entitled to have the opportunity of giving evidence upon it although the order of remand contains no express direction to that effect.—*Kisto Churn v. Muggun Chuckerbutty*, 10 W. R. 491.

When a suit has been dismissed upon a preliminary point, and the decision on that point has been reversed by the appellate Court, and the case goes down with a view to trial on its merits, evidence may properly be received even from defendants who had appeared and *a fortiori* from a defendant who had not appeared.—*Koonj Beharee v. Tarinee Kant*, 8 W. R. 235.

Where a case has been remanded by an appellate Court in an appeal against the decision given after the remand, fresh points which might and ought to have been urged before the remand, cannot be allowed to be taken.—*Ansar Ali v. C. E. Grey*, 2 C. L. J. 403.

A defence of limitation cannot be raised for the first time after there has been a remand on special appeal from the decree of the Court which has heard the cause on remand.—*Moru v. Gopal*, 2 B. 120 (6 W. R. 178 *followed*; 9 B. H. C. R. 282, 11 B. H. C. R. 283 *distinguished*; 2 B. H. C. R. 162, 2 B. H. C. R. 197 *referred to*). See also *Dattu v. Kasai*, 8 B. 535.

Unless such objection is taken in the memorandum of appeal, it is not open to an appellant at the hearing of the appeal to question the validity of an order of remand previously made in the case under this rule.—*Tilak Raj Singh v. Chakardhari Singh*, 15 A. 119.

**Court-fee.**—*Held* that, in an appeal under S. 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under this section, the proper court-fee is Rs. 2.—*Ballai Rai v. Mahabir Rai*, 21 A. 178.

**Revision.**—No revision lies against an order of remand.—*Bishanath v. Mt. Ramsin*, A. I. R. 1923 All. 464.

**Appeal from an order of remand under this rule.**—Under Or. XLIII, r. 1 (u), an appeal lies from an order remanding a case, where an appeal would lie from the decree of the appellate Court. The period of limitation for an appeal from an order of remand is 90 days from the date of the order, under Art. 156 of the Limitation Act. But where a party submits to an order of remand and does not appeal against the order he cannot dispute its correctness at a later stage of the appeal.—*Musst. Mashi-un-nissa v. Musst. Kanib Sughra*, 60 I. C. 975; 19 A. L. J. 139.

An appeal lies from an order of remand under this rule, even though before the filing of the appeal, the suit has been decided by the first Court in compliance with the order of remand.—*Jatinga Valley Tea Co. v. Ohera Tea Co.*, 12 C. 45. Followed in *Uman Kunwar v. Jarbandhan*, 30 A. 479 (F. B.): 5 A. L. J. 447 (29 A. 659 overruled; 32 C. 1023; 9 C. W. N. 895 dissented from). But see *Madhu Sudan v. Kamini Kanta*, 9 C. W. N. 895; 2 C. L. J. 35-n; 32 C. 1023, where it has been held that an appeal from an order of remand passed under this rule cannot be entertained if presented after the disposal of the suit. Followed in *Salig Ram v. Brij Bilas*, 29 A. 659 and in *Gulzari Mal v. Kabirunnissa*, 30 A. 191; 5 A. L. J. 270. But 29 A. 659 has been overruled in 30 A. 479 (F. B.). It would appear from the above rulings that there is a diversity of opinion on the above point.

No appeal lies to the High Court from a general order of remand by the lower appellate Court on the ground of the mishandling of the trial in the first Court.—*Firm Ohhajju Mal Munna Lal v. Firm Pyare Lal Jumna Prasad*, 63 I. C. 858.

*Held*, that an order under this rule is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so if the order in question has the effect of deciding finally the cardinal point in the suit.—*Habibunnissa v. Munawarunnissa*, 25 A. 629 (17 A. 112, 8 B. 548 and 10 M. I. A. 340 referred to).

Though an appeal lies under Or. XLIII, r. 1 (u) of the C. P. Code from an order of remand, no appeal will lie from the order when the order itself is made in an appeal preferred under any other clause of that rule.—*Naubat Singh v. Baldeo Singh*, 33 A. 479; *Mathura v. Nobin Chandra*, 24 C. 774; *Jhanday Lal v. Sarman Lal*, 21 A. 291.

An appeal lies from an order remanding a case under Or. XLI, r. 23, even if the suit has been decided on a preliminary point.—*Sashi Mukhi v. Abinash*, A. I. R. 1922 Cal. 279.

**Appeal from remand order purporting to have been made, though improperly, under Or. XLI, r. 23.**—No appeal lies against an order passed by an appellate Court remanding a case otherwise than under Or. XLI, r. 23 of the Civil Procedure Code.—*Mahendra v. Ramtaran*, 23 C. W. N. 1049; 31 C. L. J. 357. The Court of appeal when it remands a suit to the trial Court for fresh disposal, should make it quite clear whether

the order of remand is made under Or. XLI, r. 23 or independently of that provision.—*Kakamma v. Chandrasekhara*, 119 I. C. 705: A. I. R. 1929 Mad. 205. But the question is whether an appeal lies in cases where the order purports to be an order under Or. XLI, r. 23, although the order ought not to have been made under that rule. The question was answered in the affirmative by the Calcutta High Court in *Basumati v. Taritbasani*, 31 C. L. J. 354: 44 I. C. 416, where Richardson and Beachcroft, JJ., observed: "It may be that regard being had to terms of Or. XLI, r. 23, this is not a case in which it was, strictly speaking, open to the learned Subordinate Judge to make an order under that rule. But whether the order was regularly made or irregularly made, it appears to me to be in form and substance an order under that rule. That being so, the order must be treated as an order under r. 23, from which an appeal lies." The same view was also taken in the following cases; *Prosanno v. Baidya*, 24 C. W. N. 709: 56 I. C. 516; *Radha Krishna v. Kamal Kamini*, 35 C. L. J. 345: 70 I. C. 547: A. I. R. 1922 Cal. 456; *Gokul Prasad v. Ram Kumar*, 44 A. 176: 64 I. C. 878: A. I. R. 1922 All. 254; *Kulsumunnissa v. Ram Prasad*, 44 A. 492: A. I. R. 1922 All. 226: 67 I. C. 713; *Bhairab v. Kali Kumar*, 37 C. L. J. 491; *Kayem Biswas v. Bahadur Khan*, 30 C. W. N. 41: 42 C. L. J. 22: 59 I. C. 744: A. I. R. 1925 Cal. 1253; *Jagathari v. Medini*, 31 C. W. N. 878: 104 I. C. 422: A. I. R. 1927 Cal. 642; *Harbhajan v. Mewa Singh*, 110 I. C. 748: A. I. R. 1928 Lah. 753. The right of appeal is determined by what the Court purports to do and not by what the Court should have done; and consequently where the Court purports to order a remand under Or. XLI, r. 23, though really the order is under S. 151, the order is appealable.—*Gopal v. Mangal*, 107 I. C. 284: A. I. R. 1928 Lah. 341. The above view has been dissented from and it has been held that where the order of remand is *ultra vires*, and not a decree, it is not appealable, though it purports to be an order under this rule.—*Banka Behari v. Birendra*, 55 C. 219: 47 C. L. J. 69: 103 I. C. 864: A. I. R. 1927 Cal. 850. The proper remedy is to challenge its validity in revision.—*Ibid*. But where the order of remand was neither passed nor purported to have been passed under r. 23 no appeal will lie.—*Jagathari v. Medini*, 31 C. W. N. 878: A. I. R. 1927 Cal. 642: 104 I. C. 422.

An order of the Court of first instance rejecting a plaint was set aside by the appellate Court which directed the first Court to proceed with the trial of the suit on the merits. It is not an order under this rule and is not appealable.—*Cotton Trading Syndicate v. Firm of Malawa Mal*, 108 I. C. 597: 131 I. C. 750: A. I. R. 1931 Lab. 497: 32 P. L. R. 409.

A suit for maintenance was valued at Rs. 3,000 for purposes of jurisdiction. The suit having been disposed of on merits there was an appeal and the correct valuation was then discovered to be Rs. 18,000. The appellate Court thereupon set the decree aside and remanded the case: *held*, that the order of remand was not appealable as it was not made under this rule, though it could be the subject-matter of revision.—*Hamir Kaur v. Court of Wards*, 138 I. C. 62: 33 P. L. R. 634: A. I. R. 1932 Lab. 538.

**Appeal from remand under the inherent power.**—In several cases it has been held that when the order of remand is not made under Or. XLI, r. 23, but by reason of a Court's inherent jurisdiction under S. 151, the order is not appealable.—*Radhakrishna v. Venkata*, 48 M. 713: A. I. R.

1925 Mad. 229: 84 I. C. 965; *Raghunandan v. Jadunandan*, 3 P. L. J. 253: 43 I. C. 959; *Wisakhi Ram v. Alawal*, A. I. R. 1924 Lah. 457: 6 L. L. J. 153: 78 I. C. 408; *Ma Me v. Ma Min*, 3 R. 490: A. I. R. 1925 Rang. 320: 92 I. C. 368; *D. Jageshar Jha v. Mahtab Singh*, (1926) P. 302: 7 P. L. T. 811: 96 I. C. 440: A. I. R. 1926 Pat. 516; *Chaudhary Chandrika Prasad v. Mithu*, 6 P. 380: 103 I. C. 722: A. I. R. 1927 Pat. 296; *Sobharam v. Ram Prashad*, 117 I. C. 280: A. I. R. 1923 Nag. 67; *K. V. Sundara Ramaiyer v. Sathianathan*, 102 I. C. 28: A. I. R. 1927 Mad. 1190 (*Sadhu Krishna v. Kuppan Ayyangar*, 30 M. 54 (F. B.): 16 M. L. J. 479 relied on); *Suppiah v. Muthiah*, 112 I. C. 710: A. I. R. 1928 Mad. 984; *Devorampoodi v. Goparaju*, 112 I. C. 1: A. I. R. 1928 Mad. 991.

A remand cannot be construed to be one under S. 151 simply because the Court has failed to express that the remand is under r. 23 or r. 25; and where a remand order is accompanied by an order for refund of court-fee, the remand should be considered to be under r. 23—*Sahibji v. Mohammad Sarwar Khan*, 106 I. C. 842: A. I. R. 1928 Lah. 116: 9 L. L. J. 543.

Appeal from order of remand when such order does not specify the provision of law under which it is made.—Where an appellate Court passes an order of remand without specifying the provision of law under which the order is made, it must be presumed to be made under Or. XLI, r. 23, C. P.

44 A. 492: . . . . . Prasad,  
44 A. 176. . . . . Kumar,  
80 P. L. R. 645: A. I. R. 1930 Lah. 221. C. 330:

Letters Patent appeal—An order of a single Judge of High Court under this rule is a "judgment" within the meaning of S. 15 of the Letters Patent and is therefore appealable.—*Gopinath v. Moheshwar*, 35 C. 1096. But see *Guru Prosanno v. Ambicamoyi*, 13 C. W. N. colli

**24.** Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. [S. 565.]

Where evidence on records sufficient, Appellate Court may determine case finally.

## COMMENTARY.

Alterations—This rule corresponds to S. 565, C. P. Code, 1882, with some verbal changes only. The word "where" has been substituted for "when"; the word "suit" has been substituted for the word "case"; the word "from" has been substituted for the word "against"; and the word "preferred" has been substituted for the word "made," which occurred in the old section. The object and meaning of this rule is clearly explained in 3 M. 96 noted below.

Where evidence on record sufficient, appellate Court may determine case finally.—Where a Court of first instance after taking evidence,

dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case, and the decree is reserved on appeal, the Court of Appeal, if it considers the evidence on record sufficient, may decide the case, and is not bound to remand it for trial under r. 23.—*Bandi Subbayya v. Madalapalli*, 3 M. 96. See also *Amma v. Kunhunni*, 9 M. 355.

This rule does not enable an appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.—*Official Trustee of Bengal v. Krishna Chunder*, 12 I. A. 166; 12 C. 239 (P. C.).

Where a lower appellate Court has before it all the evidence which the parties wish to adduce, and decides upon a preliminary point (e.g., the genuineness of a *pottah*), it has no authority to remand the case, but should itself try it.—*Ram Joy v. Nundo Moyee*, 10 W. R. 374.

The appellate Court will not remand a case for re-trial on a point not raised in the Court below if the evidence already recorded is sufficient to enable the appellate Court itself to decide the point.—*Haridas Purshotam v. Gamble*, 12 B. H. O. R. 23.

Where an objection was taken to the jurisdiction, and the objection was allowed, but the Court at the same time disposed of the case on the merits and dismissed the suit, and on appeal the appellate Court affirmed the decree of the lower Court on the question of jurisdiction only; *held*, that there were materials before the appellate Court to dispose of the appeal on the merits.—*Debi Saran v. Debi Saran*, 6 A. 378; *Sheo Prasad v. Anrudh Singh*, 6 A. 440.

Where a Court of first appeal omits to determine a material issue of fact, the High Court as a Court of second appeal is not competent, under this rule, to determine such issue itself, but should refer it for determination to the Court of first appeal.—*Sheo Ratan v. Lappu Kuar*, 5 A. 14.

**25.** Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

[S. 566.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 565, C. P. Code, with some alterations of a verbal character and with the addition of the words "and the reasons therefor" in the concluding part, adopting 19 B. 551.

r. 25.

Distinction between an order under Or. XLI, r. 23 and an order under Or. XLI, r. 25.—There is a distinction between an order under Or. XLI, r. 23 and an order under Or. XLI, r. 25, C. P. Code which remands specific issues for decision. An order of the former class is a final order which is subject to appeal and cannot be considered by the Court which passed it except on review, whereas an order under Or. XLI, r. 25 is an interlocutory order which it is open to the Court to consider.—*Kuar Nageshar Sahai v. Kuar Mata Prasad*, 25 O. C. 189 : 9 O. L. J. 235.

Framing issues and remand of the case.—The functions of the appellate Courts under Or. XLI, rr. 24, 25, and 27 discussed and pointed out. In cases where the Court, acting under r. 25 has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court, the term "finding" being used in S. 566 (this rule) in its restricted sense of an answer to the proposition referred for enquiry, and not of an award or decision of the issue before the Court.—*Bal Kishen v. Jasoda Kuar*, 7 A. 765 (F. B.). (referred to in *Beni Pershad Kuari v. Nand Lal*, 24 C. 98).

Where a Subordinate Court has dealt with questions arising on the merits of the case, no order of remand can be made by the appellate Court under r. 23, but if the appellate Court is of opinion that there should be a finding upon any particular issue or further evidence should be taken on any such issue, it may make an order of remand under this rule.—*Rakhit Mahanta v. Puddo Bauri*, 9 O. W. N. 54. See also *Hukam Singh v. Raghubir*, 27 A. 700 : (1905) A. W. N. 157.

Where the Court of first appeal remanded a case under r. 23, for addition of necessary parties; held, that the proper course for the lower appellate Court would have been to join the necessary parties, and then to raise the proper issues and to refer the issues to the first Court for trial under this rule.—*Ganesh Bhikaji v. Bhikaji Krishna*, 10 B. 398. See also *Kelu Mulachari v. Chendu*, 19 M. 157.

If the appellate Court is of opinion that the trial Court has failed to decide any issue or has failed to draw up any necessary issue, the proper course to follow was itself to frame the issue and to send it down, if necessary, to the trial Court for taking evidence and to return the evidence, together with its finding, to the lower appellate Court. An order remanding the whole case is bad.—*Krishna Das v. Manindra Chandra*, 95 I. C. 123 : A. I. R. 1926 Cal. 954.

Where an appellate Court finds it necessary that a particular issue should be framed and tried, it should proceed under the provisions of Or. XLI, r. 25, to frame the issue and refer it for trial to the lower Court. It is not proper for the appellate Court to set aside the judgment of the trial Court and send back the case to that Court for deciding it by framing an issue which the appellate Court considers necessary for the decision of the case.—*Mansurali v. Jamiran Bewa*, 44 O. L. J. 101 : 95 I. C. 203 : A. I. R. 1926 Cal. 976.

Where the appellate Court is of opinion that certain findings of fact are necessary for the proper disposal of an appeal, and that evidence should

be led on these points, the proper procedure is under r. 25 by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from, but it cannot act partly under r. 23 which only applies to the case of a suit which has been decided on a preliminary point and partly under r. 25 by calling for further findings; an order remanding a case for giving parties an opportunity to adduce evidence on a certain point for disposal and at the same time setting aside the trial Court's decree is technically wrong—*Annaji v. Thakubai*, 53 B. 335: 118 I. C. 790: A. I. R. 1929 Bom. 175: 31 Bom. L. R. 208.

Under this rule an appellate Court can frame a new issue and refer it for trial although it has not been raised by the defendant's written answer.—*Chandi Din v. Narain Kuar*, 14 A. 366 (P. C.). See *Ahmedabad Advance Spinning etc. Co. v. Lakshmishanker*, 30 B 173.

A lower appellate Court has power under this rule to send back a case for trial upon an issue not satisfactorily tried by the Court of first instance.—*Umbika Churn v. Ramdhun*, 11 W. R. 35.

A decree in a suit having been passed on the merits by the Court of first instance, the Court of appeal, being of opinion that an issue not tried by the former Court, ought to have been tried, reversed the decree, and under r. 23 remanded the case for trial upon that issue. *Held*, that the order reversing the decree and remanding the case for trial of the issue was improper, and that the proper course for the appellate Court was to have taken that laid down by rr. 25 and 26—*Mokund Lal v. Hurbullubhnargin*, 12 O. L. R. 136.

Where there is no sufficient evidence before the appellate Court for the disposal of an issue which is material to the determination of the suit, the proper course to be followed is to remand the case under this rule.—*Ram Pershad v. Krishna*, 3 Agra 146. See also *Shumboo Chunder v. Russick Chunder*, 15 W. R. 346.

Where the appellate Court finds that the parties failed to grasp the essential questions arising in the case and to adduce evidence adequately, the appellate Court is entitled to frame new issues and remand them for trial.—*Shah Mahomed v. Ramzan*, 66 I. C. 833.

The District Court, on appeal, remanded the suit to the lower Court for finding on fresh issues. After return of the findings the District Judge transferred the appeal to the Sub-Judge, who heard and determined it. *Held*, that the District Judge had no power to transfer to a Sub-Judge an appeal which was part-heard and pending before him.—*Kumara Sami v. Subbaraya*, 23 M. 314.

When a Court of first instance has tried out a suit, the appellate Court has no jurisdiction to make an order of remand under r. 23, but if a new issue has to be tried, it should proceed under r. 25.—*Ram Dao Mondal v. Indromoni*, 3 O. W. N. 325. See also *Lalla Chuni Lal v. Mohiji Singh*, 1 C. W. N. 340.

Where in a suit the plaintiff tendered three witnesses in support of his claim, but the Court having examined one of such witnesses and being satisfied with his evidence, declined to examine the others, and passed a decree in favour of the plaintiff and on appeal by the defendant, the lower appellate Court reversed the decree, without allowing the

plaintiff to produce fresh evidence. *Held*, that under the circumstances above described, it was competent to the High Court in special appeal to set aside all proceedings in both Courts below, and to remand the case under this rule with directions to the first Court to re try the case, admitting all admissible evidence which had been previously tendered - *Ganga Prasad v. Lal Bahadur*, 17 A. 117 (16 A. 342 referred to). See also *Durga Dhal v. Anoraj*, 17 A. 29.

Apart from rr. 23 and 25, no express power of remand is given by the Code to an appellate Court.—*Habib Bakhsh v. Baldeo*, 23 A. 167 (171)

On an appeal from the decision of a Munsif in favour of the plaintiffs in a suit for rent, the District Judge set aside the decree, ordered a new trial, and directed the amendment of the plaint by inserting the boundaries of the land. *Held*, that the order for amendment of the plaint was bad under r. 23, as the original Court had not disposed of the suit upon a preliminary point. If the information was necessary, the District Judge should send down an issue on the point for trial under this rule—*Krishnaya Navada v. Panchu*, 17 M. 187.

When a case should not be remanded—Where no specific issue has been framed on the question of adoption, but the matter had been tried and determined without any objection on the part of the plaintiff, who had not been taken by surprise, but was fully informed by the defendant's lists of documents, and from the cross-examination of his witnesses that the defence would be taken, *held* that it was undesirable that the case should be remanded for re-trial on a special issue framed as to the adoption—*Ohandra Kunwar v. Narpal Singh*, 34 L. A. 27: 29 A. 184 (P. C.): 11 C. W. N. 321: 5 C. L. J. 115 17 M. L. J. 103 9 Bom. L. R. 267. 4 A. L. J. 102: 2 M. L. T. 109.

Since a declaratory decree is a matter of discretion, a claim for a declaration ought not to be remanded by an appellate Court for further enquiry which is likely to entail delay and expense.—*Doorga Persad v. Doorga Konwar*, 4 C. 190: 3 C. L. R. 31.

Where the lower appellate Court framed a wrong issue for decision, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue.—*Vishnu Ramchandra v. Ganesh*, 21 B. 325.

An appellate Court is not justified in framing an issue which does not arise from the pleadings of the parties, and in remanding the case under this rule for fresh enquiry.—*Ilikka Pakramar v. Kutti Kunhamed*, 17 M. 69.

Where the trial Court did not come to a finding on a point as, in the view it took of the case, it became unnecessary for it to do so, the appellate Court is not bound to remand the case but is entitled in law to come to a finding of fact by itself on the point.—*Rangasawmi v. Sundarapandia*, 110 I. C. 548: A. I. R. 1928 Mad. 635.

An appellate Court cannot affirm some of the findings of the trial Court and set aside the decree and remand the case for a fresh trial. If the lower Court thinks it necessary that a fresh local investigation should be held, it



should order it itself or it should direct the lower Court to direct a local investigation to be held and to send back to the appellate Court the result of such local investigation.—*Mahendra v. Narayani*, 95 I. C. 170; A. I. R. 1926 Cal. 912.

An inherent power of remand exists in the appellate Court even in a case where the appellate Court might have acted but did not act under r. 25.—*Devorampoodi v. Goparaja*, 112 I. C. 1: (1928) M. W. N. 164; A. I. R. 1928 Mad 991.

**Powers and duties of the Court to which issues are remitted.**—A Court of first instance to which issues have been remitted under this rule by the appellate Court, has only jurisdiction to try the issues remitted, and is *functus officio* in other respects and cannot make a reference of the case to arbitration which is only within the jurisdiction of the appellate Court.—*Nand Ram v. Fakir Chand*, 7 A. 523. See also *Gossain Dowlut Geer v. Bissessur Geer*, 22 W. R. 207; *Habib Bakhsh v. Baldeo*, 23 A. 167, 171.

When a case is remanded by the High Court to the lower appellate Court for recording further evidence and for its finding thereon, it is not open to the latter to further remand the case to the trial Court for recording evidence and submitting its findings.—*Anant Ram v. Din Mohammad*, 102 I. C. 273; A. I. R. 1927 Lah. 769.

A Court to which a case is remanded for re-trial on a particular issue amongst others, cannot, on remand, allow that issue to be abandoned and proceed to try the case upon the other issues raised.—*Shib Chund v. Joymala Dasi*, 7 C. L. R. 103.

**Power of lower Court to take additional evidence on remand where order of remand does not so order.** *Held*, that the lower Court had power to take additional evidence on the issue remanded, although not specially authorized to do so by the order of remand.—*Kamalakshi v. Ramasami*, 19 M. 127.

It has been *held* that an appellate Court is not bound to accept a finding returned to it by the first Court under r. 25, if the appellants object to such findings are preferred, but is comp . . . the finding is correct and is fit to be . . . *Ali*, 2 A. 908 (1 Agra 50 dissented from; 1 A. 165 followed; followed in *Umed Ali v. Salima Bibi*, 6 A. 383); *Mukhtara v. Sardara*, 71 I. C. 444; A. I. R. 1923 All. 417.

Certain issues were admitted under Or. XLI, r. 25, C. P. Code for trial on additional evidence that might be tendered by the parties. On the date fixed for production of evidence, the plaintiff appeared but the defendants were absent. The Court took the evidence for the plaintiff and recorded its findings *ex parte*. On the application by the defendants . . . to the date that the Court had power to make and had acted properly in making the order inasmuch as a full compliance with the directions of the appellate Court under Or. XLI, r. 25, C. P. Code required the taking of evidence for both parties.—*Ajodhia Prasad v. Ram Narain*, 19 A. L. J. 79; 63 I. C. 447.

Where the appellate Court ordered a retrial on payment of costs by the plaintiff within two months from the date of the receipt of records in the original Court and further provided that in default the suit should stand dismissed, the failure of the Court to call the attention of the parties to the receipt of records is no excuse for failing to pay the costs in time and if the party committed default, the suit stood automatically dismissed. There is no obligation on the trial Court to notify to the parties about the receipt of records on remand of the case by the Court of appeal.—*Banshi v. Majahar Uddin*, 36 C. W. N. 693.

**Power of appellate Court to deal with the whole appeal after return of findings**—It was held that, upon the return of the finding on remand, the Court could not treat the appeal as already decided and the objections as the sole matter for consideration, but must consider both the appeal and objections, and decide the whole case.—*Lachman Prasad v. Jamna Prasad*, 10 A. 162; *Gopi Nath v. Sat Narain*, 74 I. C. 1014; A. I. R. 1933 All. 334. See also *Lala Prag Lal v. Jai Narayan*, 22 C. 419, where it has been held that on the hearing of the appeal, the entire case, including the order of remand, was open to consideration, and that the High Court had power to determine whether that order or the order subsequently passed was correct on the merits.

A Court of appeal framed certain issues under this rule and remanded them for findings by the original Court. On the return of these findings as neither party filed any objections, the appellate Court accepted these findings without giving any reasons for so doing, or even stating in its judgment whether it concurred in them or not, and confirmed the decree of the original Court. Held, that judgment of the appellate Court was not a judgment according to law.—*Bhagvan v. Kesur*, 17 B. 428.

An order of remand under this rule decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of determination of the appeal under Or. XLI, r. 26 and for helping the lower Court to proceed rightly in carrying out the order; but the Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under this rule.—*Upendra v. Joyesh*, 32 C. W. N. 1233; 47 C. L. J. 112; 107 I. C. 730; A. I. R. 1923 Cal. 186.

**New issue raised before High Court**.—Where the lower appellate Court has omitted to determine a question of fact which appears essential to the right decision of the suit on the merits, the High Court can frame the necessary issues and refer them for trial under Or. XLI, r. 25.—*Seturatnam v. Venkatachala*, 47 I. A. 76; 43 M. 567 (P. C.); 33 M. L. J. 476; 18 A. L. J. 707; 22 Bom. L. R. 578; 56 I. C. 117; 25 C. W. N. 485. But the finding of the lower Court upon the issues so remanded is conclusive and cannot be challenged.—*Ram Mehr v. Pals Ram*, 6 L. L. J. 145.

Though the High Court is competent in second appeal to remit a case to the lower Court for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought to be done only in exceptional cases for good cause shown and on payment of costs.—*Ram Chandra v. Secretary of State for India*, 43 I. A. 172; 43 C. 1104, 1118 (P. C.); 20 C. W. N. 245; 14 A. L. J. 1009; 18 Bom. L. R. 838; 31 M. L. J. 745; ; *Chandu Lal v.*



Where the appellate Court ordered a retrial on payment of costs by the plaintiff within two months from the date of the receipt of records in the original Court and further provided that in default the suit should stand dismissed, the failure of the Court to call the attention of the parties to the receipt of records is no excuse for failing to pay the costs in time and if the party committed default, the suit stood automatically dismissed. There is no obligation on the trial Court to notify to the parties about the receipt of records on remand of the case by the Court of appeal.—*Banshi v. Majahar Uddin*, 36 C. W. N. 693.

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should order it itself or it should direct the lower Court to direct a local investigation to be held and to send back to the appellate Court the result of such local investigation.—*Mahendra v. Narayani*, 95 I. C. 170: A. I. R. 1926 Cal. 912.

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It has been *held* that an appellate Court is not bound to accept a finding returned to it by the first Court under r. 25, merely because no objections to such findings are preferred, but is competent to examine and satisfy itself that the finding is correct and is fit to be accepted.—*Akbari Begam v. Wilayat Ali*, 2 A. 908 (1 Agra 50 *dissented from*; 1 A. 165 *followed*; followed in *Umed Ali v. Salima Bibi*, 6 A. 383); *Mukhtara v. Sardara*, 71 I. C. 444: A. I. R. 1923 All. 417.

Certain issues were admitted under Or. XLI, r. 25, C. P. Code for trial on additional evidence that might be tendered by the parties. On the date fixed for production of evidence, the plaintiff appeared but the defendants were absent. The Court took the evidence for the plaintiff and recorded its findings *ex parte*. On the application by the defendants showing sufficient cause for their non-attendance, the Court, after notice to the plaintiffs set aside the *ex parte* finding, restored the suit and fixed a new date for parties to produce their evidence. *Held*, on revision from this order, that the Court had power to make and had acted properly in making the order inasmuch as a full compliance with the directions of the appellate Court under Or. XLI, r. 25, C. P. Code required the taking of evidence for both parties.—*Ajodhia Prasad v. Ram Narain*, 19 A. L. J. 79: 63 I. C. 447.

Where the appellate Court ordered a retrial on payment of costs by the plaintiff within two months from the date of the receipt of records in the original Court and further provided that in default the suit should stand dismissed, the failure of the Court to call the attention of the parties to the receipt of records is no excuse for failing to pay the costs in time and if the party committed default, the suit stood automatically dismissed. There is no obligation on the trial Court to notify to the parties about the receipt of records or remand of the case by the Court of appeal.—*Banshi v. Majahar Uddin*, 36 C. W. N. 693.

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An order of remand under this rule decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of determination of the appeal under Or. XLI, r. 26 and for helping the lower Court to proceed rightly in carrying out the order, but the Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under this rule.—*Upendra v. Jogesh*, 32 C. W. N. 1233; 47 C. L. J. 119; 107 I. C. 730; A. I. R. 1928 Cal. 186.

**New issue raised before High Court.**—Where the lower appellate Court has omitted to determine a question of fact which appears essential to the right decision of the suit on the merits, the High Court can frame the necessary issues and refer them for trial under Or. XLI, r. 25.—*Seturatnam v. Venkatachala*, 47 I. A. 76; 43 M. 567 (P. C.); 38 M. L. J. 476; 18 A. L. J. 707; 22 Bom. L. R. 578; 56 I. C. 117; 25 C. W. N. 495. But the finding of the lower Court upon the issues so remanded is conclusive and cannot be challenged.—*Ram Mehr v. Pali Ram*, 6 L. L. J. 145.

Though the High Court is competent in second appeal to remit a case to the lower Court for re-hearing on an issue not raised in the pleadings nor in the evidence, it is not competent to do so in an appeal from a judgment of a Court of first instance.—*Chandu Lal v. Chandu Lal*, 14 A. L. J. 1005; 10 Bom. L. R. 638; 31 M. L. J. 145; 20 C. W. N. 245.

*Firm of Lakshmi Chand Jowaladat*, 5 L. L. J. 49; *Bhikabai v. Goja Mhaku*, 98 I. C. 297; 28 Bom. L. R. 1090; A. I. R. 1926 Bom. 577.

**Issues remitted are triable by the Court which originally tried the suit or appeal.**—When issues are remitted for trial under this rule, such issues are triable only by the Court which originally tried the case.—*Sabri v. Ganeshi*, 14 A. 23 (followed in *Ali Sher Khan v. Ahmadullah Khan*, 29 A. 660; 4 A. L. J. 603). See also *Lahore Bank Ltd. v. Lakhiram*, 105 P. R. 1903; *Uttam Chand v. Muhammad Bakhsh*, 71 I. C. 896.

**Appeal.**—An order referring issues for trial under this rule is not appealable.—*Kalikristo v. Ramchunder*, 8 C. 147; 9 C. L. R. 461 (followed in *Gooroo Prasanno v. Ambikamoyi*, 2 I. C. 636). A suit to recover a sum of money having been decreed against one of the two defendants, he appealed. The lower appellate Court held that the decree was *prima facie* correct, but as it was of opinion that the issue of limitation had not been sufficiently explored, the case was remanded to the Court of first instance for re-hearing and disposal on that issue. Against that order of remand, an appeal was preferred to the High Court. *Held*, that in making the order, the lower appellate Court was purporting to act under Or. XLI, r. 25 and not under Or. XLI, r. 23 (although it had jurisdiction under neither), and no appeal lay.—*Jagathari v. Medini Mohan*, 31 C. W. N. 878. Nor does an appeal lie under the Letters Patent.—*Bara Estate, Ltd. v. Anup Chandra*, 2 P. L. J. 663.

A partial order of remand under Or. XLI, r. 25 is not appealable.—*Maung Shweon v. N. K. R. P. Mudahar*, 2 Bur. L. J. 216.

**26. (1)** Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

**Determination of appeal.** (2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal. [5, 567.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 567, C. P. Code, 1882, with some alterations of a verbal character. In sub-rule (1) the word "form" has been substituted for the word "become," which stood after the word "shall"; the word "any" has been substituted for the word "the" which stood after the words "objections to" and in sub-rule (2), the word "an" has been added before the word "fixed."

"Such evidence and findings shall form part of the record in the suit."—The evidence and findings become part of the record in the suit and when the Court proceeds to determine the appeal after remand under Or. XLI, r. 25, such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under Or. XLI, r. 25 was made as also what has been added in the

Court of Appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon.—*Kamini Kumar v. Durga Charan*, 37 C. L. J. 122.

Where no memorandum of objection is filed.—If no memorandum of objection is filed by either party, the Court is not thereby absolved from its duty of hearing the appeal.—*Subbayya v. Rami*, 22 M. 344. The appellate Court, even if no objections are filed, is bound to examine the correctness of the findings and to state in its judgment the reason for which it either accepts or rejects the findings.—*Kunhi v. Kutti*, 20 M. 496.

An appellate Court though not bound to entertain objections filed after the expiration of the prescribed period, should, nevertheless, upon the hearing of the remand, allow the party filing them to be heard with regard to them. Further, an appellate Court, apart from any objection by the parties to the findings when returned, should examine and test them to see whether or not they ought to be accepted.—*Mumtaz Begam v. Fateh Husain*, 6 A. 391 (6 A. 383, 1 A. 165, and 2 A. 908 referred to).

Where no objections have been filed under Or. XLI, r. 26, C. P. Code, the Court may in its discretion decline to hear objections at the hearing.—*Partab Singh v. Achar Singh*, 3 L. L. J. 230.

But the appellate Court is not bound to accept any finding blindly merely because no objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded, and to satisfy itself that it is correct and fit to be accepted.—*Akbari Begam v. Wilayat Ali*, 2 A. 908 (1 Agra 50 dissented from, 1 A. 165 followed; followed in *Umed Ali v. Salim Bibi*, 6 A. 393). See also *Woomesh Chunder v. Jonardun*, 15 W. R. 235; *Mumtaz Begam v. Fateh Husain*, 6 A. 391; *Bhagvan v. Kesur*, 17 B. 428; *Ram Chandra v. Sono*, 19 B. 551.

Time to file objections to finding.—The limitation of time in this rule is obviously meant to be a restriction upon the rights of the parties, and not upon the discretion of the Court.—*Damodar Das v. Gokal Chand*, 7 A. 79 (92) (F. B.).

After the expiry of the period fixed, the appellate Court may, in its discretion, receive or decline to receive a memorandum of objections to the finding on remand.—*Chotay Lall v. Chunnoo Lall*, 6 I. A. 15; 3 C. L. R. 465 (469) (P. C.); 4 C. 744 (751).

"Court-fee."—No Court-fee is chargeable upon the memorandum of objections filed under this rule.—*Damodar v. Masudan*, 105 I. C. 108; A. I. R. 1928 Pat. 85; 9 P. L. J. 19.

"Shall proceed to determine the appeal."—When an appellate Court has made an order referring issues for trial under r. 25, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal to another Court.—*Udit Narain v. Thanda*, 15 A. 315; *Kumarasami v. Subbaraya*, 23 M. 314.

Second appeal.—The provisions of this rule and of r. 25 apply, so far as may be by virtue of Or. XLII, to second appeals. The High Court may, in second appeal, therefore, refer issues of fact for trial to the lower appellate Court, but when the finding and evidence upon such issues are



returned to the High Court, the finding is conclusive, and it cannot be challenged upon the evidence before the High Court as in first appeal. The reason is that a second appeal is not allowed on questions of fact.

Production of additional evidence in Appellate Court.

**27.** (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. [S. 568.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 568, C. P. Code, with some alterations of a verbal character.

Sub-rule (1) exactly corresponds to para. 1 of the old section.

Clause (a) corresponds to Cl. (a) of the old section with this modification that the word "*from*" has been substituted for the word "*against*"; the word "*preferred*" has been substituted for the word "*made*"; and the words "*has refused*" have been substituted for the word "*refuses*."

Clause (b) exactly corresponds to Cl. (b) of the old section.

Sub-rule (2) corresponds to last para. of the old section with this alteration that the word "*wherever*" has been substituted for the word "*whenever*"; and the words "*allowed to be produced*" have been substituted for the words "*is admitted*," which occurred in the old section.

**Scope of this rule—Powers and functions of appellate Court.**—The power to admit additional evidence should be exercised by a Court of appeal with much caution, and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted, will be evidence which, if produced at the trial, would have been admissible; *Mahomed Khaleel v. Les Tanneries Lyonnaises*, 53 I. A. 84: 49 M. 435 (P. C.): 31 C. W. N. 1: 94 I. C. 767: A. I. R. 1926 P. C. 34: 28 Bom. L. R. 1391.

Additional evidence under this rule should not be taken until the appellate Court has examined the evidence on the record and has, after such,

examination, come to the conclusion that the evidence, as it stands, is inherently defective; as, for instance, when the lower Court has omitted to take the evidence of an attesting witness to a mortgage-deed.—*Bank of Bengal v. Lucas*, 51 C. 185: 81 I. C. 471: A. I. R. 1924 Cal. 578.

The circumstance that evidence has been improperly excluded by the trial Court does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides in Or. XLI, rr. 27 (1) (a), 28 and 29, the method to be followed in a case of this description. It is open to the Judge of the appellate Court to take the evidence himself or to direct the primary Court to take the evidence and to send it to the appellate Court for consideration.—*Jyot Kumar v. Jadu Nath*, 34 C. L. J. 160. To remand a case on such a ground is a course which can be characterised as exercising jurisdiction illegally and with material irregularity.—*Venkamma v. Goparaju*, 112 I. C. 1: A. I. R. 1928 Mad. 991: (1928) M. W. N. 164.

Where the trial of a case is defective by reason of relevant evidence having been shut out or by refusal of an adjournment which should have been granted to enable a party to adduce all the evidence or for any other reason, the appellate Court can ask the lower Court to take the evidence so shut out or give the party, who had not the opportunity to adduce all his evidence, an opportunity to adduce evidence, and to record a finding on the evidence so taken; and the mere fact that the appellate Court has not set aside the decree of the lower Court does not in any way take away the jurisdiction it has to set aside the judgment and direct the lower Court to take evidence and record fresh finding.—*R. Narayanaswami v. Vedambal*, 106 I. C. 498: A. I. R. 1927 Mad. 1065: 39 M. L. T. 399.

The legitimate occasion for the admission of additional evidence by the appellate Court under this rule arises only when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Where fresh evidence is discovered outside the Court, such evidence can be imported into the case on an application under Or. XLVII, r. 1.—*Krishnama Chariar v. Narasimha*, 31 M. 114: 3 M. L. T. 308 (31 B. 351 (P. C.) followed); *Garden Reach Spinning and Manufacturing Co. v. Secretary of State for India*, 42 C. 675, *Uchant Ahir v. Basawan Ahir*, 55 I. C. 226; *Firm of Ram Rikhhpal Sham Lal v. Firm of Bans Dhar & Sons*, 66 I. C. 370 (31 B. 351 (P. C.) relied on, 31 M. 114 and 42 C. 675 followed); *Parsotim Thakur v. Lal Mohar*, 58 I. A. 254: 10 P. 654 (P. C.): 132 I. C. 721 A. I. R. 1931 P. C. 143: 35 C. W. N. 786: 54 C. L. J. 1: 61 M. L. J. 489: 29 A. L. J. 513. See also *Bhaitonsingh v. Hindusingh*, 67 I. C. 237: (1922) Nag 119; *Jai Krishna v. Bibi Soghra*, 4 P. L. T. 418: 71 I. C. 881; *Labh Singh v. Ahmad Shah*, 97 I. C. 369; *Firm of Husseinbhai v. Ramdas*, 125 I. C. 803 (F. B.): A. I. R. 1930 Sind 105: 24 S. L. R. 15.

Courts should refrain from sending for the records in an informal manner for the purpose of looking into documents which had never been tendered in evidence.—*Harcharn v. Sarup Singh*, 126 I. C. 437: A. I. R. 1930 Lah. 750. It is not proper for a Court to take additional evidence without duly recording it in accordance with law.—*Allum Malto v. Barka Manjhi*, 118 I. C. 315. See also *Ram Autar v. Baldeo*, 11 P. 782: 140 I. C. 895: A. I. R. 1932 Pat. 352.

It is largely discretionary with an appellate Court to admit additional evidence on appeal and a party cannot claim it as a matter of right.—*Nayajan Ali v. Midnapore Zamindary Company*, 67 I. C. 770; and where the Court has exercised this discretion and refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground for second appeal.—*Thaman Singh v. Jiwan Singh*, 131 I. C. 228; A. I. R. 1931 Lah. 506.

The appellate Court should exercise its power of allowing additional evidence very cautiously and sparingly and only in the interests of justice.—*Raja Sreenath Roy v. Secretary of State for India*, 36 C. L. J. 345; *Kutiyar v. Vaithilinga*, 120 I. C. 746; A. I. R. 1930 Mad. 343. But the Court should not take a narrow view of the rules of procedure and in order to do justice between the parties the Court should allow additional evidence to be adduced in appropriate cases, e.g., where the results of shutting out evidence would be to keep the creditor out of his money unnecessarily.—*Kameshwar v. Hirday*, 132 I. C. 363; A. I. R. 1931 Pat. 181; 12 P. L. J. 79. The only function of a Court of facts is to do complete justice between the parties, and the Court should not reject documents as to the genuineness of which there could possibly be no room for doubt on such technical grounds as that they were produced at a late stage.—*Mt. Naraini Koer v. Gena Missir*, A. I. R. 1929 Pat. 324; 120 I. C. 291.

Order XLI, r. 27 does not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal. It only means that where there is a lacuna in the evidence which precludes the appellate Court from pronouncing judgment on the evidence which is already on the record, additional evidence should be allowed to be adduced.—*Batjinh v. Dip Lal*, 57 I. C. 843.

On an appeal on the merits of the case being filed, the appellate Court without recording any reason as required by this rule allowed such further evidence to be taken, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the Judges but on special and preliminary application. Held, that the appellate Court had no jurisdiction to admit the additional evidence, and that it was wrongly admitted and must be disregarded.—*Kessowji Issur v. G. I. P. Railway Company*, 34 I. A. 115; 31 B. 381 (P. C.); 11 C. W. N. 721; 6 C. L. J. 5; 17 M. L. J. 347; 4 A. L. J. 461.

Where additional evidence is taken by the High Court with the assent of both sides, it is not open to either party to complain of it.—*Jagannath v. Hanuman*, 36 I. A. 221; 36 C. 833 (P. C.); 13 C. W. N. 830; 11 Bom. L. R. 861; 19 M. L. J. 435; 3 I. C. 465.

The test as to whether additional evidence should be received in an appellate Court under this rule, depends upon the question whether or not the appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause." As to this, the appellate Court is to be the sole Judge. The rejection of an application under that section cannot be said to involve any "substantial question of law" within the meaning of S. 110, C. P. Code, so as to give the right of an appeal to the Privy Council.—*Upendra Mohan v. Gopal Chandra*, 21 C. 484; *Jhingur Jha v. Badri Sahu*, 54 I. C. 666.

In cases where the Court acting under r. 25 has been obliged in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstances that the evidence is accompanied by a "finding" of the inferior Court, the term "finding" being used in r. 25 in its restricted sense of an answer to the proposition referred for enquiry, and not of an award or decision of the issue before the Court. The functions of the appellate Courts under Or. XXI, rr. 24, 25 and 27, discussed and pointed out.—*Balkishen v. Jasoda Kuar*, 7 A. 765 (F. B.) (referred to in *Beni Pershad Kuari v. Nand Lal*, 24 C. 98).

In a second appeal, the High Court remanded a case to the lower appellate Court for proper decision of certain issues raised in the suit; and the lower appellate Court, taking evidence on the issues, came to findings of fact on that evidence. Held, that the lower appellate Court tried the case, not as an original case, but as an appeal.—*Beni Pershad Kuari v. Nand Lal*, 24 C. 98.

When additional evidence should be allowed.—Under this rule the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause.—*In the goods of Prem Chand*, 21 C. 484, 486.

The power given by this rule of taking of its own motion, additional evidence should be very sparingly exercised by the Courts and great caution should be exercised in this matter.—*Sreeman Chunder v. Gopal Chunder*, 11 M. I. A. 28: 7 W. R. 10 (P. C.); *Hurpershad v. Sheo Dyal*, 26 W. R. 55 (P. C.). 3 I. A. 259.

Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the appellate Court should receive the decree in evidence and act upon it.—*Sashi Bhuson v. Parasulla*, 64 I. C. 721 (31 B 381 (P. C.)), 31 M. 114, 36 A. 93 referred to).

When the first Court was satisfied with the evidence produced, and, therefore, did not allow the plaintiff to produce all his evidence, and the appellate Court does not think the evidence sufficient, it ought to allow the plaintiff on appeal to call the evidence excluded by the first Court.—*Brij Soondur v. Kaimoonnissa*, 23 W. R. 63.

Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal, held that, before doing so, the lower appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants.—*Khuda Bakhsh v. Imam Ali*, 9 A. 339.

It is within the discretion of the lower appellate Court, to allow the parties an opportunity to adduce fresh evidence if it is satisfied that the interests of justice require that course.—*Damodur Dass v. Ritoo Sing*, 24 W. R. 325.

Where certain documents were accepted in the trial Court without proof and objection to their reception was for the first time raised in appeal, the party adducing such evidence should be given an opportunity to give formal proof of the documents.—*Gorkha v. Kahnun*, 30 P. L. R. 693.

Where the evidence upon the record is not sufficient to enable the appellate Court to pronounce a judgment upon regular appeal, it may require the Court against whose decree the appeal is made to take additional evidence, defining the points to which such evidence is to be confined, in order to enable the appellate Court finally to determine the case.—*Narasimaharav v. Antagi*, 2 B. H. C. R. 61.

Where a lower appellate Court admitted a review with the object of taking into consideration a material issue which it had omitted to consider at the trial, held that, having admitted the review on grounds independent of fresh evidence, it was competent for the Court, under this rule, to admit fresh evidence, if required to enable it to pronounce a satisfactory judgment, or for any substantial cause.—*Beharee Lal v. Troyluckho*, 12 W. R. 223.

The true interpretation of this rule is that, when a Court sees that by some inadvertence or mistake, a party has not produced some evidence which he was capable of adducing, and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned, and accidental, the Court will allow such further evidence to be taken.—*Gowhur Ali v. Sakheena Khanum*, 15 W. R. 507.

When a lower Court disposes of a case upon the merits as proved by evidence not legally admissible against the defendants, and the appellate Court considers it proper to allow the plaintiff to adduce further evidence, it may either take such further evidence itself, or send the case back to the lower Court to take such evidence.—*Ramjoy Surmah v. Puran Kishan*, W. R. (F. B.) 124.

Where the first Court refused the plaintiff's application to summon five of his witnesses, notwithstanding that it postponed the case for ten days, although fifteen other of the witnesses were present, the High Court held that the first Court's omission to summon the witnesses was, under the circumstances, a sufficient reason, for the lower appellate Court to send for them, and take their evidence.—*Abelakh Roy v. Guggun Bhuggut*, 23 W. R. 268.

When the lower Court is wrong in excluding evidence bearing on the question at issue, the appellate Court is justified in admitting the evidence. Further, when a Court has doubt as to whether a certain evidence is admissible or not, and its decision is open to appeal, it is better to admit than to exclude such doubtful evidence.—*Kali Kishore v. Dhusan Chunder*, 18 C. 201 (P. C.): 17 I. A. 169.

Where the District Judge admitted certain evidence which was rejected by the trial Court and that evidence consisted of a deposition in which an admission regarding the relationship was made by a woman who was dead and whose property the appellants were claiming, *held* that the evidence though not admissible under Or. XLI, r. 27 (1) (b) was admissible under r. 27 (1) (a).—*Gokul v. Baldeo*, 7 P. 90; A. I. R. 1928 Pat. 113; 9 P. L. T. 180.

In a bond-suit the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond. The first Court held that the endorsements were genuine. The appellate Court remanded the suit to take further evidence with regard to the endorsements; and held upon the return of the evidence that the endorsements were forgeries and dismissed the suit. *Held*, that the additional evidence was legally taken and admissible under this rule.—*Srinivasachariar v. Rangammal*, 18 M. 94.

Where in a second appeal the High Court remanded a case for return of findings on an issue previously framed but not tried, *held*, that the lower Court had power to take additional evidence on the issue remanded, although not specially authorised to do so by the order of remand.—*Kamalakshi v. Ramasami*, 19 M. 127.

Where the appellate Court finds that the trial in the first Court is misconceived, it cannot set aside the whole judgment and make an order for remand for fresh trial simply because of the unsatisfactory way in which the trial Court dealt with the matter of local investigation; and the proper procedure is to make an order of local investigation itself or direct the trial Court to appoint a Commissioner for making a local investigation and proceed under rr. 27, 28 and 29 of Or. XLI, and after the local investigation is made out any evidence desired by the appellate Court to be taken is taken, the appellate Court should decide the appeal on all questions arising in the suit itself.—*Haripada v. Debnath*, 110 I. C. 427; A. I. R. 1923 Cal. 749; *Mufizuddin v. Jelaluddin*, 110 I. C. 448; A. I. R. 1923 Cal. 748.

A District Munsif after hearing evidence and deciding issues, passed a decree. On appeal the Sub-Judge reversed the decree, and remanded the case under Or. XLI, r. 23, on the ground that certain documentary evidence tendered by the defendant had been excluded, and the plaintiff's witnesses who had been cited in the list had not been wholly examined. *Held* that r. 23 was inapplicable to such a case; and that the proper course for the Sub-Judge would have been to act either under Or. XLI, r. 27 or r. 29.—*Seshan Pattar v. Seshan Pattar*, 23 M. 447 (23 M. 445 distinguished), *Rajani v. Khatir Mahomed*, 94 I. C. 393; A. I. R. 1926 Cal. 897.

Where the lower Court after rejecting defendant's application for adjournment heard the case *ex parte*, and passed a decree in plaintiff's favour; and where on appeal by the defendant the appellate Court reversed the decree and remanded the case, *held*, on second appeal, that the suit having been tried on the merits, the lower appellate Court could not remand the case under S. 562, but ought to have proceeded under Ss. 563, 569, C. P. Code, 1882.—*Parvatishankar v. Bai Naval*, 17 B. 733.

When additional evidence should not be allowed.—An appellate Court should not receive evidence, though alleged to be material and

important, which has not been produced in the lower Court, without substantial reason for its non-production. The High Court refused to reverse a decision on the ground of the improper admission of evidence.—*Jagadindra v. Bhabatarin*, 5 B. L. R. Ap. 54.

In a case governed by the specific directions contained in rr. 27 and 28, an order of remand purporting to be passed by the Court in the exercise of its inherent power is vitiated by material irregularity.—*Mallappa v. Alagiri*, 133 I. C. 205 : A. I. R. 1931 Mad. 791 : 60 M. L. J. 475 : (1931) M. W. N. 710.

Where the lower Court admits documents contrary to the provisions of this Rule, the only thing the High Court can do in second appeal is to exclude them from consideration altogether.—*Harcharan v. Sarup Singh*, 126 I. C. 437 : A. I. R. 1930 Lah. 750. See *Ram Naresh v. Chirkut*, 9 O. W. N. 379.

When the appellant did not choose to call the only available attesting witness to prove the will produced by him and in consequence the lower Court held the execution of the will not proved, he cannot by adducing fresh evidence in the appellate Court be allowed to patch up the weak points in his case and fill up the omissions, a procedure not warranted by the rules of the Code.—*Peda Monikyam v. Vantabathina*, 34 L. W. 663.

Where the parties have closed their evidence in the trial Court, it is no province of the Appeal Court to admit additional evidence on a point which was not in issue in the trial Court and which never arose from the pleadings.—*Dwarka Prasad v. Badri Lal*, 127 I. C. 515 : A. I. R. 1930 All. 220.

The mere fact that a litigant was not aware of the existence of documentary evidence in the case is no ground for the admission of such evidence for the first time in appeal.—*Srimati Manmohini v. Ram Kishore*, 63 I. C. 334.

It is no part of the duty of the appellate Court to raise fresh issues and it cannot be contended that the evidence needed to support such issues will fall within the category of evidence which the Court may require to be admitted. Where a party has not filed documents in his possession he cannot be permitted to file them in appeal merely on the ground that he was not alive to the possibility of supporting his claim in that manner.—*Raja of Kalahasti v. Venkatalingama*, (1932) M. W. N. 529.

An unregistered document admitted to be all along in possession of a party, cannot be allowed in evidence in second appeal, merely because it is alleged that it is recently discovered.—*Prem Singh v. Md. Khurshid*, A. I. R. 1927 Lah. 574 : 103 I. O. 215 ; *Keswaji Issur v. G. I. P. Ry. Co.*, 34 I. A. 115 : 31 B. 381 (P. C.) : 6 C. L. J. 5 : 11 C. W. N. 721 : 4 A. L. J. 461 : 17 M. L. J. 347.

An appellate Court acts improperly in admitting additional evidence after the close of the arguments in the case.—*Isap Ali v. Satis*, 65 I. C. 504.

Where an appellant who had ample opportunity of giving evidence in the Court below elected not to do so, but to rest his case on the evidence as it

stood, he ought not to be allowed at the stage of appeal to give evidence which he could have given below.—*Rom Dos v. Oficial Liquidator*, 9 A. 366.

Circumstances under which an appellate Court will not allow additional evidence to be produced at the hearing of an appeal under this rule.—*Nadior Ohond v. Chunder Sikhur*, 15 C. 765.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed; and in the Court of Appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce. *Held*, that the evidence could not be admitted.—*Manchor Gonesh v. Lakhmirom*, 12 B. 247.

The appellate Court should not send for and admit fresh documentary evidence which has not been put in by either party in the lower Court.—*Dworkanath v. Rom Lochun*, 10 W. R. 92; *Zahroh v. Bhugwan*, 16 W. R. 211; *Norendro Nath v. Rodha Charon*, 46 C. 119, 128. Nor should it allow additional evidence to prove the genuineness of a document held by the lower Court to be a fabrication.—*Nadior Chand v. Chunder Sikhur*, 15 C. 765.

Where evidence was omitted to be called in the lower Court, *held*, on appeal, that the plaintiffs' case could not at this stage be supplemented by examining parties whom the plaintiffs did not think fit to call, or by books which they did not produce in the Court below.—*Velas Ali v. Motadeen*, 10 W. R. 402.

Where, in the first Court, the defendant's pleader deposed on oath that the defendant had no documents whatever, and that all were burnt, *held*, that the lower appellate Court was wrong in permitting the defendant to file a *Pottah*, which was alleged to have escaped the general destruction.—*Serajool Huq v. Keramutooloh*, 19 W. R. 88.

The High Court decided a case irrespective of certain documents brought forward by a party at the hearing of the appeal, and afterwards rejected an application for a review of that judgment. In an application to the Privy Council for special leave to bring in those documents, *held*, that further evidence ought not to be admitted under this rule, that there was a great danger in the Court of ultimate appeal lightly introducing evidence which had not been under the consideration of the Court below and which the parties had no means of testing.—*Gobind Sundari v. Jagadamba*, 3 B. L. R. P. C. 25. See also *Romchandra v. Krishnaji*, 28 B. 4.

Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea if by so doing further findings of fact will be rendered necessary, and if its consideration involves the reference of fresh issues for determination by the lower Court.—*Kanahai Lal v. Suraj Kunwar*, 21 A. 446.

The refusal by an appellate Court to exercise the discretion vested in it by this section, with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of S. 584, C. P. Code, 1892 (S. 100), because S. 563 (this rule) distinctly implies that



A. I. R. 1929 Lah. 91; *Mehr Fazil v. Wali Muhammad*, 132 I. C. 6: 31 P. L. R. 1012.

The negligence of pleaders in not tendering evidence at the proper time does not entitle the parties to an indulgence to have it admitted in the appellate Court.—*Abdul Nabi v. Mazharali*, 125 I. C. 33: A. I. R. 1930 Sind 318; *Malappa v. Venkaji*, 125 I. C. 423: A. I. R. 1930 Bom. 272: 32 Bom. L. R. 608; *Buta Singh v. Balwant Singh*, 32 P. L. R. 813 (in which it has been held that in such case the remedy of the party, if any, is to file a suit for damages against the pleader); *Nihal Chand v. Dal Singh*, 136 I. C. 17: 32 P. L. R. 874: A. I. R. 1932 Lah. 135.

Where the certified copy of the proceedings in a Small Cause Court was not filed in the primary Court as the point as to the proceedings having taken place was not seriously disputed in that Court, it should be admitted at the appellate stage as a certified copy of a public document when the question arose at that stage.—*Jahar Lal v. Chandra Kanta*, A. I. R. 1928 Cal. 265.

The appellate Court can take in a second certified copy of the deposition of a witness when the first copy filed in the trial Court was found to be incorrect, as this is not taking additional evidence and even if it is, the incorrectness of the copy is a sufficient cause for doing so.—*Nagina Singh v. Ramjanam Singh*, A. I. R. 1928 Pat 64: 9 P. L. T. 215: 105 I. C. 83.

"Court shall record reasons for admission."—The power given by this rule of taking, of its own motion, original evidence anew, should be exercised very sparingly by the Courts and, when exercised, it is desirable that the reasons for exercising it should always be recorded or minuted by the Court in the proceedings.—*Sreeman Chunder v. Gopal Chunder*, 7 W. R. 10 (P. C.): 11 M. I. A. 23; *Ambica Prasad v. Gopal Buxsh*, 1 C. L. J. 550; *Gunga Gobind v. Collector of 24-Pergunahs*, 7 W. R. 31 (P. C.): 11 M. I. A. 345; *Hurpershad v. Sheo Dyal*, 3 I. A. 259: 26 W. R. 55; *Jugobundhoo v. Goluck Chunder*, 10 W. R. 228; *Joog Maya v. Ram Chunder*, 10 W. R. 378; *Lowa Jha v. Bisseshur*, 11 W. R. 6; *Banee Pershad v. Lalla Jogessur*, 11 W. R. 47; *Ohardon v. Ajeet Singh*, 12 W. R. 52; *Shib Chunder v. Kasheerath*, 12 W. R. 245; *Juggut Indur v. Bhubo Tarinee*, 14 W. R. 19; *Snadden v. Todd, Finlay & Co.*, 7 W. R. 313. See *Kessowji Issur v. G. I. P. Ry. Co.*, 34 I. A. 115: 31 B. 381 (P. C.): 11 C. W. N. 721: 6 C. L. J. 5: 4 A. L. J. 461: 17 M. L. J. 347; *Ambica Charan v. Girish Chandra*, 68 I. C. 719; *Mahomed Khaleel v. Les Tanneries Lyonnaises*, 53 I. A. 84: 49 M. 435 (P. C.): 94 I. C. 767: 44 C. L. J. 67: 28 Bom. L. R. 1391: A. I. R. 1926 P. C. 34: 31 C. W. N. 1. See also the Privy Council cases noted under the previous heading. See also *Ram Naresh v. Chirkut*, 9 O. W. N. 379. It is extremely desirable that when the Court exercises its power under this rule, it should make a direct reference to this rule, giving its reason in such a form that there is no room for doubt that the Court has realised "that it is exercising (following 61 M. L. 379: A. I. R. 1932 Ber

The provision in this rule as to an appellate Court recording its reasons for admitting additional evidence is directory merely, and not imperative.—

*Gopal Singh v. Jhakri Rai*, 12 C. 37 (followed in *Burha Mandari v. Megh Nath*, 2 C. L. J. 4-n). See also *Beni Pershad Kuari v. Nand Lal*, 24 C. 98; *Rahimuddin Kazi v. Radha Govinda*, 64 I. C. 238.

Where the evidence of a defendant has been taken by the Court of first instance so imperfectly that the lower appellate Court cannot pass a satisfactory judgment between the parties, it is competent to the Judge of that Court under the provisions of S. 355, C. P. Code, 1859, to have the defendant fully examined before himself, but not to remand the case for re-hearing and re-trial. If he examines the defendant he is bound to record his reasons for so doing, in order that the High Court may be enabled on appeal to decide whether or not the new evidence has been rightly admitted.—*Mohesh Chunder v. Madhub Chunder*, 13 W. R. 85.

Where a Judge sends for a map or other document, he is bound to record his reasons for doing so, according to the provisions of the C. P. Code, and the evidence so obtained must be taken and received by him in the presence of the parties in open Court, and afterwards kept on the record. It is not competent to him under S. 355, C. P. Code, 1859, merely of his own discretion to send for a document for personal inspection irrespective of the parties to the suit.—*Gunput Roy v. Ram Deour Roy*, 21 W. R. 416. See also *Shookrah Shaikh v. Nund Coomar*, 25 W. R. 246.

Where the lower appellate Court allows additional evidence to be taken though it is not satisfied that the evidence is necessary under Cl. (a) or Cl. (b) of S. 563 of the C. P. Code, 1882 (this rule) the High Court will interfere; but where this does not appear to be the case, and there is simply an omission on the part of the appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere.—*Hafiz Abdul Kurrin v. Sri Kissen*, 11 C. 139. See, however, *Juggernath v. Kanai Das*, 6 C. W. N. 31.

The provision of this rule as to an appellate Court recording its reasons for admitting additional evidence is complied with if the Court records "that it considers necessary, for the proper decision of the case, to take additional evidence."—*Radhanath v. Ramgobind*, 3 B. L. R. 218; 12 W. R. 224. See also *Hafiza v. Hossein*, 13 W. R. 328.

An appellate Court is not justified in taking additional evidence after a case has been argued before it and a date fixed for judgment, without

Order XLI, r. 27 has been read.

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I. C. 239).

Where evidence has been taken by an appellate Court in the presence of parties or their agents, it should not be rejected on appeal merely because the Court omitted to record its reasons for admitting it.—*Bhugwan Chunder v. Raj Coomar*, 13 W. R. 303.

Right of opposite party to rebut additional evidence.—When the appellate Court admits additional evidence under Or. XLI, r. 27, the other side must have an opportunity of rebutting it.—*Hriday Krishna v. Rajani Kanta*, 68 I. C. 293; A. I. R. 1923 Cal. 300 (31 B. 381 (P. C.)); 24 C. L. J.

457 referred to); *Man Singh v. Nawlakhbati*, 2 P. 607: 72 I. C. 239; *Ramzan v. Nabi Bux*, 6 L. L. J. 234: 80 I. C. 530: A. I. R. 1924 Lab. 638; *Rameshwar v. Badri Sahu*, 124 I. C. 87: A. I. R. 1930 Pat. 105: 11 P. L. J. 470. Where additional evidence was recorded and no reason stated for its admission, the suit was remanded with a direction to allow the opposite party to adduce rebutting evidence.—*Kebal v. Rajani*, 39 C. L. J. 261: 81 I. C. 999: A. I. R. 1925 Cal. 98. But it has also been held that the Court is only bound to record the reason for the admission of additional evidence but there is no provision that the Court must give an opportunity to the other party to rebut the evidence so admitted.—*Mahommad Wazir v. Shaik Majid*, 56 C. L. J. 246.

Where the appellate Court obtained a written opinion as to the date of stamp affixed on a handnote and using it gave judgment in favour of the appellant: held, that the opinion not having been formally proved and the plaintiff not having been given an opportunity of cross-examining the person giving the opinion thereon, ought not to have been taken in evidence and the finding of the Judge must be discarded.—*Ram Autar v. Baldeo*, 11 P. 782: 140 I. C. 895: A. I. R. 1932 Pat. 352.

**Second appeal.**—Where the Court has admitted evidence under this rule, the hearing for that reason be treated as a *fact* go into questions of fact.—*Beni Thakri*, 12 C. 37. The reason being that by virtue of the provisions of S. 100, the High Court is precluded from entering into questions of fact except as provided by S. 103. A refusal by the lower appellate Court to admit fresh evidence is not appealable.—*In the goods of Prem Chand*, 21 C. 484; *Ram Piari v. Kallu*, 23 A. 121; *Durga Prasad v. Jai Narain*, 33 A. 379. See also *Vaithinatha v. Kuppu*, 42 M. 737 (F. B.); *Thaman Singh v. Jivan Singh*, 131 I. C. 228: A. I. R. 1931 Lab. 506; *Buta Singh v. Balwant Singh*, 32 P. L. R. 813. The High Court in second appeal will not interfere with an order of the lower appellate Court refusing to admit fresh evidence unless it is shown that the discretion was exercised contrary to legal principles; and in such a case the plaintiff must show that even with due diligence he could not produce the evidence; and the mere fact that evidence of similar character to that adduced at the trial has come to light since the trial, which evidence, if it had been considered, might have affected the weight of the evidence before that Court is no argument.—*Kalicharan v. Jaldhari*, 115 I. C. 674: A. I. R. 1923 Pat. 98: 10 P. L. T. 10. The order of the Court permitting additional evidence was discretionary and it could not be set aside in revision.—*Ganda Ram v. Dev Raj*, 33 P. L. R. 330.

Where there is no *lacuna* or defect to be filled up or remedied and no substantial cause for taking additional evidence, the additional evidence admitted must be left out of consideration in disposing of the case.—*Ram Naresh Singh v. Chirkut*, 9 O. W. N. 379.

An appellant cannot complain in second appeal that the additional evidence taken under this rule in the first appellate Court for the purpose of giving him an opportunity of establishing by production of further evidence that the *dakhilas* given by the landlords were genuine, was wrongly received by that Court.—*Durga Prasad v. Tarakeswar*, 49 C. L. T. 478: A. I. R. 1923 Cal. 492: 120 I. C. 460 (following *Jagarnath v. Hanuman*, 36 I. A. 221: 36 C. 833, 839 (P. C.): 13 C. W. N. 830: 10 C. L. J. 74).

**Appeal to Privy Council.**—Where an application is rejected under this rule, such rejection does not give a right of appeal to the Privy Council.—*In the goods of Prem Chand*, 31 C. 484.

**Power of appellate Court to take notice of facts which have happened since the date of judgment of the lower Court.**—Public documents coming into existence subsequent to the filing of second appeals may be admitted in evidence in the High Court. A Court cannot shut its eyes to the events that came into existence during the pendency of any suit or proceeding.—*James Henry George Hill v. Satam Singh*, (1920) P. 4 (20 C. W. N. 1099 referred to).

See 11 C. W. N. 732; 6 C. L. J. 74, and 6 C. L. J. 92, 102, 662, noted under r. 33 of this Order.

**Power of second appellate Court to take additional evidence.**—In second appeals decisions of fact cannot be impugned and hence it is futile to admit evidence which is tendered to impugn a question of fact and which therefore should be rejected.—*Ranj Lal v. Lalawati*, 119 I. C. 561; A. I. R. 1929 All. 375; *Shamsuddin v. Molannessa Bibi*, 95 I. C. 300; A. I. R. 1926 Cal. 941; *Wadgoji v. Mahadeo*, A. I. R. 1927 Nag. 398; 102 I. C. 27.

**28.** Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or another subordinate Court, to take such evidence and to send it when taken to the Appellate Court. [S. 569.]

Mode of taking  
additional evidence.

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 569, C. P. Code, 1892, with some verbal changes only. The word "wherever" has been substituted for "when-ever"; the word "produced" has been substituted for the word "received"; the word "from" has been substituted for the word "against" and the word "preferred" has been substituted for the word "made" which occurred in the old section.

**Scope.**—A lower Court in taking evidence ordered under this rule, acts in a ministerial capacity.—*Ram Joy v. Prankishan*, 2 W. R. 80.

If the case is remanded for the attendance and examination of the plaintiff, the lower Court may dispense with his attendance, and accept the evidence of his agent instead, if the plaintiff be ill and unable to attend.—*Syud Reza v. Enaet Hossein*, 1 W. R. 330.

If a case is remanded for the examination of one of the plaintiffs, the defendants cannot insist upon, nor can the Court examine, the other plaintiffs also.—*Bolakee Loll v. Radha Singh*, 1 W. R. 357.

Where the additional evidence consists of documents, they should be made exhibits in the case.—*Daji v. Sakharam*, 38 B. 565.

**29.** Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to be confined and recorded. and record on its proceedings the points so specified. [S. 570.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 570, C. P. Code, 1882, with the omission of the words "in all cases" which occurred in the beginning of the old section.

### JUDGMENT IN APPEAL.

**30.** The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders. [S. 571.]

### COMMENTARY.

**Alterations**—This rule corresponds to S. 571, C. P. Code, 1882, with the substitutions of the words "from" for the word "against," and "preferred" for the word "made," which occurred in the old section.

**Pronounce judgment.**—A Judge may, at the close of the hearing of a suit, state at once orally the judgment which he intends to record and deliver.—*Anonymous*, 5 M. H. C. R. (App. Side) 8.

"After hearing the parties or their pleaders."—This rule only authorizes the Court to pronounce judgment after hearing the parties, and judgment pronounced without hearing them is unauthorized by the Code. Thus where an appellate Court heard and decided an appeal without being aware of the death of the appellant, the decree was held to be a nullity.—*Janardhan v. Ramchandra*, 26 B. 317; *Narain v. Kalu*, 2 L. L. J. 144.

As to amendment of clerical or arithmetical mistakes in judgments, decrees or orders, see S. 162 and the notes thereunder.

Sections 572 and 573 of the old Code, which contained provisions relating to the judgment, have been omitted. The sub-rule (3) of S. 137 of the present Code requires or allows anything other than the recording of evidence, to be done in writing in any such Court, such writing may be in English." In r. 31, the words "shall be in writing" have been added, hence S. 572 of the old Code has been omitted as unnecessary.

Section 573 of the old Code has also been omitted because S. 137 (3) makes provision for supplying translation.

**Effect of delivery of judgment after death of respondent.**—Where argument in an appeal was heard before but judgment was delivered after the death of the respondent. *Held*, that the judgment should be treated as operating as if it had been delivered on the day when the argument was heard.—*Narna v. Anant*, 19 B. 807 and *Chetan Charan v. Balbhadra Das*, 21 A. 314. *See*, however, *Janardhan v. Ramchandra*, 26 B. 317 : 4 Bom. L. R. 23, where it was held that the decree is a nullity when the appeal is heard and decided by the appellate Court without being aware of the death of the appellant.

*See now Or. XXII, r. 6 and the cases noted thereunder.*

Contents, date  
and signature of  
judgment.

**31.** The judgment of the appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein. [S. 574.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 574, C. P. Code, 1882, with some additions and alterations.

The words "*shall be in writing*" have been added before the words "shall state." The other changes are merely verbal. The object of the above addition will clearly appear on referring to sub-rule (3) of S. 137 of the present Code, which supplies the omission of Ss. 572 and 573 of the old Code. Section 137 (3) lays down, that where this Code requires or allows anything, other than the recording of evidence, to be done in writing in any such Court, such writing may be in English. Thus the words "*shall be in writing*," read with S. 137 (3), make it incumbent upon Courts to write judgments in English.

**Contents of the judgment of the appellate Court.**—Where it is found that the judgment of the lower appellate Court does not fulfil the requirements of this rule, the proper order is to set aside the decree and to remand the case to the lower appellate Court to dispose of the appeal according to law. Duty of appellate Court in case of change of officer, pointed out.—*Saravana Pillai v. Sesha Reddi*, 31 M. 469 (F. B.) : 18 M. L. J. 34 : 3 M. L. T. 71 (20 M. 496 ; 25 C. 97 ; 17 B. 428 ; 19 B. 551 referred to).

Where the judgment of the lower appellate Court dismissing an appeal was merely as follows: "The appeal is dismissed with costs," the High Court set aside the decree on the ground that the Court had not complied with the provisions of this rule.—*Srikant Dey v. Huri Das*, 11 C. L. R. 131. The same course was adopted where the judgment was "appeal rejected" under S. 551 (Or. XLI, r. 11) of the Civil Procedure Code.—*Rami Deka v. Brojo Nath*, 25 C. 97.

The judgment of a lower appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded, with general observations, as follows: "The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. The Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court. The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration." Held, that this was in law no judgment at all inasmuch as it did not satisfy the requirements of S. 574, C. P. Code, 1882 (this rule).—*Sohawan v. Babu Nand*, 9 A. 26. But see *Sundar Bibi v. Bisheshar Nath*, 9 A. 93 (F. B.). See also *Bahau Singh v. Jaimangal*, (1906) A. W. N. 86.

An appellate Court is bound to write a judgment, when an appeal is dismissed after rejecting an application for adjournment on the ground of absence of counsel.—*Patinhare v. Vellur Krishnan*, 26 M. 267.

Order XLI, r. 31 controls Or. XLI, r. 11, and an appellate Court dismissing an appeal under the latter provision must state the points for decision and the decision thereon with reasons.—*Bipin Behari v. Jogendra Nath*, 65 I. C. 479 (all relevant cases discussed).

The judgment of the appellate Court dismissing an appeal was as follows: "The point in dispute is a question of fact and I see no reason to differ from the finding of the lower Court." Held, that the judgment did not comply with the provisions of this rule as the reasons for the decision were not stated; that the defect was not cured by S. 578, C. P. Code, 1812 (S. 99); and that the defect in the appellate judgment is a ground of a special appeal.—*Shaharulla Mondal v. Bangoo Mondal*, 13 C. W. N. 143 (12 C. 199 distinguished). But see *Rakhal Chunder v. Satindra Deb*, 5 C. L. J. 348 (25 C. 197 distinguished), and *Pachi Dass v. Bala Dass*, 13 C. W. N. 1031.

The omission in a judgment to make any special reference to the oral evidence by the parties to a case is not in itself sufficient to show that as a matter of fact the Court did not consider the evidence of the witnesses who were examined in the case.—*Motiwor Rasuk v. Dhanu Molla*, 59 I. C. 963.

A judgment of a lower Court setting out no part of the evidence which leads the Judge to the conclusion at which he has arrived, is insufficient to enable a Court of second appeal to say whether the arguments of the trial Court on " . . . not a judgment in accordance . . . " I. C. 436. See also *Anandpal v. Mahabal*, 1 Luck. 458: 95 I. C. 525: A. I. R. 1927 Oudh. 95.

**Points for determination.**—The object of the Legislature in making it incumbent on an appellate Court to raise points for determination is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter.—*Mhasu Bhujee v. Davalat*, 7 Bom. L.R. 174. The Judge of the lower appellate Court not having recorded his judgment as required by S. 359 of Act VIII of 1859 (this rule), the case was sent back to the lower Court, for the Judge to state the points for decision and to give his decision upon those points consecutively.—*Tatur Khawas v. Jagannath*, 7 B. L. R. Ap 14: 15 W. R. 131. A Judge's decision, not being in conformity with the provisions of S. 359, Act VIII of 1859, was held to be illegal and defective.—*Rughobur v. Chattrapat*, 1 Agra 73; *Imrit Singh v. Koylashoe*, 11 W. R. 559.

Section 359, C. P. Code, 1859 (this rule), made it incumbent upon an appellate Court to set down distinctly the point or points on which it has to decide the appeal, and record its reasons for the decision it arrives at on each and all of these points.—*Shurbessur v. Sadhoo Churn*, 15 W. R. 130; and *Raj Chunder v. Rama Kant*, 15 W. R. 324.

The judgment of an appellate Court should clearly and fully dispose of all the points in issue between the parties by a distinct finding on each of them.—*Bhagbut Khan v. Puddo Bewa*, 3 W. R. 192; *Dhun Rae v. Ramphul*, 2 N. W. P. 109.

"We wish to impress upon the lower Courts of appeal, the necessity of always raising points for determination, as required by the provisions of the C. P. Code, in every appeal, before it is argued, because they narrow the points in controversy and leave little or no room for complaint in second appeals".—*Govind v. Yesuji Khandoji*, 10 Bom. L. R. 492

The judgment of an appellate Court must contain the points for determination, the decision thereupon and the reasons therefor. It need not contain a review or setting forth of the whole of the evidence. The propriety of giving an intelligent and clear account of the evidence in the judgment is laid down.—*Noor Mahomed v. Zuhoor Ali*, 11 W. R. 34.

The judgment of an appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them.—*Sitarama Sastrulu v. Suryanarayana*, 22 M. 12.

An appellate Court cannot make a declaration of right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.—*Official Trustee of Bengal v. Krishna Chandra*, 12 C. 239 (P. C.): 12 I. A. 166.

**The decision thereon.**—This rule does not make it imperative on an appellate Court to record its finding or decision on every point where it is really unnecessary to do so.—*Ismail Khan v. Hari Charan*, 9 C. W. N. 60. *Contra* Rampini, J.

When an appellate Court decides an appeal on a preliminary point it should decide the case on the merits as well, for it would then obviate a remand if the decision of the lower appellate Court on the preliminary question of law did not commend itself to the High Court.—*Manomohan v. Shib Chandra*, 34 C. W. N. 839.



The dismissal of an appeal under S. 551, C. P. Code, 1882 (Or. XLI, r. 11), by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, according to the provisions of this rule, should show the points raised, the decision upon these points and the reasons for deciding them.—*Rami Deka v. Brojo Nath*, 25 C. 97; *Dharam Das v. Shanker Ahir*, 53 A. 528; 132 I. C. 300; A. I. R. 1931 All. 589; *Durga v. Narain*, A. I. R. 1931 All. 597 (F. B.): 29 A. L. J. 875. See also *Royal Reddi v. Linga Reddi*, 3 M. 1, and the cases under r. 11.

The finding on an issue of a lower appellate Court, which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.—*Govind v. Vithal*, 20 B. 753.

A Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.—*Thakuri v. Kundan*, 17 A. 280.

Decision of appellate Court on other grounds—Effect of such decision.—When the decision of a lower Court is taken on appeal to a superior tribunal and that tribunal, for any reason, does not think fit to decide any matter it is left an open question (8 C. 681 referred to): If the appellate Court declines to decide an issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a further suit than it would be, if that judgment had been reversed by the Court of Appeal.—*Ghurphakni v. Purneshwar Dayal*, 5 C. L. J. 653 (6 B. 110, 7 C. 381 referred to).

"To state reasons for the decision."—The judgment of an appellate Court should state clearly the reasons of the conclusion therein contained.—*Chunder Kant v. Hurish Chunder*, 1 W. R. 214; *Goburdhun v. Sadhoo*, 1 W. R. 244; *Kartick Nepit v. Personomoyee*, 2 W. R. 77; *Doolee Chund v. Oomda Begum*, 18 W. R. 473; *Khetkur Mohun v. Bhyrub Chunder*, 3 W. R. 126; *Trilochun v. Ishen Chunder*, 3 W. R. 176; *Hossein Buksh v. Ameena Khatoon*, 16 W. R. 280; *Korban Ali v. Ashan Ali*, 4 W. R. 4; *Shathuk Paul v. Gudadhur Roy*, 4 W. R. 100; *Bhagvat Sangji v. Partabsangji*, 4 B. H. C. R. 105; *Robert Wilson v. Radha Dulari*, 2 C. W. N. 63.

The reasons for the decision should be stated not only when the decree of the first Court is varied or set aside, but also when it is confirmed.—*Rami Deka v. Brojo Nath*, 25 C. 97; *Babu Madhav v. Venkatesh*, 16 B. 540. If this rule is not observed, the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law.—*Saravana Pillai v. Sesha Reddi*, 31 M. 469 (F. B.).

Where the decision of a case involves issues of fact, and the first Court has gone fully into the evidence, and recorded its finding and decision, if the appellate Court agrees with the conclusions of the Court below, the appellate Court is not obliged by law to state in detail the reasons previously recited in which it concurs.—*Lalla Juggeshwar Sahay v. Gopal Lall*, 15 W. R. 54. See also *Imrit Lall v. Nuckshed*, 10 W. R. 100; *Kulumutee v. Jowahur Lall*, 11 W. B. 318. But see *Pertap Narain v. Maigh Lall*, 13 C. W. N. 949; *Mahommed Hossain Chaudhary v. Rabia Khatoon*, 69 I. C. 467.



The finding of an appellate Court not accompanied by reasons is not conclusive.—*Gopalrao Ganesh v. Kishor Kalidas*, 9 B. 527; *Krishnarav v. Vasudev*, 8 B. 371. See also *Ningappa v. Shivappa*, 19 B. 323.

The District Judge having given no reasons for making an order the order was discharged under the circumstances.—*Raghunath Gopal v. Nilu Nathaji*, 9 B. 452.

An appellate Court is bound to give reasons for deciding a specific point (in this case limitation) raised before it on appeal, even if it confirms generally the order of the Court below.—*Radha Gobind v. Ram Kishore*, 8 W. R. 340. See also *Haimabati v. Govinda Chandra*, 2 C. W. N. 695.

This rule is imperative, and under it the appellate Court is bound to state the reasons for its decision.—*Bhagvan v. Kesur Kuverji*, 17 B. 428 (6 A. 383, 391 followed); *Guptanand v. Behari Lal*, 21 A. L. J. 567; 74 I. C. 827; A. I. R. 1924 All. 100. The judgment of the appellate Court must state the reasons for the finding.—*Santishwar v. Lakhikanta*, 18 C. W. N. 177. A general and wholesale adoption of the judgment of the Court of first instance cannot be regarded as a sufficient compliance with the law.—*Santa Singh v. Bhan Singh*, 70 I. C. 830; 1923 Lah. 30.

In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, it is the duty of the lower appellate Court to form its own opinion on the evidence and record reasons for the findings.—*Ramchandra Govind v. Sono Sada Shiv*, 19 B. 551.

A Judge having remanded a case for further evidence to be taken and a fresh finding to be recorded on a question of fact, is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it.—*Kinhi Marakkar v. Kutti Umma*, 20 M. 496.

Failure to comply with the requirements of this rule.—When the first appellate Court has failed to comply with the requirements of this rule, the proper form of order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law. If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he need not re-hear the appeal unless he is of opinion that he cannot dispose of the remanded case without a re-hearing. But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, a re-hearing is always necessary in order that there may be a compliance with the order of the second appellate Court that the case be disposed of according to law.—*Saravana Pillai v. Sesha Reddi*, 31 M. 469 (F. B.).

The omission by an appellate Court to comply strictly with the provisions of Or. XLI, r. 31 amounts to no more than an irregularity curable by S. 99 of the Code.—*Musst. Lakhambai v. Musst. Devibai*, 59 I. C. 673; *Anandpal v. Mahabal*, 1 Luck. 453; A. I. R. 1927 Oudh 95; 95 I. C. 925.

The question whether in a particular case there has been a substantial compliance with the provisions of this rule depends on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the

regularity may be ignored if there has been a substantial compliance with and the second appellate Court is in a position to ascertain the findings of the lower appellate Court.—*Durga v. Narain*, A. I. R. 1931 All. 597 (F. B.): 9 A. L. J. 875.

Judgment affirming the decision of the trial Court.—A judgment of an appellate Court, affirming the decision of the trial Court, need not deal with the matter in dispute at the same length as would be necessary in a judgment of reversal.—*Mahendra v. Ashutosh*, 91 I. C. 478 · A. I. R. 1926 Cal. 545; *Kulumutee v. Jowahur*, 11 W. R. 318. But merely affirming the decision of the lower Court without deciding the case is not a proper judgment.—*Nilma*, A. I. R. 1928 Cal. 408. See also *Nitya Gopal*, A. I. R. 1931 Cal. 454; 133 I. C. 672.

The appellate Court must state in its judgment its own reasons and should not confine itself to approving of the reasons of the first Court, because the judgment must show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discretion in deciding them. Where this is not done, the High Court in second appeal will set aside the decree and send back the case to the lower appellate Court for disposal according to law.—*Ramchand v. Ram Rattan*, 12 I. C. 670; A. I. R. 1928 Lah. 655; 10 L. L. J. 257; *Harnama v. Phania*, 124 I. C. 346; A. I. R. 1930 Lah. 152, *Qasim Ali v. Hans Raj*, 112 I. C. 698.

Where the judgment of the lower appellate Court did not indicate the points for determination which are to be found invariably in the grounds of appeal, its decision on those points and also the reasons for its decision, but merely stated that the evidence had been well discussed by the lower Court and should not be rejected, the judgment was not in accordance with law.—*Anandpal v. Mahabai*, 1 Luck. 458; 95 I. C. 925; A. I. R. 1927 Oudh 95; 29 O. C. 380; *Phulraj v. Abhilakh*, 112 I. C. 845; A. I. R. 1928 Oudh 374; 5 O. W. N. 699. But an omission to refer in the judgment to every detail of evidence adduced is not a ground for setting aside the appellate Court's judgment.—*Zahid Ali*, 5 O. W. N. 893. A. I. R. 1928 Oodh 480:

Very great responsibility rests on the Court of first appeal, which is the ultimate Court on questions of fact, to write a judgment from which it may be clear to everybody concerned, that before recording findings of fact it did apply its mind to the materials upon the record relevant to the enquiry.—*Bharat Bhai v. Jai Narain*, 108 I. C. 129; A. I. R. 1928 All. 102; 27 A. L. J. 1102.

Where the judgment of the lower appellate Court was in the following terms:—"On the evidence on record this Court does not find reasons to disagree with the decision of the trial Court and the appeal is dismissed." Held, that the judgment should be set aside and the case remanded to that Court for fresh hearing and disposal.—*Sri Ranganatha v. Raja Gopalachariar*, A. I. R. 1928 Mad. 16.

Where decree is reversed or varied—Relief must be stated.—It is the duty of the appellate Court when it reverses the decision of the first

Court, and more especially when the judgment of the first Court is full and cogent, to point out the grounds on which it comes to a different conclusion. Where a District Judge had omitted to do so and, having left the country, could not be required to supply the omission, the High Court, being unable to make the ordinary presumption that he had fully considered the evidence, set aside his judgment, and remanded the case to be heard in appeal *de novo*—*Kristo Chunder v. Ram Brehmo*, 20 W. R. 403.

When an appellate Court upholds the decree of the first Court for reasons different from those given by the lower Court, it must specify in the decree the exact modifications necessary according to its conclusions.—*Lachho v. Har Sahai*, 12 A. 46.

A decree of an appellate Court, not specifying the relief granted, but merely repeating the judgment that the "appeal be decreed," is not a sufficient compliance with the requirements of the law.—*Hursarun v. Pursun Singh*, 2 N. W. P. 415; *Bell v. Guru Das Roy*, 1 B. L. R. A. C. 50.

**Appeal to Privy Council.**—Non-compliance with the requirements of this rule is not a ground for appeal to the Privy Council.—*Sundar Bibi v. Bisheshar Nath*, 9 A. 93 (F. B.).

**Appeals under S. 476, Cr. P. Code.**—Such appeals are regulated by Or. XLI of the C. P. Code and the judgment must comply with the provisions of this rule.—*Hamid Ali v. Madhu*, 54 C. 355; 100 I. C. 351; A. I. R. 1927 Cal. 284; 31 C. W. N. 281.

*As to the applicability of the provisions of this rule when an appeal is summarily dismissed under r. 11, see the cases noted under r. 11 of this Order.*

**32.** The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly. [S. 577.]

What judgment may direct.

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 577, C. P. Code, with the substitution of the word "*preferred*" for the word "*made*," which occurred in the old section. The use of the word "*may*" in this rule clearly indicates the discretionary power of the appellate Court.

"If the parties agree as to the form of decree in appeal, appellate Court may pass a decree accordingly."—Where an application purporting to contain terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *solehnama* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured, *held*, that the High Court was not justified in passing a decree under S. 577, C. P. Code, 1882, in accordance with the terms of the unverified *solehnama*.—*Bandhu Bhagat v. Muhammad Taqi*, 14 A. 350. Once an appeal is preferred from a decree the appellate Court becomes seized of the entire proceedings and

becomes vested with the jurisdiction of confirming, varying and reversing the decree from which the appeal is preferred.—*Abid Ali v. Har Pershad*, 5 Luck. 359 : 119 I. C. 462 : A. I. R. 1930 Oudh 13 : G. O. W. N. 644. The appellate Court has power to declare that the suit had abated.—*Manohar v. Commissioner of Income-tax, Punjab*, 10 L. 691 : 118 I. C. 436 : A. I. R. 1929 Lah. 173.

Where an execution sale is set aside in appeal but the purchaser offers to satisfy the entire decree if the sale should be left intact, it was held that the Court could pass an order to that effect.—*Mahomed Abdulla v. Sakhamam*, 54 B 348 : 125 I. C. 903 : A. I. R. 1930 Bom. 290 : 32 Bom. L. R. 436.

**33.** The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. [New.]

Provided that the Appellate Court shall not make any order under S. 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

#### Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals. A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.

#### COMMENTARY.

**Object and scope of the rule.**—This rule is new. It has been taken for the most part from Or. LVIII, r. 4 of the Rules of the Supreme Court of Judicature in England. It should be read with r. 4 of this Order. By the addition of this rule, the power of the appellate Court has been enlarged.

The object of introducing this rule in the present Code will appear from the following report of the Special Committee :—

"The Committee consider it most important that an appellate Court should have the fullest power to do complete justice between the parties. The illustration indicates a type of case for which provision is intended to be made."

This rule has virtually superseded 27 A. 23, 23 M. 229, and other cases in which similar view was taken and has adopted the principle laid down in 31 C. 643 (F. B.), 8 C. W. N. 496. All those cases are noted under r. 4 of this Order under the heading "Decree against some of the defendants—Alteration of decree by appellate Court."

The proviso to this rule has been added by the C. P. Code (Amendment) Act (IX of 1922).

**Cases to which the rule applies.**—Although the terms of Or. XLI, r. 33 are very wide and they do confer on an appellate Court wide powers for the purpose of making such decree or order as the exigencies of the case or the ends of justice may require, still, ordinarily, the powers contained in r. 33 should be limited to those cases where, as a result of the appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.—*Nandalal v. Mukundalal*, A. I. R. 1926 Cal. 57; 89 I. C. 24 (44 C. 759 (P. C.)); 34 M. L. J. 361 (P. C.) *expld.*; 22 C. L. J. 390; 28 C. L. J. 123 *folld.*; *Bikram v. Mohit*, 64 I. C. 178; *Abjal Majhi v. Intu Bepari*, 22 C. L. J. 394; *Manal Shatkh v. Mahammad Golam Nabi*, 113 I. C. 32; A. I. R. 1928 Cal. 488; *Punjab National Bank v. Umadatt*, 9 L. 291; A. I. R. 1928 Lah. 599; 112 I. C. 425; *Govind v. Ramcharan*, 68 I. C. 307.

Where the trial Court passed an order of *mandamus* under S. 45, Specific Relief Act against the defendant instead of giving a declaratory decree claimed by the plaintiffs, the appellate Court, if it was of opinion that no order of *mandamus* could be granted, was nevertheless entitled to pass a decree for declaration as originally prayed for, if the Court deemed it proper.—*Trustees for the Development of the City of Rangoon v. G. S. Behara*, 10 R. 412 (F. B.); A. I. R. 1932 Rang. 123; 139 I. C. 566.

Under Or. XLI, r. 33, the appellate Court may pass any order it thinks fit in appeal, though the appeal does not extend to the whole of the decree appealed against and though the power is exercised in favour of any respondent or any party who has not objected before it to the decree. The section is to be given a liberal interpretation. But the power must be exercised in the interest and for the furtherance of justice, and not as a mode of evading other statutory rules and orders.—*Bhutnath v. Sashimukhi*, 30 C. W. N. 885; 96 I. C. 474; A. I. R. 1926 Cal. 1042; *Narain Singh v. Kaiwan*, 95 I. C. 957; 3 C. W. N. 299; A. I. R. 1926 Ondh 304. See also *Kadiraya v. Kamalu*, (1928) M. W. N. 74; *Rukia v. Mewa Lal*, 51 A. 63; 111 I. C. 751; A. I. R. 1928 All. 746; 26 A. L. J. 1139. Where the execution sale is set aside in appeal but the purchaser offers to satisfy the entire decree if the sale should be left intact, it was held that the Court could pass orders to that effect.—*Mahomed v. Sakharan*, 54 B. 348; 125 I. C. 903; A. I. R. 1930 Bom. 290; 32 Bom. L. R. 436.

An appellate Court does not exceed the powers given to it by this rule by interfering with a portion of the decree not included in the appeal, where it adopts the principle on which the decision of the first Court was based, and makes an order which it considers ought to have been made by the said Court on the basis of that principle.—*Gobind v. Jai Gopal*, 72 I. C. 96.

This rule is applicable to all cases where an appeal is heard after this Code came into force.—*Chandramathi v. Narayanasami*, 33 M. 241. It is open to the appellate Court to vary the decree appealed against either in points (if any) in which it is erroneous or in respect of supplemental matters which are admitted.—*Sakharam Mahadeo v. Hari Krishna*,

r. 33.

6 B. 113, 115. The Courts, in the exercise of the powers conferred by this rule should not lose sight of the other provisions of the Code, nor of the Court-fees Act, nor of the Limitation Act. It should in particular bear in mind the case stated in the illustration.—*Rangam Lal v. Jhandu*, 34 A. 32 (F. B.) (distd. in *Gobind v. Jas Gopal*, 72 I. C. 96). See also *Abjal Majhi v. Intu Bepari*, 22 C. L. J. 394; *Akimannessa v. Bepin Behari*, 22 C. L. J. 397; *Shib Chandra v. Dulcken*, 28 C. L. J. 123; 48 I. C. 78.

This rule does not give a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objection himself.—*Ramalingam v. Subramania*, 50 M. 614; A. I. R. 1927 Mad. 620: (1928) M. W. N. 202: 103 I. C. 394.

Where pending a suit for administration of the estate of the deceased, X applied to be made a defendant claiming to be the adopted son of the deceased and the trial Court in an interlocutory order held that the adoption was not proved and the appeal preferred by X against this order was dismissed as premature, and thereafter on preliminary decree being passed, other parties appealed but X neither appealed nor filed any cross-objection when he was made a respondent by the other parties; it was held that it was not possible to reverse the finding against him in the absence of cross-objection and the memorandum of the previous appeal could not be considered as his cross-objection in the subsequent appeal by the other parties.—*U Po Tha v. Maung Tin*, 8 B. 480: 129 I. C. 524; A. I. R. 1930 Rang. 237.

Where upon a decree passed against several persons only some of them had appealed so far as their interests were concerned and the others were content with the decree and admitted the claim of the party, the appellate Court has no jurisdiction under this rule to reverse that part of the decree which was not appealed against.—*Venkatakrishnayya v. China Veerareddi*, A. I. R. 1928 Mad. 1144; *Piari Lal v. Saraswati*, 123 I. C. 381: 28 A. L. J. 1298.

Where the appellate Court reversed the mortgage-decree and gave a money-decree instead of a mortgage-decree in spite of the fact that the defendants had not appealed nor filed a cross-objection, it was held that the appellate Court had no power under this rule to take such an action and had acted *ultra vires*—*Vithoba v. Bhangji*, 112 I. C. 893; A. I. R. 1928 Nag. 322.

Assuming that the appellate Court may have power, in a proper case, to add a defendant as respondent under this rule for the purpose of passing a decree against him, it could not do so, so as to deprive him of a valuable right acquired by the plaintiff's failure to appeal against him in time.—*V. P. R. V.* 7: 6 R. 29 (P. C.): 32 C. W. N. 231: 54 M. L. J. 88: 30 Bom. L. R. 220: 4

The powers under this rule cannot be exercised to the detriment or prejudice of an absent respondent against whom the suit has been dismissed in the lower Court.—*Sakti Prasanna v. Naliniranjan*, 53 C. 923: 133 I. C. 177; A. I. R. 1931 Cal. 738.

A suit against A and B was decreed against A with costs and dismissed against B except as to costs. Both A and B appealed but the plaintiff did



not appeal. The High Court in appeal made a decree reducing the sum payable by *A* and dismissing the suit against *B*. The plaintiff appealed to the Privy Council. It was held that so far as *B* was concerned, the appeal being in effect direct from the trial Judge, was not competent under the Code or under the Letters Patent and Or. XLI, and r. 33 is not intended to apply to such an appeal.—*Mahomed Khaleel v. Leo Tanneries Lyonnaises*, 53 I. A. 84: 49 M. 435 (P. C.): 31 C. W. N. 1: 94 I. C. 767. The effect of this Privy Council decision is that if a case arrives at the higher appellate tribunal in such a state that to deal with it would involve hearing directly an appeal from the first Court without the intervention of the lower appellate Court, that course cannot be permitted; therefore where one of the parties had been given up in the lower appellate Court, no relief can be granted under Or. XLI, r. 33 against him in second appeal.—*Gangayya v. Venkayya*, (1929) M. W. N. 112. But where the trial Court passed a decree against one of two defendants and dismissed the suit as against the other and the defendant against whom the decree was passed appealed making the plaintiff and the second defendant party respondents but the plaintiff did not appeal against the dismissal, this rule is applicable and under it the appellate Court is competent to pass a decree against the second defendant.—*Majar Ali v. Nabin*, 35 C. W. N. 1079. See *Patiram v. Sadashee*, 132 I. C. 459: A. I. R. 1931 Nag. 97, *Khusiram v. Balakram*, 130 I. C. 774: A. I. R. 1931 Lah. 370.

Where an appellate Court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower Court.—*Govind Dass v. Ram Charan*, 4 U. P. L. R. 25: 69 I. C. 307. The object of this rule is to enable the Court to do complete justice between the parties to the appeal and therefore, where it is essential, in order to grant relief to an appellant, that some relief should at the same time be granted to the respondent also, the Court may grant that relief to the respondent although he has not filed an appeal or preferred an objection.—*Magsud v. Sheikh Abdullah*, 50 A. 218: 108 I. C. 723: A. I. R. 1928 All. 77: 25 A. L. J. 1017.

The appellate Court is entitled to grant relief to a defendant who could have appealed but has not done so.—*Tamizan v. Nanhey Lal*, 117 I. C. 111: A. I. R. 1929 All. 334; *Naresh v. Hayder*, 49 C. L. J. 83, 89: 115 I. C. 180: A. I. R. 1929 Cal. 28; *Subramania v. Sinnammal*, 53 M. 881 (F. B.): 127 I. C. 624: A. I. R. 1930 Mad. 801: 59 M. L. J. 634: (1930) M. W. N. 798: 32 L. W. 395. See also *Gangama v. Veerappa*, 131 I. C. 833: A. I. R. 1931 Mad. 513; *Ganga Prasad v. Hardei*, 133 I. C. 536: A. I. R. 1932 All. 32. Where a party brings a suit claiming  $\frac{2}{3}$ th of the property as his share as an heir to his father and the Court allows only  $\frac{1}{2}$  and when in an appeal by the other party the person is found entitled to  $\frac{2}{3}$ th share in view of the change in the law introduced by a ruling published subsequent to the decision of the lower Court, the High Court has power to correct the lower Court's mistake of law even though the person has not appealed against the lower Court's decision allowing him only  $\frac{1}{2}$  share.—*Ma San Nyun v. Maung Yint*, 127 I. C. 597: A. I. R. 1930 Rang. 190. The appellate Court can increase the rate of alimony payable to a wife even though she has not preferred an appeal for that purpose.—*Isvarayya v. Isvarayya*, 58 I. A. 350: 54 M. 774 (P. C.): 35

C. W. N. 1185 : 133 I. C. 716 : A. I. R. 1931 P. C. 234 : (1931) A. L. J. 808 : 33 Bom. L. R. 1402 : 8 O. W. N. 990 : 61 M. L. J. 367 : 34 L. W. 518.

A Full Bench of the Allahabad High Court, in a case where the plaintiff sued the defendant for rent and obtained a decree for a portion of his claim and the plaintiff then appealed against the disallowance of the balance of the amount but the defendant submitted to the decree and neither filed a cross appeal nor took objection under r. 22, has held that it was not competent to the appellate Court acting under r. 33 to interfere with the decree obtained by the plaintiff so far as it had not been challenged by the defendant.—*Rangam Lal v. Jhandu*, 34 A. 32 (F. B.). See also *Abjal Majhi v. Intu Bepari*, 22 C. L. J. 394. Where a mortgage suit against the mortgagor and a transferee from him was decreed, the mortgagor not appearing at the trial, but on appeal by the transferee, the suit was dismissed against the defendants on the ground that the mortgage-deed was not legally attested, it was held that although the lower appellate Court had jurisdiction to dismiss the whole suit under this rule, it ought to have in a case of this character confined the dismissal to the case against the transferee.—*Abinash v. Dasarath*, 56 C. 593 : 32 C. W. N. 1223 : 43 C. L. J. 231 : 114 I. C. 84 : A. I. R. 1929 Cal. 123.

Where a suit for contribution was decreed against three defendants, and one of them appealed, the appellate Court can under this rule set aside the decree against the appealing defendant and pass a further decree on the other two for the sum previously charged upon the appellant.—*Bejoy v. Kusum*, 33 C. W. N. 221 : A. I. R. 1929 Cal. 315.

A decree was passed for varying amounts against three defendants, of whom two only appealed, the third being made a party to the appeal. Held, that it was competent to the appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had.—*Jawahar Bano v. Shujaat Husain*, 43 A. 85 : 18 A. L. J. 925 ; *Mohsham Ali v. Muloo*, 24 A. L. J. 536 : 94 I. C. 347 ; *Man Han v. R. M. A. L. Firm*, 4 R. 110 : 97 I. C. 876 : A. I. R. 1926 Rang. 172. See *Tricomdas v. Gopinath*, 44 C. 759 (769) (P. C.) : 44 I. A. 65 : 19 Bom. L. R. 450 : 32 M. L. J. 357 : 15 A. L. J. 217 : 39 I. C. 156.

Where in a suit on a mortgage, a preliminary decree is passed specifying the separate liability of each property for a separate sum and only some of the defendants appeal in respect of a part of the decree, the appellate Court could not by virtue of Or. XLI, r. 33, C. P. Code have dismissed the suit against those defendants who were not parties to the appeal and had in fact submitted to the decree.—*Gyan Singh v. Ata Husain*, 43 A. 320 : 19 A. L. J. 83.

It is not competent to an appellate Court to interfere with the decree obtained by the appellant in so far as it has not been challenged by the respondent by way of appeal or cross-objections.—*Ram Lal Johari Mal v. Dip Chand*, 3 L. L. J. 231 : 60 I. C. 705.

An appellate Court can grant relief to an appellant as against a defendant against whom there is no appeal. But the power conferred by Or. XLI, r. 33 should be exercised in cases where, as the result of an appellate Court, interference in favour of the appellant further interference is required to

adjust the rights of the parties in accordance with justice, equity and good conscience.—*Bikram Kumar v. Mohit Krishna*, 64 I. C. 178.

In a suit for ejectment against tenants in possession of the land purchased by the plaintiff or in the alternative for compensation against his vendor, the first Court dismissed the suit against the tenants and awarded compensation against the vendor. The plaintiff did not appeal but the vendor appealed. The Court of Appeal, in decreeing the appeal in favour of the vendor, could give the plaintiff a decree for possession and mesne profits against the tenants.—*Charu Bala v. Nihar Kumari*, 46 C. L. J. 247: 105 I. C. 600: A. I. R. 1927 Cal. 831.

Where there is a common defence the appellate Court may dismiss a suit as against a defendant who has not appealed.—*Mohsham v. Mulu*, 48 A. 551: 94 I. C. 347: A. I. R. 1927 All. 37; but not where there is no common defence.—*Munawar v. Jagmilan*, 99 I. C. 280: A. I. R. 1927 All. 177.

"Such respondents or parties."—The use of the expression "respondents or parties" shows that the appellate Court may pass an order in favour of the respondents who have not appealed, and it may similarly decide any question in favour of a party, by which is meant a party to the suit and who is not a respondent in the appeal. The illustration to the rule does not limit the rule and is not intended to illustrate its full scope.—*Bhupnath v. Sashimukhi*, 30 C. W. N. 835: 96 I. C. 474: A. I. R. 1926 Cal. 1042. The word "parties" in this rule is intended to connote persons other than those who have been arrayed as appellants or respondents in the appeal. A decree can therefore be passed in favour but not against a person who is not a party to the appeal.—*Madan Lal v. Gajendrapal*, 51 A. 575: 116 I. C. 436: 27 A. L. J. 344: A. I. R. 1929 All. 243 (doubting *Rukia v. Mewa Lal*, 51 A. 63: 111 I. C. 751: A. I. R. 1928 All. 746).

Appellate Court is competent to take cognizance of events happened since the decree or order challenged was passed.—It is not only competent to a Court of Appeal but it may be its duty to take notice of events which have happened subsequently to the passing of the decree or order appealed against; and such events when not appearing in the record may be proved by extrinsic evidence.—*Ram Ratan v. Mohant Sahu*, 6 C. L. J. 74: 11 C. W. N. 732 (6 B. 113, 16 M. 350, 1 Bom. L. R. 218, 25 B. 606, 11 A. 148 referred to); *Ahmadji v. Mahamadji*, 1 Bom. L. R. 288. See also *Hazari Mulla v. Janaki*, 6 C. L. J. 92; *Ramyad Sahu v. Bindewari*, 6 C. L. J. 102; *Udit Chobey v. Rashika Prasad*, 6 C. L. J. 669; *Nuri v. Ambica*, 44 C. 47: 20 C. W. N. 1099; *Amrit Lal v. Kanti Lal*, 133 I. C. 244: A. I. R. 1931 Bom. 280: 33 Bom. L. R. 266; *Pandurang v. Ramchandrarao*, 54 B. 902: 130 I. C. 385: A. I. R. 1930 Bom. 554: 32 Bom. L. R. 1252. An appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based; but if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it in order to give just and proper relief to the parties in the appeal before it; and upon similar considerations Or. XLI, r. 33 empowers a Court of Appeal to make such a decree or order as the case may require. Therefore where a suit for ejectment was instituted at a time when the Rent Act of 1920 was in operation

but when the matter came up before the lower appellate Court, the Rent Act had expired, it was held that the temporary Act running out ceased to have effect upon the proceedings and the case must be decided in accordance with the general law under the Transfer of Property Act.—*Suresh v. Kantichandra*, 47 C. L. J 530 : 110 I. C 715 : A. I. R. 1928 Cal. 436.

**Proviso.**—The proviso was added by Act IX of 1922. It provided that where, in pursuance of any objection, the lower Court has omitted or refused to make any order as to compensatory costs under S. 35-A, the appellate Court shall not make any order as to such omission or refusal.

**34.** Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same. [S. 576.]

Dissent to be recorded

### COMMENTARY.

**Alterations.**—This rule corresponds to S 576, C. P. Code, 1882, with the substitution of the word "where" for "when" in the beginning.

*See notes under S. 38.*

### DECREE IN APPEAL.

**35.** (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

Date and contents of decree.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree. [S. 579.]

Judge dissenting from judgment need not sign decree.

### COMMENTARY.

**Alterations in the rule.**—This rule corresponds to S. 579, C. P. Code, 1882, with some additions and alterations.

Sub-rule (1) exactly corresponds to para. 1 of the old section.

Sub-rule (2) corresponds to para. 2 of the old section, with some additions, alterations and omissions. The words "and the memorandum of appeal" which stood after the words "the number of the appeal" in the old section, have been omitted. The result of the omission seems to be that the appellate decree need not contain the memorandum of appeal. By the above omission the ministerial officers of the Civil Courts have been relieved of a great deal of clerical work. But Form No. 9 of Sch. I, App. G which is the form of the decree in appeal, has not been amended in accordance with this omission. The forms are not intended to override the express provision of the law. See notes under Or. XLVIII, r. 3. The words "and a clear specification of the relief granted or other adjudication made" have been substituted for the words "and shall specify clearly the relief granted or other determination of the appeal," which occurred in the old section. This alteration is simply a change of words and phrases.

Sub-rule (3) corresponds to para. 3 of the old section with some additions and alterations. The words "by whom" have been substituted for the words "by what parties" which occurred in the old section; and the words "out of what property" have been added after the words "by whom."

Sub-rule (4) exactly corresponds to para. 4 of the old section.

The proviso also corresponds to the proviso of the old section with the substitution of the word "and" for the word "if".

**Effect of appellate decree—Relief granted.**—Where the appellate Court has modified the decree of the Court below, the decree of the appellate Court supersedes entirely that of the lower Court, and is the only decree capable of execution.—*Shohrat Singh v. Bridgman*, 4 A. 376 (F. B.); *Muhammad Sulaiman v. Muhammed Yar Khan*, 11 A. 267 (F. B.); *Muhammad Sulaiman v. Fatima*, 11 A. 314 (F. B.); *Nourang Rai v. Latif Chaudhri*, 13 A. 394; *Shivlal v. Jumak Lall*, 18 B. 542; *Sakhalechand v. Velchand*, 18 B. 203; *Nanchand v. Vitlu*, 19 B. 258; *Daulat v. Bhukandas*, 11 B. 172; *Noor Ali v. Koni Meah*, 13 C. 13; *Kistokinker v. Burroda Caunt*, 10 B. L. R. 101 (P. C.); *Manavikraman v. Unniappan*, 15 M. 170; *Jawahir Mal v. Kistur Chand*, 13 A. 343; *Pichuvayyengar v. Seshayyengar*, 18 M. 214 (F. B.); *Mul Chand v. Ram Ratan*, 20 A. 493. See also the case noted under Or. XXI, r. 11, under the heading "Final decree susceptible of execution."

Sections 579 and 587, C. P. Code, 1892 (Or. XLI, r. 85, S. 108), do not require the claim to be stated in the decree so as to make such statement a part of the decree itself.—*Soude Shrinivasapa v. Krishnapa*, 11 B. 177.

A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces.—*Gheran v. Kunj Behari*, 9 A. 413.

The date which the decree should bear is the date on which the judgment is pronounced.—*Parbati v. Bhola*, 12 A. 79.

Where the decree of the appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based, and to the decree of the first Court, held that, though the decree was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was capable of

execution, execution should, as a matter of equity, be granted to the decree-holder.—*Jawahir Mal v. Kistur Chand*, 13 A. 343.

Pending an appeal in a partition suit, one of the defendants died, and the plaintiff became entitled to a larger share on account of his death. Held that the appellate Court had power to vary the decree by giving the plaintiff his larger share.—*Sakharam Mahadev v. Hari Krishna*, 6 B. 118.

After the disposal of an appeal, and before preparation of decree, a Court has power to direct the plaintiff to correct the valuation and pay additional Court-fees on his memorandum of appeal.—*Mahmood, J., contra in Mahadei v. Ram Kishen*, 7 A. 528.

**Decree in cross-appeals.**—The law contemplates that there should be only one decree in one suit except in certain cases in which the Code lays down that there may or must be two decrees (one preliminary and one final); and the function of the appellate Court is to determine what decree the Court below ought to have made, and it follows that, where the trial Court has passed only one decree, there can be substituted for that decree only one decree, should the case come up on appeal; so, while it may be that for purposes of procedure, and in order to formally complete the records it may be necessary in the case of cross appeals to draw up a separate decree in each case, there is, in fact, only one and the same decree which ought to be incorporated with each appellate record.—*Nannu v. Nazim*, 50 A. 517: A. I. R. 1928 All. 274: 26 A. L. J. 258: 113 I. C. 93.

**Costs.**—When an appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.—*Mohomed Busseeroollah v. Ram Kant*, 16 W. R. 266.

Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court, the proper course is to dismiss the appeal without costs.—*Fischer v. Kamala Naicker*, 8 M. I. A. 170: 3 W. R. (P. C.) 33

Section 360, Act VIII of 1859 (this rule), only requires the Judge of an appellate Court to state in his decision by what parties (and in what proportions if necessary) the costs of the original suit, which he must take for granted, are to be paid; but not to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court.—*Mothooru Mohun v. Hury Kishore*, 18 W. R. 286 (reversing on review, 17 W. R. 445).

When a decree of the High Court awards costs, the order is not bad in law simply because it does not specify the exact amount to be paid as costs of the lower Court. Such specification is not rendered incumbent by Act VIII of 1859, S. 360 (this rule), which only requires a Court of Appeal to declare the proportions in which the costs are to be paid where more parties than one are made liable.—*Raj Krishno v. Pranoda Debee*, 21 W. R. 74.

An appellate Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne; it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought.—*Kashee Chunder v. Bungshee Buddar*, 23 W. R. 89.

**Chartered High Courts.**—This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction (Or. XLIX, r. 3).

**Form.**—For Form of decree in appeal, see App. G, Form No. 9.

Copies of judgment and decree to be furnished to parties.

**36.** Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense. [S. 580.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 580, of the C. P. Code, 1882, with the addition of the word "*Appellate*" before the word "Court."

**37.** A copy of the judgment and of the decree certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits. [S. 581.]

Certified copy of decree to be sent to Court whose decree appealed from.

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 581, C. P. Code, 1882, with the substitution of the word "*from*" for the word "*against*."

**Object.**—This section simply specifies how an appellate decree is to be dealt with, and *inter alia*, it goes on to say that such decree shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits.—*Kassa Mal v. Gopi*, 10 A. 389, 392.

The reason for sending a certified copy of the appellate decree to the lower Court is, that the decree of the appellate Court completely supersedes the decree of the lower Court, and is the only decree capable of execution.—*Muhammad Sulaiman v. Muhammad Yar Khan*, 11 A. 267 and *Muhammad Sulaiman v. Fatima*, 11 A. 314. See also *Nourang Rai v. Latif Chaudhri*, 13 A. 394 (4 A. 376 followed).

## ORDER XLII.

### APPEALS FROM APPELLATE DECREES.

Procedure.

1. The rules of Or. XLI shall apply, so far as may be, to appeals from appellate decrees.

### COMMENTARY.

**History.**—This rule corresponds to the first part of S. 587, C. P. Code, 1882; and it should be read with S. 103 of the Code under which all the rulings have been noted.

**Second appeals.**—See notes under Ss. 100, 102, 103, 107 and 108, and the notes under the preceding Or. XLI.

It is necessary that every second appeal preferred shall be accompanied by a copy of the decree of the lower appellate Court with the memorandum of second appeal.—*Hakam Beg v. Rahim Shah*, 100 I. C. 810: A. I. R. 1927 Lah. 912.

**Presentation of second appeal without copy of first Court's judgment, if valid.**—A memorandum of second appeal must be accompanied not only by the copies specified in Or. XLI, r. 1, C. P. Code, but also by a copy of the judgment of the Court of first instance, and where the latter is filed after the expiry of the period of limitation, the appeal must be dismissed as time-barred unless just cause is shown for extending the period.—*Dyala v. Hiru*, 67 I. C. 670; *Bhairon v. Ram Autar*, 19 A. L. J. 598 (F. B.); *Mathra v. Ram Singh*, 105 I. C. 689: A. I. R. 1927 Lah. 747.

Under the rules framed by the Lahore High Court every memorandum of appeal in a second appeal must be accompanied by a copy of the judgment of the trial Court and a note by the appellant that the said copy is already in the High Court in another appeal arising out of the same proceedings is not a sufficient compliance with the rules; *Naidar v. Bhartu*, 101 I. C. 776: A. I. R. 1927 Lah. 423; 29 P. L. R. 272. See *Ghulam Muhammad v. Rura*, 104 I. C. 290: A. I. R. 1927 Lah. 721.

Where there were two cases before the trial Court between the same parties and one judgment written and a brief order was passed in the connected matter stating the result for the reasons contained in the common judgment and in second appeal a copy of the brief order was filed but not the judgment, it was held that the appellant ought to have filed the judgment and his omission was fatal to the second appeal.—*Mengha Ram v. Hadi Hussain*, 111 I. C. 384.

**Right of a party in first Court but not in first appeal to prefer a second appeal.**—It is not competent for the defendants or plaintiffs who are not parties to the appeal in the Court below to file a second appeal. To permit such an appeal would really amount in effect to permitting an appeal



against the decree of the trial Judge.—*Raghu Lal v. Arjun Singh*, 132 I. C. 205; A. I. R. 1931 All. 766; 29 A. L. J. 271.

**Inherent power of High Court to remand in second appeal.**—When the Court of first instance declined to record oral evidence tendered by the plaintiff on the ground that the documentary evidence produced by him was quite sufficient to prove his case and the decree passed in his favour was reversed in appeal, but the lower appellate Court declined to permit the plaintiff to produce oral evidence, it was held by the High Court that it had inherent power, *ex debito justitie*, to set aside the proceedings of both the Courts below and to direct the first Court to re-try the case.—*Durga v. Anoraji*, 17 A. 29; *Kabal v. Rajani*, 39 C. L. J. 261; 81 I. C. 999; A. I. R. 1925 Cal. 98; *Jeshankar v Bai Divali*, 22 Bom. L. R. 771; 57 I. C. 525.

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# ORDER XLIII.

## APPEALS FROM ORDERS.

Appeals from  
orders.

1. An appeal shall lie from the following orders under the provisions of section 104, namely:—

- (a) an order under r. 10 of Or. VII returning a plaint to be presented to the proper Court;
- (b) an order under r. 10 of Or. VIII pronouncing judgment against a party;
- (c) an order under r. 9 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (d) an order under r. 13 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;
- (e) an order under r. 4 of Or. X pronouncing judgment against a party;
- (f) an order under r. 21 of Or. XI;
- (g) an order under r. 10 of Or. XVI for the attachment of property;
- (h) an order under r. 20 of Or. XVI pronouncing judgment against a party;
- (i) an order under r. 34 of Or. XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under r. 72 or r. 92 of Or. XXI setting aside or refusing to set aside a sale;
- (k) an order under r. 9 of Or. XXII refusing to set aside the abatement or dismissal of a suit;
- (l) an order under r. 10 of Or. XXII giving or refusing to give leave;
- (m) an order under r. 3 of Or. XXIII recording or refusing to record an agreement, compromise or satisfaction;

- (n) an order under r. 2 of Or. XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (o) an order [under r. 2 or r. 4 or r. 7] of Or. XXXIV refusing to extend the time for the payment of mortgage money;
- (p) orders in interpleader-suits under r. 3, r. 4 or r. 6 of Or. XXXV;
- (q) an order under r. 2, r. 3 or r. 6 of Or. XXXVIII;
- (r) an order under r. 1, r. 2, r. 4 or r. 10 of Or. XXXIX;
- (s) an order under r. 1 or r. 4 of Or. XL;
- (t) an order of refusal under r. 19 of Or. XLI to re-admit, or under r. 21 of Or. XLI to re-hear, an appeal;
- (u) an order under r. 23 of Or. XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under r. 6 of Or. XLV.
- (w) an order under r. 4 of Or. XLVII granting an application for review. [S. 538.]

### COMMENTARY.

**History.**—This rule corresponds to S. 538, C. P. Code, 1892, with additions, alterations and omissions.

"We suggest that there should be appeals from orders pronouncing judgment against a party under Or. VIII, r. 10, Or. X, r. 4, and Or. XVI, r. 20. These orders are under the present law appealable as decrees, but, having regard to the definition of a decree under the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders. We have also given an appeal against an order made under r. 21 of Or. XI."—*See the Report of the Select Committee.*

The words within square brackets in Cl. (o) were substituted for the words "under r. 3 or r. 8," by the Transfer of Property (Amendment) Supplementary Act, 1930 (XVI of 1930).

**Section 104.**—This Order read with S. 104 (2), of which it is a part, makes it clear that *no appeal shall lie from any order passed in appeal under this Order*; that is, no second appeal will lie from orders passed in appeals under this Order.—*See Naubat Singh v. Baldeo Singh* 33 A. 479.

### APPEALABLE ORDERS.

Clause (a)—an order under r. 10 of Or. VII returning a plaint to be presented to the proper Court;

Clause (a)—This clause corresponds to Cl. (6) of the old section with the omission of the words "*returning plaints for amendment.*" Although in the present Code there is no express provision for returning plaints for amendment, S. 151 of the present Code is wide enough to include such a case.—*See notes under that section.* An order returning plaint for amendment is no longer appealable under this clause.

Where after the issues in a suit were framed, the Court decided that it had no jurisdiction, and returned the plaint to be presented in the proper Court; held that its decision was appealable under S. 580, C. P. Code, 1882, as an order.—*Abdul Samed v. Rajendro Kisher*, 2 A. 357. But where a plaint has been returned for presentation to the proper Court, it is not open to the plaintiff to appeal from the order, after he has taken back the plaint and refiled it in the Court directed.—*Beni Madhub v. Jotendra Mohan*, 5 C. L. J. 590; 11 C. W. N. 765.

Where an order returning a plaint for presentation to the proper Court is passed by a Court of Appeal, an appeal will lie from such order in the manner provided by S. 589 of the Code of 1882.—*Wahidullah v. Kanhaya Lal*, 25 A. 174 (F. B.) (3 A. 456 overruled). See also *Chinnasami Pillai v. Karuppaudayan*, 21 M. 234; *Goor Bux v. Birj Lal*, 26 C. 275; 3 C. W. N. 243; *Venkatanarasu v. Kotayya*, 97 I. C. 790; 51 M. L. J. 119; A. I. R. 1926 Mad. 900. But see *Hari Chand v. Madan Lal*, 128 I. C. 491; A. I. R. 1930 Lah. 839, in which it has been held that no appeal lies from such an order of the appellate Court.

When a Court of first instance returned a plaint to be presented to the proper Court and the Court of Appeal set aside such order, and directed the original Court to hear the cause; held, that the High Court had no jurisdiction to interfere with such appealable order.—*Mathura Nath v. Umesh Chandra*, 1 C. W. N. 626.

The first Court ordered the plaint to be returned, for want of jurisdiction, but the appellate Court holding that the first Court was competent to try the suit, made an order "decreeing the appeal." It subsequently made an additional order directing that the case "should be returned for re-trial." On appeal to the High Court from such additional order, held that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which, under the last clause of S. 588, C. P. Code, 1882, was final.—*Kishna Ram v. Narsing Sevak*, 3 A. 855.

A District Court transferred a suit for trial from one Subordinate Court to another. The Court to which the suit was transferred finding that the Court in which it was instituted was not the proper Court in which the suit should have been instituted, returned the plaint for presentation to the proper Court. Held that the order must be taken to have been passed under S. 57, C. P. Code, 1882, and was therefore appealable under this section.—*Pacham: Awasthi v. Ilahi Bakhsh*, 4 A. 478.

A Munsif dismissed a suit on the ground that, if it had been properly valued, it would not have come within his jurisdiction. The District Judge affirmed the Munsif's judgment and directed the plaint to be returned under S. 57 for presentation to the proper Court. This was not done. Held, that a second appeal would lie.—*Joynath v. Lall Bahadur*, 8 C. 126; 10 C. L. R. 146.

After the suit had been admitted, and the parties called on to produce evidence, the Munsif ordered the plaint to be returned for presentation in the proper Court, on the ground that the suit should have been instituted in the Sub-Judge's Court. *Held*, that the Munsif's order was appealable to the lower appellate Court, and under Act X of 1877, the lower appellate Court's order, to the High Court.—*Kalian Das v. Nawal Singh*, 1 A. 620.

Orders amending plaints then and there, are not made appealable under this section of the Code.—*Rajindra Kishore v. Radha Prasad*, 3 A. 854.

No appeal lies against the order of an appellate Court returning a memorandum of appeal for presentation to the proper Court.—*Raghunath Charan v. Shamo Koeri*, 31 C. 344 (14 M. 462 dissented from); *Nazar Husain v. Kesri Mal*, 12 A. 581; *Nuruddin v. Pran Kishan*, 40 A. 659; *Bankey Lal v. Meghraj*, 19 A. L. J. 868; 63 I. C. 951.

An application for a decree under Or. XXXIV, r. 6 cannot be considered to come under "plaint" and consequently an appeal does not lie under this rule from an order returning such application to be presented to the proper Court.—*Bhup Singh v. Fateh Singh*, A. I. R. 1931 All. 192; 29 A. L. J. 893.

Clause (b)—an order under r. 10 of Or. VIII pronouncing judgment against a party;

This clause corresponds to part of Cl. (10) of the old section.

Rule 10 of Or. VIII lays down the procedure when a party from whom a written statement is required by the Court fails to present the same within the time fixed by the Court. The Court may in such a case either pronounce judgment against the defaulting party or make such other order as the Court thinks proper. See notes under r. 10, Or. VIII.

Order XLIII, r. 1 (b) merely gives a right of appeal if a judgment has been  
: : : : : appeal lies under this rule from an order  
: : : : : by a party are sufficient and rejecting  
: : : : : for striking off his pleadings.—*Jagat*  
: : : : : A. I. R. 1931 Lah. 77.

Clause (c)—an order under r. 9 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.

This clause corresponds to Cl. (8) of the old section with some verbal changes only. Rule 9 of Or. IX lays down the procedure for setting aside a decree passed against the plaintiff by default.

When a decree is made against a plaintiff by default under r. 8 of Or. IX, the following courses are open to him: viz., (1) he may apply to set aside the order of dismissal under r. 9 of Or. IX; (2) he may apply for review; (3) he may appeal from the decree dismissing the suit under S. 96 (see *Gosto v. Hari Mohan*, 8 C. W. N. 313, noted below, and the cases therein referred to); or (4) he may appeal under this clause. See notes under r. 9, Or. IX. The words "in a case open to appeal" exclude Small Cause Court suits and such other cases not open to appeal.

r. 1.

When the plaintiff's application under Or. IX, r. 9, C. P. Code, is rejected on the ground that the previous order of dismissal was under Or. XVII, r. 3 and not under Or. XVII, r. 2, the plaintiff is entitled to appeal against it under Or. XLIII, r. 1.—*Syed Bakar Husain v. Mirza Hussain Mirza*, 73 I. C. 373 : A. I. R. 1923 Pat. 223.

An order under S. 102, C. P. Code, 1882 (Or. IX, r. 8), dismissing a suit, is as much a decree as an order under any other section deciding a suit. The order comes within the definition of a decree and is appealable as such. The mere fact that a further remedy is given under S. 588, C. P. Code, 1882 (this rule), does not bar an appeal.—*Gosto Behary v. Hari Mohan*, 8 C. W. N. 313 (9 A. 427 and 30 C. 660 (F. B.) : 7 C. W. N. 486 referred to).

No appeal lies against an order dismissing for default an application to set aside the dismissal of a suit for default under Or. IX, r. 9.—*Bajjilal v. Rameshwar*, 7 P. 333 : 109 I. C. 264 : A. I. R. 1928 Pat. 335.

No appeal lies from an order rejecting an application to restore to the under S. 311, C. P. Code, 1882 (Or. XXI default under S. 102, C. P. Code, 1882 *uddin*, 27 C. 414; *Raja v. Srinivasa*, 11 M. 319; *Ningappa v. Gangawa*, 10 B. 483; and *Jung Bahadur v. Mahadeo Prosad*, 31 C. 207 : 8 C. W. N. 160 (19 W. R. 122 followed). Followed in principle in *Ghashti Bibi v. Abdal Samad*, 29 A. 596: (1907) A. W. N. 186. See also *Hara Kumar v. Murari Mohan*, 36 C. L. J. 184 (19 C. W. N. 25 *referred to*) When a suit is dismissed at an adjourned hearing for plaintiff's non-appearance the dismissal is one under Or. XVII, r. 2 and is appealable under this clause.—*Shriniant Sagajirao v. Smith*, 20 B. 736

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application—*Bharat Indu v. Asghar Ali Khan*, 45 A. 148 : 21 A. L. J. 135.

Clause (d)—an order under r. 13 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

This clause corresponds to Cl. (9) of the old section, with some additions and verbal alterations. See notes under r. 13, Or. IX. The words "*in a case open to appeal*" have been added, to exclude Small Cause Court suits and other cases in which no appeal lies.

An appeal lies under S. 534, C. P. Code, 1882 (Or. XXXVII, r. 4), from an order refusing to set aside an *ex parte* decree.—*Luckmidas Vithaldas v. Ebrahim*, 2 B. 644.

An appeal lies under Or. XLIII, r. 1 (d), against an order dismissing for default an application to set aside an *ex parte* decree.—*Musst. Bodhia v. Ram Chandra*, 101 I. C. 753 : A. I. R. 1927 Pat. 240.

This clause applies to *ex parte* orders passed in execution proceedings.—*Krishna Chandra v. Protap Chandra*, 3 C. L. J. 276

There is no appeal from an order setting aside an *ex parte* decree.—*Shama Dass v. Hurbans Narain*, 16 C. 426; *Tasaddug Husain v. Hayatunnissa*, 25 A. 280; *Beera Ram v. Mitha Ram*, 103 P. R. 1905: 45 P. L. R. 1906; *Ujagar Singh v. Sohan Singh*, A. I. R. 1927 Lab. 775.

No appeal will lie from an order made under S. 157 (Or. XVII, r. 2) read with S. 108 (Or. IX, r. 13), C. P. Code, 1882, setting aside a decree passed *ex parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned.—*Bhaywan v. Hira*, 19 A. 355 (23 C. 738, referred to).

An order refusing to set aside an *ex parte* order in execution proceedings was held appealable.—*Krishna Chandra v. Protap Chandra*, 3 C. L. J. 276.

An appeal lies from an order rejecting the application for an order to set aside a decree passed *ex parte*, when the order is made because the conditions which were lawfully imposed on the defendants were not complied with.—*Naryan v. Vaikunt*, 29 Bom. L. R. 1245; A. I. R. 1927 Bom. 1 (F. B.) (*Fakirgouda v. Vishundas*, 29 Bom. L. R. 578 overruled).

No appeal lies from an order passed by a Land Acquisition Judge dismissing an application under Or. IX, r. 13 for setting aside an *ex parte* award.—*Rajendra Nath v. Kamal Krishna*, 36 C. W. N. 352 (following *Hasun Molla v. Tasruddin*, 39 C. 393 and *Banshidhur v. Secretary of State*, 54 C. 312).

Clause (e)—an order under r. 4 of Or. X pronouncing judgment against a party;

This clause corresponds to Cl. (10) of the old section. Rule 4 of Or. X (S. 120 of the old Code) lays down that where a pleader refuses or is unable to answer any material question relating to the suit, the Court may direct the party to appear in person and in default pronounce judgment against him.—See notes under r. 4, Or. X.

Clause (f)—an order under r. 21 of Or. XI;

This clause is new. An order under r. 21 of Or. XI has been held to be a decree and hence the order has been made appealable. *Vide* 19 B. 307, 7 A. 159, and 6 C. L. J. 374, noted under r. 21 of Or. XI.

Rule 21, Or. XI, which corresponds to S. 136 of the old Code, lays down that where a party fails to comply with an order to answer interrogatories, for discovery or inspection, then his suit (if plaintiff) is liable to be dismissed and if defendant, his defence shall be struck out.

An order refusing to strike out a defence is one under Or. XI, r. 11, and is appealable.—*Jnanada Prosad v. Falkur*, 34 I. C. 220: A. I. R. 1930 Cal. 426: 126 I. C. 781.

Clause (g)—an order under r. 10 of Or. XVI for the attachment of property;

This clause corresponds to part of Cl. (14) of the old section.

Rule 10 of Or. XVI, which corresponds to S. 168, C. P. Code, 1882, lays down the procedure for attachment of property of an absconding witness.—*See notes under Or. XVI, r. 10.*

Clause (h)—an order under r. 20 of Or. XVI pronouncing judgment against a party;

This clause corresponds to part of Cl. (10) of the old section. Rule 20 of Or. XVI (S. 177 of the old Code) empowers the Court to pronounce judgment against a party who being present in Court refuses, without lawful excuse, to give evidence or produce any document then and there in his possession.—*See notes under r. 20, Or. XVI.*

Clause (i)—an order under r. 34 of Or. XXI on an objection to the draft of a document or of an endorsement;

This clause corresponds to Cl. (15) of the old section. Rule 34 of Or. XXI (S. 216 of the old Code) relates to decree for execution of document.

Clause (j)—an order under r. 72 or r. 92 of Or. XXI setting aside or refusing to set aside a sale.

This clause corresponds to Cl. (16) of the C. P. Code, 1882, with some modifications. Rule 72 of Or. XXI (S. 294 of the old Code) prohibits the decree-holder to bid for or buy property without permission, and r. 92 makes orders under rr. 89, 90 and 91 (Ss 310-A, 311 and 313 of the old Code) appealable as orders.

The question whether an order under Or. XXI, r. 66 fixing the value of a property to be sold in execution has been fully discussed in the notes to that rule under heading "Appeal."

Similarly, the question of appealability of orders setting aside or refusing to set aside sales under Or. XXI, r. 89 has been discussed in the notes to that rule under heading "Appeal against order under this rule."

The effect of the introduction of *fraud* as a ground for setting aside a sale in an application under Or. XXI, r. 90 on the question of appealability of an order setting aside or refusing to set aside a sale has been explained in the notes to that rule.

*See also notes to Or. XXI, r. 92 under heading "Appeals from orders passed under this rule" and "Revision."*

No appeal lies from an order passed by a District Judge setting aside a sale in execution of an *ex parte* rent decree valued at less than Rs. 100.—*Monmohini v. Lakhinarain*, 28 C. 116 (27 C. 484 followed).

Where, after a judgment-debtor has applied, under S. 311, C. P. Code, 1882, to have a sale set aside, the auction-purchaser is made a party to the



proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale.—*Gopal Singh v. Dular Kuar*, 2 A. 352; *Kanthi Ram v. Bankey Lal*, 2 A. 396.

An order passed under the first clause of S. 312, C. P. Code, 1882, after an objection made under the provisions of S. 311 has been disallowed, is appealable under Cl. (16) of S. 599, C. P. Code, 1882.—*Tota Ram v. Khub Chand*, 7 A. 253 (F. B). See also *Dakshina Mohan v. Basumati Debi*, 4 C. W. N. 474 (479); and *Bejoy Singh v. Hukum Chand*, 29 C. 548.

No second appeal lies against an order under S. 312, C. P. Code, 1882, setting aside a sale.—*Aubhaya Dassi v. Pudmo Lochun*, 22 C. 802 (18 C. 422 followed).

An order under Or. XXI, r. 92 is appealable and under S. 104 (2) of the Code no further appeal lies from an order passed in appeal in such appeal.—*Maung Pe Sein v. Ma Thin Mya*, 7 R. 37: 117 I. C. 253: A. I. R. 1929 Rang. 148, in which it has also been held that the provisions of S. 11, Burma Courts Act, do not affect those of S. 104 of the Code.

There is no appeal to the High Court from an order refusing to set aside a sale unless such order is made under Ss. 294, 312 or 313 of the C. P. Code, 1882.—*Durga Sundari v. Govinda Chandra*, 10 C. 368. See also *Bansidhar v. Gulab Kuar*, 16 A. 443.

The question as to whether an order dismissing an application under Or. XXI, r. 90 for default is appealable or not has been considered in a very large number of cases and it has been held that such an order falls under Or. XXI, r. 92 and as such an appeal lies from it under Or. XLIII, r. 1 (j). See e.g., *Broja Sundar v. Moti Lal*, 14 C. W. N. 573: 13 C. L. J. 163; *Kumud Kumar v. Hari Mohan*, 21 C. L. J. 628; *Kali Kanta v. Shayam Lal*, 25 C. L. J. 163. See also *Narendra v. Rakhal*, 41 C. L. J. 286, in which it has been held that an order under Or. XXI, r. 90 to have a proceeding is an order which interferes with the order under S. 115 of the Code.

But the correctness of these decisions was doubted by Page, J. in *Basaratulla v. Reazuddin*, 30 C. W. N. 570, in application to set aside the sale made and not on the merits cannot be set aside and therefore such an order is not held that the position becomes different where the application under Or. XXI, r. 90 is dismissed either on the merits or when the applicant does not appear and the opposite party is present and ready to contest, and in such a case the order dismissing the application is appealable under Or. XLIII, r. 1 (j).—*Basanta v. Khirode*, 55 C. 616: A. I. R. 1928 Cal. 25. Reviewing the earlier decisions and the decision of Page, J. it has been held in *Ansarali v. Bhim Sankar*, 33 C. W. N. 392, that an appeal lies from an order dismissing an application under Or. XXI, r. 90 for default whether such default be for the non-appearance of the applicant or for non-appearance of both the parties, and even when no formal order is recorded under r. 92 confirming the sale.

There is no appeal against an order refusing to set aside the dismissal of an application under Or. XXI, r. 90 for default.—*Dasarath v. Maharaja*

*Khaunish*, A. I. R. 1927 Cal. 938 (following *Jung Bahadur v. Mahadeo*, 31 C. 207; 8 C. W. N. 160, and distinguishing *Kali Kanta v. Shyam Lal*, 25 C. L. J. 163; 38 I. C. 598).

No second appeal lies to the High Court from an order refusing to set aside a sale in execution of a decree.—*Daivanayagam v. Rangasami*, 19 M. 29.

No appeal lies from an order passed under S. 294, C. P. Code, 1882, refusing permission to a decree-holder to bid at a sale in execution of his decree.—*Jodoonath v. Brojo Mohun*, 13 C. 174.

An appeal does not lie from an order setting aside a sale, passed under S. 312, para. 2 of the C. P. Code, 1882—*Sakharam v. Bhiku*, 11 B. 603. But see *Shib Singh v. Mukat Singh*, 18 A. 437 (overruled by *Shiam Behari v. Rup Kishore*, 20 A. 379 (F. B.)).

Where on the application of the judgment-debtors, a sale was set aside but the order setting aside the sale saddled them with the costs of the other side, and they filed an appeal against that part of the order which directed them to pay the costs of the other side, *held*, that an appeal lay; *Shib Kumar v. Sheo Ghulam*, 44 A. 209; 20 A. L. J. 11.

An application under S. 311, C. P. Code, 1882, on behalf of a judgment-debtor who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale. From this order the judgment-debtor appealed. *Held*, that the appeal must be considered to be one from an order under the first para. of S. 312, C. P. Code, 1882, confirming the sale after disallowing the appellant's objection, and that it would therefore lie.—*Baldeo Singh v. Kishan Lal*, 9 A. 411.

No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under S. 244, C. P. Code, 1882, *held*, that S. 244 bars a separate appeal, whilst it precludes a right of appeal, if the appeal is limited strictly by S. 588 *Roy*, 21 C. 789.

Under the provisions of S. 588, C. P. Code, 1882, no second appeal lies to the High Court from an order passed in appeal by a District Judge, on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity.—*Gopi Koeri v. Gopi Lal*, 21 C. 799. See also *Bansidhar v. Gulab Kuar*, 16 A. 443.

No appeal lies under this rule after confirmation of sale where no objection had been specifically allowed or dismissed by the executing Court.—*Brij Kumar v. Jagadamba*, A. I. R. 1929 All. 671.

Where a sale is confirmed and an application is made to set it aside, no appeal lies from the order and definitely no second appeal is permitted.—*Bahadur Ali v. Co-operative Credit Society*, A. I. R. 1929 Lah. 778.

An order rejecting an application by a judgment-debtor, under S. 293, C. P. Code, 1882, to recover from the purchaser the loss occasioned by re-sale, is appealable under this section.—*Bajinath v. Moheep Narain*, 16 C. 535; *Kali Kishore v. Guru Prasad*, 25 C. 99: 2 C. W. N. 408; *Rajendra Nath v. Ramcharan*, 2 C. W. N. 411; *Amir Baksha v. Venkatachala*, 18 M. 439; *Vallabhan v. Págunni*, 12 M. 454.

Land having been sold in execution of a decree, one claiming that it had been held by the judgment-debtor *benami* for him, applied to set aside the sale under S. 311, C. P. Code, 1882, and his petition was rejected. The appellate Court remanded the case to be disposed of on the merits. *Held*, that the order remanding the case was not appealable.—*Timmanna v. Mahabala Bhatta*, 19 M. 167.

Clause (k)—an order under r. 9 of Or. XXII refusing to set aside the abatement or dismissal of a suit;

This clause corresponds to Cl. (20) of the old section.

Rule 9 of Or. XXII corresponds to Ss. 371 and 372-A of the old Code, and it prescribes the procedure for setting aside an order of abatement or dismissal of a suit. An order under Or. XXII, r. 3 is not open to appeal.—*Trilochan Prasad v. Bhagwati*, 73 I. C. 230.

There is nothing in Or. XLIII, r. 1 (k) which enables the High Court to apply the word "suit" to an appeal, and so there is no appeal against an order refusing to set aside the abatement of an appeal by the appellate Court.—*Akkas Mia v. Abdul Aziz*, 33 C. W. N. 881: 49 C. L. J. 538: A. I. R. 1929 Cal. 532.

An order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time is a decree and appealable as such, even if no formal decree dismissing the suit is drawn up.—*Suppu Nayakan v. Perumal*, 34 I. C. 372: 30 M. L. J. 486: 1 M. W. N. 301: 19 M. L. T. 364. See *Barju v. Kunja*, 10 P. 471: 133 I. C. 767: A. I. R. 1931 Pat. 353: 12 P. L. T. 90.

An appeal lies from a finding that a suit has abated but such an appeal is from the decree in the suit and it should be accompanied by a copy of the decree.—*Hassomal v. Pirbux*, 26 S. L. R. 81.

Clause (l)—an order under r. 10 of Or. XXII giving or refusing to give leave;

This clause corresponds to Cl. (21) of the old section. Rule 10 of Or. XXII (S. 372 of the old Code) lays down the procedure in other cases of an assignment, creation or devolution of interest during the pendency of a suit.

An appeal will lie from an order dismissing an application under S. 372, C. P. Code, 1882, to be brought upon record as representative of a deceased party, such order being a decree within the meaning of S. 2, C. P. Code.—*Indo Mali v. Gaya Prasad*, 19 A. 142 (followed in *Moti Ram v. Kundan Lal*, 22 A. 380). See also *Sourindra Mohun v. Siromoni Debi*, 28 C. 171: 5 C. W. N. 307, where it has been held that an appeal lies from an order

directing substitution of parties under S. 372, C. P. Code, 1882. But see *Lalit Mohan v. Shebock Chand*, 4 C. W. N. 403 (19 A. 142, *explained and distinguished*); *Tej Singh v. Chabeli Ram*, 24 A. 342; and *Jamna Bibi v. Sheikh Jha*, 24 A. 532 (F. B.) (4 C. W. N. 403 *followed*; 22 A. 380 *overruled*; 19 A. 142 *explained and distinguished*).

An application by a mortgagor to be added as a party to a partition suit is an application under Or. XXII, r. 10, and an order granting or refusing it is appealable in accordance with the provisions of this rule.—*Jadu Nath v. Murari Mohan*, 35 C. W. N. 296; 134 I. C. 307; A. I. R. 1931 Cal. 594. There are some observations in the decision of the Judicial Committee in *Manindra v. Ram Lal*, 49 I. A. 220; 27 C. W. N. 29, which may favour the view that the rule applies only to the case of substitution and not to the case of addition of a party, but it is not clear whether their Lordships intended to go that length.

An order passed on an application under S. 372, C. P. Code, 1882 (Or. XXII, r. 10), is appealable under S. 588, Cl (21), C. P. Code, 1882, and is not open to revision by the High Court under S. 622 of the Code (S. 115).—*Raynor v. Mussorie Bank, Ltd.*, 7 A. 681.

Section 372, C. P. Code, 1882 (Or. XXII, r. 10), has no application to proceedings in execution of decree, and a Court has no jurisdiction reading S. 372, with S. 647, C. P. Code, 1882, to bring in a party after decree, and make him a judgment-debtor for the purposes of execution. Where a Court had so acted, its order was held appealable under S. 588, C. P. Code, 1882.—*Goodall v. Mussorie Bank, Ltd.*, 10 A. 97 (5 C. 726 *referred to*).

Clause (m)—an order under r. 3 of Or. XXIII recording or refusing to record an agreement, compromise or satisfaction;

This clause is new. Rule 3 of Or. XXIII (S. 375, C. P. Code, 1882) relates to compromise of suits. In this connection, see *Sridharan v. Puramathan*, 23 M 101 and other cases noted under Or. XXIII, r. 3, under the heading "Appeal."

Where the Court, holding that a compromise is not valid and binding on the parties, refuses to record the same, an appeal lies under Or. XLIII, r. 1 (m), assailing the grounds for refusal to record.—*Nandlal v. Ram Sarup*, 103 I. C. 80. A. I. R. 1927 Lah. 546.

The words used in Or. XLIII, r. 1 (m), C. P. Code, "an order under ... ant, compromise, compromise or proved is not ... *Mal*, 73 I. C.

111.

An appeal from an order under Or. XXIII, r. 3 is competent even ... sed in terms of ... to appeal both ... *near Ratneswar*, 36 C. W. N. 1013.

Clause (n)—an order under r. 2 of Or. XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

This clause is new. Rule 2 of Or. XXV (S. 381 of the old Code) relates to the effect of failure to furnish security for costs. This clause gives legislative sanction to the law as laid down in *Williams v. Brown*, 8 A. 108. (F. B.) noted under Or. XXV, r. 2.

Clause (o)—an order under r. 2, 4 or 7 of Or. XXXIV refusing to extend the time for the payment of mortgage-money;

This clause is new. The words "r. 2, 4 or 7" have been substituted for the words "r. 3 or r. 8" by the Transfer of Property (Amendment) Supplementary Act, 1930. Rule 3 or r. 8 of Or. XXXIV (Ss. 87 and 93 of the T. P. Act IV of 1882), empowers Courts to enlarge time for payment of money due upon decrees in mortgage suits. This clause has been inserted adopting the law as laid down in *Hulas Rai v. Prithi Singh*, 9 A. 500, and in *Rahima v. Nepal Rai*, 14 A. 520, where it has been held that such an order is appealable as a decree. See notes under those two rules.

"The extension of time for the payment of mortgage money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing but not from an order granting, an extension of time."—*See the Report of the Special Committee.*

Clause (p)—orders in interpleader-suits under r. 3, r. 4 or r. 6 of Or. XXXV;

This clause corresponds to Cl. (23) of the old section. Rules 3, 4 and 6 correspond respectively to Ss. 473 and 475 of the old Code.

The adjudication upon the claims of the defendants in an interpleader-suit is a decree and is appealable under S. 540, C. P. Code, 1882 (S. 96). The direction as to interpleading is an order and is appealable under S. 588, Cl. (23), C. P. Code, 1882—*Maharaj Singh v. Chittar Mal*, 30 A. 22 : 4 A. L. J. 683 : (1907) A. W. N. 270.

Clause (q)—an order under r. 2, r. 3 or r. 6 of Or. XXXVIII;

This clause corresponds to part of Cl. (24) of the old section. Rule 2 of Or. XXXVIII (S. 479, C. P. Code, 1882) relates to defendant's furnishing security for his appearance (after arrest before judgment) to satisfy a decree that may be passed against him.

Rule 3 (S. 480, C. P. Code, 1882) relates to procedure in case of application, by the person who becomes surety, to be discharged.

Rule 6 (S. 485, C. P. Code, 1882) relates to attachment before judgments of defendant's property when he fails to show cause.—*See notes under each of those rules.*

An order of attachment before judgment is appealable under S. 588, Cl. (24) C. P. Code, 1882.—*Mir Ali Mahomed v. Biharlal*, 21 B. 273.

r. 1.

An order under Or. XXXVIII, r. 5 is not appealable while an order under r. 6 is appealable. An order for attachment before judgment which is unconditional must be deemed to be an order under Or. XXXVIII, r. 6, even though it is stated to be passed under r. 5.—*S. Jai Dev v. S. Jai Singh*, 107 276 : A. I. R. 1928 Lah. 445.

When in response to a notice issued under Or. XXXVIII, r. 5 defendant appears and shows cause and the Court accepts his contention, the order falls under Or. XXXVIII, r. 6 (2) and from such an order an appeal lies under Or. XLIII, r. 1 (q).—*Chokhey Lal v. Sri Kishen*, (1932) A. I. J. 228 : A. I. R. 1932 All. 269.

Clause (r)—an order under r. 1, r. 2, r. 4, or r. 10 of Or. XXXIX;

This clause is part of Cl. (24) of the old section. Rule 1 of Or. XXXIX (S. 492) relates to cases in which temporary injunction may be granted.

Rule 2 (S. 493) relates to injunction to restrain repetition or continuance of breach of contract or injury, etc.

Rule 4 (S. 496) relates to interlocutory orders.

Rule 10 (S. 502) relates to deposit of money, etc., in Court.—*See notes under those rules.*

An appeal will lie under S. 538, Cl. (24), C. P. Code, 1882, from an order under S. 496 of the Code, refusing to set aside an injunction —*Zabada Jan v. Muhammad Tatab*, 15 A. 8 (6 C 163 referred to).

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered a notice to issue to them. The plaintiff appealed to the District Judge, who granted the injunction. Held, that the order of the Subordinate Court was not appealable to the District Judge —*Luis v. Luis*, 12 M. 186.

An order refusing to attach property for disobedience of an interim injunction falls within Or. XXXIX, r. 2 (3), C. P. Code, and is open to appeal.—*Diwan Chand v. Jharia Coal Co.*, A. I. R. 1922 Lah 347 : 66 I. C. 9.

Where the defendant had, in breach of his undertaking to the Court not to do any act which might be injurious to the plaintiff, but the lower Court refused to grant an injunction, the order of the lower Court amounted to an injunction and that the order refusing to commit for disobedience of the injunction was appealable.—*Chaturbhujdas v. Natvarlal*, 134 I. C. 1165 : A. I. R. 1931 Bom. 509 : 33 Bom. L. R. 1109.

Clause (s)—an order under r. 1 or r. 4 of Or. XL;

This clause is part of Cl. (24) of the old section.

Rule 1 of Or. XL (S. 503, C. P. Code, 1932) relates to appointment of receiver.

Rule 4 is new and relates to enforcement of receiver's liabilities. See notes under those rules.

An order under Or. XLIII, r. 1 (s), declaring that a receiver should be appointed to anybody by name as receiver is an order *v. Ganesh Ram*, 1 P. 625 : (1922) P. 256 ; it. 577 (40 M. 18 : 40 I. C. 185 (F. B.) relied on ; 14 C. L. J. 489 ; 13 C. L. J. 157, 17 Bom. L. R. 510, 18 A. L. J. 212 not folld.). See also *Nrisingha v. Rajniti*, 13 P. L. T. 525

An order refusing to appoint a receiver is appealable as a decree.—*Gossain Dulmir v. Tekait Helnarain*, 6 C. L. R. 467 ; *Venkatasami v. Stridavamma*, 10 M. 179 (F. B.) (overruling *Subramanya v. Appasami*, 6 M. 355).

An order refusing to remove a receiver appointed under S. 503. C. P. Code, 1882, is appealable—*Mithibai v. Limji Nouroji*, 5 B. 45.

An order removing a receiver is appealable at the instance of the parties to the litigation but the receiver has no right of appeal.—*Monmchan v. Surendra*, 36 C. W. N. 903. See *Sripati v. Bibhuti*, 53 C. 319 : 92 I. C. 940 : A. I. R. 1926 Col. 593. This view has been dissented from in *A. U. John v. Agra United Mills Ltd.*, 134 I. C. 454 : A. I. R. 1931 All. 72 : 29 A. L. J. 13, in which it has been held that where a Court appointing a receiver under Or. XL, removes him from his office, there is no right of appeal at all.

An order authorizing a receiver appointed by the Court to remove any person in possession of the property is appealable under S. 539, Cl. (24), C. P. Code, 1882, at the instance of the person sought to be dispossessed.—*Hudson v. Morgan*, 13 C. W. N. 654 : 9 C. L. J. 563 : 36 C. 713.

An order refusing to appoint a receiver under S. 503, C. P. Code, 1882, is appealable.—*Venkatasami v. Stridavamma*, 10 M. 179 and 180-note (6 M. 355 overruled). See also *Boidya Nath v. Makhan Lal*, 17 C. 630 (6 C. L. R. 467 followed) ; *Sangappa v. Shivbasawa*, 24 B. 38 ; and *Khagendra Narain v. Shashadhar Jha*, 31 C. 495 : 8 C. W. N. 608 ; *Manindra v. Suniti Bala*, A. I. R. 1926 Cal. 1006.

The directions which a Court gives in passing a receiver's accounts are not appealable under this clause.—*Rani Keshabati Kumari v. Mac Gregor*, 12 C. W. N. 648 : 35 C. 568.

Where in execution proceedings the Court appoints a person as receiver of the property at the instance of the decree-holder, it is not open to a third party with whom the judgment-debtor has entered into an agreement respecting the property to question the order or to file an appeal under Or. XLIII, r. 1 (s) ; *Thakur Jas Indar v. Thakur Baldeo Singh*, 110 I. C. 410 : A. I. R. 1928 Oudh 295 : 5 C. W. N. 463.

For other cases see notes under Or. XLI, rr. 1 to 4, ante.

Clause (t)—an order of refusal under r. 19 of Or. XLI to re-admit, or under r. 21 of Or. XLI to re-hear an appeal ;

This clause corresponds to Cl. (27) of the old section.

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Rule 19 of Or. XLI (S. 553, C. P. Code, 1882) relates to re-admission of an appeal dismissed for default. Rule 21 of Or. XLI (S. 560, C. P. Code, 1882) relates to an application for re-hearing of an appeal heard *ex parte*.

An appeal does not lie from an order dismissing an appeal for default.—*Mansab Ali v. Nihal Chand*, 15 A. 359. See also *Nand Ram v. Muhammad Bakhsh*, 2 A. 616; *Mukhi v. Fakir*, 3 A. 382; *Dhan Singh v. Basant Singh*, 8 A. 519; *Chand Kour v. Partab Singh*, 16 C. 98 (P. C.); *Muhammad Naimullah v. Ihsanullah*, 14 A. 226 (F. B.); *Jawahir Singh v. Debi Singh*, 18 A. 119. See also *Amrito Lal v. Ram Chandra*, 29 C. 60 (23 C. 115 and 827, and 22 M. 221, referred to). *Contra*—*Ram Chandra v. Madhav Purushottam*, 16 B. 23. Followed in *Radha Nath v. Chandi Charan*, 30 C. 660; 7 C. W. N. 486 (F. B.) (23 C. 115 and 827 overruled). Referred to in *Gosto Behary v. Hari Mohan*, 8 C. W. N. 313.

Where an appeal has been dismissed under S. 555, C. P. Code, 1882, for the appellant's default, he may apply for its re-admission under S. 558, and if such re-admission is refused, he is entitled to an appeal under S. 588, Cl. (27), C. P. Code, 1882.—*Elahi Buksh v. Marachow*, 4 C. 825; 3 C. L. R. 593.

An order under Or. XXI, r. 19 refusing to set aside an order of dismissal of an appeal passed, *ex parte*, is appealable even though the order of refusal was passed in appeal in the course of an insolvency proceeding.—*Bir Singh v. Humphery*, 120 I. C. 791; A. I. R. 1930 Lah. 112; 31 P. L. R. 908.

Besides the above cases, see *Mathura v. Basanta*, 30 C. 510, noted under r. 19 and *Hare Krishna v. Bishnu Chandra*, 35 C. 799; 12 C. W. N. 888; 7 C. L. J. 426, noted under r. 21 of Or. XLI, and also the other cases collected under each of those two rules.

Clause (u)—an order under r. 23 of Or. XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

This clause corresponds to Cl. (23) of the old section, with the addition of the words "*Where an appeal would lie from the decree of the appellate Court.*" The above addition has been made to give effect to *Mathura v. Nobin*, 24 C. 774 and *Jhandy Lal v. Sarman Lal*, 21 A. 291, and it overrides 10 C. 523, 19 M. 391, 3 A. 18, 7 B. 292, 8 B. 260, and 11 C. W. N. 862. In these latter cases it was held that where an appellate Court passed an order remanding a case of Small Cause Court class, an appeal does lie to the High Court from the order of remand. In the former two cases it was held that an appeal does not lie. By the above addition, the conflicting cases have been reconciled adopting the law as laid down in *Mathura Nath v. Nobin Chandra*, 24 C. 774, and in *Jhandy Lal v. Sarman Lal*, 21 A. 291.

A party who is prejudiced by an order of remand can appeal against such order; but where a party has himself asked for a remand and obtained an order of remand, he cannot appeal because the ground covered by it is not desired.—*Qadirunnissa v. Qutbul* 398.



Where the first Court rejected the plaint on the ground of misjoinder of causes of action and of defendants and the lower appellate Court set aside the order and remanded the case for decision on the merits: *held* that an appeal lies to the High Court under S. 588, Cl. (29), C. P. Code, 1882, against that order.—*Ram Prasad v. Sachi Dassi*, 6 C. W. N. 585.

The first Court made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit; but the appellate Court holding that the first Court was competent to try the suit, made an order "decreeing the appeal" and directing that the case "should be returned for re-trial." *Held*, that no second appeal would lie, as it was in reality one from an order returning a plaint, and not an appeal from an order remanding the case under S. 562, C. P. Code, 1882.—*Krishna Ram v. Narsingh Sevok*, 3 A. 855. See *Naubat Singh v. Baldeo Singh*, 33 A. 479; 9 I. C. 666; 8 A. L. J. 12; *Motilal v. Nandan*, 121 I. C. 545; A. I. R. 1930 All. 192; (1930) A. L. J. 454; *Lala Ulfat Rai v. Lala Tulshi Prasad*, 125 I. C. 581; *Cotton Trading Syndicate Commission Agency v. Malwa Mal*, 131 I. C. 750; A. I. R. 1931 Lah. 497.

Where an order of remand was made without jurisdiction, *held* that an appeal lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case.—*Jatinga Valley Tea Co., Ltd v. Chera Tea Co., Ltd.*, 12 C. 45. See also *Narain Pal v. Kali Kishore*, 1 C. W. N. xxix (29).

An appeal from an order of remand under S. 562, C. P. Code, 1882, cannot be entertained if presented after the final disposal of the suit. The right of appeal given by S. 538 of the Code, from orders specified in that section ceases with the disposal of the suit.—*Madhu Sudan v. Kamini Kanta*, 9 C. W. N. 895; 2 C. L. J. 35-n; 32 C. 1023 (12 C. 45 distinguished). Followed in *Gulzari Mal v. Kobirunissa*, 30 A. 191; 5 A. L. J. 270. See also the cases noted under r. 23, Or. XLI.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed. *Held*, by the Full Bench, that legality of the remand order and the subsequent proceedings could, under S. 591, C. P. Code, 1882, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under S. 588, Cl. (28), C. P. Code, 1882.—*Rameshar Singh v. Sheodin Singh*, 12 A. 510 (F. B.) (followed in *Sheonath v. Ramdin*, 18 A. 19). See also *Mohesh Chunder v. Jahiruddi*, 5 C. W. N. 509; 28 C. 324.

A party aggrieved by an interlocutory order of remand may object to its validity in his appeal against the final decree though he might have appealed against the order under S. 588, C. P. Code, 1882, and has not done so.—*Savitri v. Ramji*, 14 B. 232.

An appeal from an order, in an appeal, remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of S. 562, C. P. Code, 1882, or not, but the question whether the decision of the appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.—*Badam v. Imrat*, 3 A. 675 (F. B.); *Loki Mahto v. Aghoree Ajail*, 5 C. 144:

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4 C. L. R. 465; *Bhau Bala v. Bapuji Bapuji*, 14 B. 14; *Abraham Khan v. Faizunnissa*, 17 C. 168; *Hasan Ali v. Siraj Husain*, 16 A. 252. See also *Sankaran v. Raman Kutti*, 20 M. 152.

An order of remand under the inherent powers of an appellate Court and not falling within Or. XLI, r. 23, C. P. Code, is not appealable; *Sheik Mahomed v. Rangasami*, 31 M. L. T. 182; 16 L. W. 515; *Wisakhi Ram v. Alwad*, 6 L. L. J. 153; *Permanand v. Bhon Lohar*; 7 P. L. T. 535; 97 I. C. 105; *Rama Nath v. Tarak*, 107 I. C. 746; A. I. R. 1928 Cal. 305.

An appeal does not lie from an order of remand passed by a special Judge under the Bengal Tenancy Act.—*Mothur Chandra v. Tara Sunkar*, 7 C. W. N. 440; *Debi Prosad v. Official Trustee, Bengal*, 37 C. L. J. 314.

Section 190 of the N. W. P. Reut Act (XII of 1881) makes S. 562, C. P. Code, 1882, applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under S. 562, C. P. Code, 1882, an appeal will lie from such order to the High Court under S. 588, Cl. (28), C. P. Code, 1882.—*Partap Singh v. Narain Das*, 16 A. 375. See also *Veeraswamy v. Manager, Pittapur Estate*, 26 M. 518, which was a case under the Madras Reut Recovery Act (VIII of 1865).

A Judge of the High Court when hearing an appeal against an erroneous order of remand under S. 562, C. P. Code, 1882 (Or. XLI, r. 23), may pass a final decree in the suit, instead of remanding the suit to the lower appellate Court. No appeal lies against such decree under the Letters Patent, Cl. 15.—*Sankaran v. Ramakutti*, 19 M. 152 (followed in *Vasudevo v. Viswaraja*, 20 M. 407).

Though orders under S. 562, C. P. Code, 1882 (Or. XLI, r. 23), are appealable under S. 588, Cl. 28, C. P. Code, 1882, yet the provisions of the latter section are subject to its last para. which says that orders passed under this section shall be final; and therefore no second appeal lies from an order passed by the Code, 1882.—*Sorman Lal v. handy Lal v.* 21 A. 291).

Where a lower appellate Court instead of remanding a suit under S. 566, C. P. Code, 1882, erroneously remands it under S. 562, C. P. Code, 1882, Or. XXI, r. 23, and the party aggrieved by its order appeals to the High Court under S. 588, Cl. (28), the High Court cannot deal with the case as if it had been remanded from a lower Court. All that the High Court can do is to rectify the error, and to direct that it decide the suit.—*Lal v. Azizunnissa*, 7 A. 136 (3 A 675); *Bansi*, 8 A. 172.

The effect of the alteration made by the High Court of Allahabad and the Chief Court of Oudh in the language of Or. XLIII, r. 1 (u) by putting the words "any order" for the words "an order under r. 23 of Or. XLI" is not to permit an appeal even from an order of remand under Or. XLI r. 23 but the alteration was intended to and does cover by its language such orders of remand also as are not specifically made under r. 23 but may fall to be

made by a Court in the exercise of its inherent jurisdiction *ex debito justitiæ* or under the provision of S. 151.—*Sarabjit v. Farhatullah*, 127 I. C. 33: A. I. R. 1930 Oudh 366. See also *Mati Lal v. Nandan*, 191 I. C. 545: A. I. R. 1930 All. 122. 23 A. L. J. 451, in which it has been held that the alteration has been made in the language of this rule to cover cases which do not come within the four corners of the language of Or. XLI, r. 23 and yet such order is justifiable, but it is not intended that a second appeal can be permitted from orders from which no second appeal is otherwise allowed.

In an appeal from an order of an appellate Court, the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the lower appellate Court.—*Tika Ram v. Shama Charn*, 20 A. 42.

Section 588, C. P. Code, 1882 (this rule), does not apply where the appeal is from one of the Judges of the High Court to another Division Bench of the High Court, and does not restrict the right of appeal conferred by Cl. 15 of the Letters Patent.—*Toolsimony v. Sudevi*, 3 O. W. N. 347: 26 C. 361 (9 C. 482 followed; 11 A. 375, 14 A. 226 (230), 9 M. 253, 447, and 20 M. 407 considered and dissented from).

There is no appeal under the Letters Patent, Cl. 15, against an order of a single Judge, passed under S. 588, Cl. 28, C. P. Code, 1882.—*Venganayyan v. Ramasami*, 19 M. 422.

Though an appeal lies under Or. XLIII, r. 1 (u) from an order of remand, no appeal will lie from the order when the order is itself made in an appeal preferred under any other clause of Or. XLIII, r. 1.—*Mt. Sumirta v. Mahabir*, 111 I. C. 789. Where an order dismissing an application to set aside an *ex parte* decree is set aside and the Court of first instance is directed to proceed with the suit, the order is not an order of "remand" within the meaning of Or. XLIII, r. 1 (u) and the order of the appellate Court is not appealable.—*Ejazi Begam v. Latifan*, 53 A. 519.

Besides the cases noted above, see the cases collected under r. 23 of Or. XLI, below the heading, "Appeal from an Order of Remand under this rule."

The following cases have been overridden—A Court in the exercise of the appellate jurisdiction passed an order under S. 562, C. P. Code, 1882, remanding a case of the Small Cause Court class as described in S. 586. Held, that under the express words of the second portion of S. 589, C. P. Code, 1882, an appeal does lie to the High Court from such an order.—*Kirte Mohaldar v. Ramjan* 10 C. 523; *The Collector of Bijnor v. Jafar Ali*, 3 A. 18 (F. B.); *Mahadev Narsinh v. Ragho Keshav*, 7 B. 292; *Chinnatambi v. Chinnana*, 19 M. 391; *Agandh v. Khajah Aliullah*, 11 C. W. N. 862.

Clause (v)—an order made by any Court other than a High Court refusing the grant of a certificate under r. 6 of Or. XLV;

This clause is new and it corresponds to the proviso to S. 601, C. P. Code, 1882. Rule 6 of Or. XLV runs as follows: "Where such certificate (that it is a fit one for appeal to His Majesty in Council) is refused, the petition shall be dismissed."

## r. 1.

The Judge in the Privy Council Department refused an application for a certificate, but was stopped from giving his reasons by the petitioner's counsel, who had hopes of making a compromise. The attempt at compromise having failed, the petitioner appealed under Cl. (15) of the Letters Patent, when the Judge in the Privy Council Department was referred to, and was not able to deliver any judgment. *Held*, that no appeal lay to the High Court.—*Tara Chand v. Radha Jeebun*, 24 W. R. 148.

Although, under Cl. (15) of the Letters Patent of 1865, an appeal is given to the High Court from any judgment of a single Judge, an order or certificate of a Judge allowing an appeal to the Privy Council cannot properly be considered a judgment of the High Court.—*Amirunnessa v. Behary Lall*, 25 W. R. 529. See also *Manly v. Patterson*, 7 C. 339; 9 C. L. R. 166.

An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of Cl. 15 of the Charter, and is therefore appealable.—*Kally Soondery v. Hurrish Chunder*, 6 C. 594; 7 C. L. R. 543; on appeal, 9 C. 482; 12 C. L. R. 511.

In a suit for account, the High Court refused, under S. 601, C. P. Code, 1882 (Or. XLIV, r. 6), to grant the defendant a certificate on the ground that a decree directing the taking of accounts is not final within the meaning of S. 595, C. P. Code, 1882 (S. 109). On application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right of the Crown to admit an appeal, *held*, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decree was final within the meaning of S. 595 (S. 109).—*Rahimbhoy v. Turner*, 15 B. 155; 18 I. A. 6 (referred to and followed in *Muzhar Hossein v. Bodha Bibi*, 17 A. 112 (P. O.)).

Clause (w)—an order under r. 4 of Or. XLVII granting an application for review;

This clause is new, it gives general right of appeal from an order under r. 4 of Or. XLVII (S. 626 of Act XIV of 1882).

Sub-rule (2) of r. 4, Or. XLVII, provides that "where the Court is of opinion that the application for review should be granted, it shall grant the same." This Cl. (w) should be read with r. 7 of Or. XLVII, which also gives an appeal from an order granting review on the grounds specifically mentioned therein.

The right of appeal conferred by Or. XLIII, r. 1 (w) against an order granting review is not an unlimited right, but is subject to the condition of Or. XLVII, r. 7 and therefore no appeal lies in such cases on any other grounds.—*Madhori Saran v. Parbati*, 47 A. 891; 88 I. O. 653; A. I. R. 1925 All. 552; 23 A. L. J. 534 (referring to *Khurshed v. Rahmatullah*, 40 A. 68 and *Nandlal v. Panchanan*, 45 C. 60 at p. 78); *A. T. K. P. L. M. Muthu Pillay v. Lakshminarayan*, 6 R. 254; 111 I. C. 80. A. I. R. 1928 Rang. 177; *Gairaddy v. Soroj Kumar*, 33 C. W. N. 693; 117 I. C. 849; *Srinivasa v. Official Assignee*, A. I. R. 1926 Mad. 641; 52 M. L. J. 692; *Surja Narain v.*

*Kunja Behari*, 25 O. W. N. 884; *Kanshi Ram v. Karam Narain*, 60 I. C. 259; 3 L. L. J. 166; *Lan Tin Ngan v. Ma Mya Kyin*, 7 R. 187; 118 I. C. 120; A. I. R. 1929 Rang. 105; *Mt. Bakhton v. Ghulam Hassan*, 9 L. 298; 112 I. C. 518; A. I. R. 1923 Lah. 609; *Beli Ram v. Padam Sain*, 116 I. C. 221; A. I. R. 1929 Lah. 26; *Mt. Rukmin Kuer v. Mt. Ram Piari*, 122 I. C. 184; A. I. R. 1930 All. 126; *Mt. Bitana v. Shanker Lal*, 131 I. C. 518; A. I. R. 1931 All. 329; *Behari Lal v. Abdul Rahaman*, 8 O. W. N. 1267; *Sikandar v. Baland*, 107 I. C. 596; 29 Pnnj. L. R. 81; A. I. R. 1927 Lah. 435; *Mt. Rukhmabai v. Ganapatrao*, 28 N. L. R. 221. But see *Mukundsa v. Motiram*, 116 I. C. 645; 12 N. L. J. 13; A. I. R. 1929 Nag. 73, in which it has been held that the right of appeal granted by Or. XLIII, r. 1 (w) is not restricted by the grounds set out in Or. XLVII, r. 7 and a party can appeal on grounds other than those mentioned in Or. XLVII, r. 7.

This was also the view taken by the Bombay High Court in *Dasho v. Karbasappa*, 94 I. C. 591; A. I. R. 1926 Bom. 121; 27 Bom. L. R. 144. But it is no longer good law in the Bombay Presidency since March 1926 when this rule was deleted by that High Court in the exercise of its powers under S. 122 of the Code; *Kunversi v. Pitamberdas*, 107 I. C. 50. See *Shidramappa v. Gurushantappa*, 116 I. C. 227; A. I. R. 1929 Bom. 183.

The High Court of Madras has held that although when a review is granted it is open to the aggrieved party to appeal against the order only on grounds specified in Or. XLVII, r. 7 yet when that stage has passed and on rehearing a fresh decree is passed and the final decree or order is appealed against the Court is not confined to the grounds mentioned in Or. XLVII, r. 7 but has full power to go into the whole case on the merits and see whether on the evidence the decree passed on review is proper; *T. R. Govinda v. Rangammal*, 106 I. C. 172; A. I. R. 1929 Mad. 261; (1927) M. W. N. 441. (See *per* Ramesam, J.—An appeal against an order granting a review can be filed only on the grounds mentioned in Or. XLVII, r. 7. If an appeal is filed against the final judgment and decree after review, even then if one of the grounds of appeal is that the order granting the review was an erroneous order, it should be attacked on the same grounds and no other; but this does not mean that the judgment after review cannot be attacked on the merits, while submitting to the order granting the review). But the High Court of Calcutta has held that in final appeal an order for review can only be challenged upon the grounds stated in S. 629 of the Code (Or. XLVII, r. 7)—*Baroda v. Gobind*, 22 C. 984 (followed in *Jagiri Ram v. Daulat Khan*, 112 I. C. 46; A. I. R. 1928 Lah. 755).

For other cases see notes under Or. XLVII, r. 4 and r. 7.

There is no second appeal from an order granting a review.—*Barada Kishore v. Jagat Chandra*, 64 I. C. 568.

Procedure.

2. The rules of Or. XLI shall apply, so far as may be, to appeals from orders. [S. 590.]

### COMMENTARY.

This rule corresponds to S. 590, C. P. Code, 1882, with some modifications. This rule is to be read with S. 108, and all the cases bearing upon this rule are collected under that section.—See the cases noted under S. 108.

Where in an appeal against an order returning a plaint, the plaintiff filed along with his memorandum of appeal the plaint which was returned to him with the endorsement made thereon by the Judge under Or. VII, r. 10, and failed to file the certified copy of the separate order which was made prior to the endorsement, it was held that there was a technical non-compliance with the provisions of Or. XLI, r. 1 but the irregularity might well be condoned under S. 5 of the Limitation Act.—*Goverdhandas v. Musammatal Rihibai*, 130 I. C. 554 : A. I. R. 1930 Sind 252.

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# ORDER XLIV.

## PAUPER APPEALS.

1. Any person entitled to prefer an appeal who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable:

Who may appeal  
as pauper.

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Procedure on ap-  
plication for ad-  
mission of appeal.

[S. 592.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 592, C. P. Code, 1882, with some additions, alterations and omissions.

The words "under this Code or any other law," which stood after the words "any person entitled," have been omitted. The words "including the presentation of such application" have been added to give effect to *In re Narasu*, 8 M. 504. The addition of the above words overrides *Maitthi v. Somappa*, 26 M. 369. The other changes introduced in this rule are change of words and phrases; that is, some words and phrases of the old section have been replaced by more appropriate words and phrases, but no change seems to have been made in the meaning.

"Words have been added to avoid the conclusion at which the Madras High Court has recently arrived in *Maitthi v. Somappa*, 26 M. 369."—See the Report of the Special Committee.

A person who desires to appeal as a pauper, must present an application for permission to appeal as a pauper, together with a memorandum of appeal in a separate paper. If the application for permission to appeal as a pauper is rejected, his application must be entered in the record; and if he can subsequently procure funds and pay the necessary court-fees, then his appeal shall proceed in the ordinary way. But when a suit is brought in *forma pauperis* under Or. XXXIII, and the application is rejected, the applicant is required to present a fresh plaint in the ordinary way, as the application for permission to sue in *forma pauperis*, is itself the plaint and the Court has no power to allow it to be stamped as plaint. This is the distinction between an application for permission to sue in *forma pauperis* and an application for permission to appeal in *forma pauperis*. As to question of limitation, see the cases noted below.

The rules of this Order are to be read with the rules of Or. XXXIII, as the rules contained in this Order are subject to the provisions of the rules of that Order.—See notes under those rules.

**Presentation of application to appeal in forma pauperis.**—This rule provides that the provisions relating to suits by paupers shall apply, so far as may be, to appeals by paupers. Therefore the application referred to in this rule, for leave to appeal as a pauper, must be presented by the applicant in person just as an application for leave to sue as a pauper as provided by Or. XXXIII, r. 3.

An application for leave to appeal in *forma pauperis* under this rule must be made by the party in person, subject to the exemption contained in Or. XXXIII, r. 3.—*In re Narisi*, 8 M. 504. (*Dissented from in Mailthi v. Somappa Banta*, 26 M. 369, where it has been held that the provisions of Or. XXXIII, r. 3 do not apply to an application under this rule, to be allowed to appeal as a pauper.) The addition of the words "in all matters including the presentation of such application" overrides this Madras decision and it is no longer law.

... a pauper was presented, not  
... er, and was on that ground  
... revision by the High Court  
under S. 622, O. P. Code, 1882 (S 115), as that section did not apply to a proceeding of so purely interlocutory a character as mentioned in S. 592 of the Code (this rule).—*Harsaran Singh v. Muhammad*, 4 A. 91.

An appeal in *forma pauperis* by a *pardanashin* woman who had sued as a pauper in the first Court, presented by her duly authorized agent and not by herself nor an advocate, vakil or attorney of the Court, is a valid presentation in law because such a woman is exempted from appearing in Court under S. 640 of the Code of 1882, i.e., S 132 of the present Code.—*Wazirunissa v. Nahi Bakhsh*, 24 A. 172. An application for leave to appeal on behalf of such a woman may be presented by her husband; and the term "authorized agent" in Or. XXXIII, r. 3, does not mean "recognized agent" as defined in Or. III, r. 2 of the Code.—*Mt. Bibi Sogra v. Radha Kishun*, 7 P. 825 : 114 I. C. 210 : A. I. R. 1929 Pat. 27. (See *per Macpherson, J.*—"At the same time I think that agents who present applications to appeal in *forma pauperis* should ordinarily produce at the time of presentation something to show that they are in that authorised").

**Subject to the provisions relating to suits by paupers.**—It is the duty of the Court to have regard to the rules contained in Or. XXXIII, whether leave is to be given to a person to appeal in *forma pauperis*, the right to appeal being subject to the rules contained in that order. When at the time of the institution of the suit, there was a subsisting agreement falling within the terms of Or. XXXIII, r. 5 (d), no leave to appeal under this rule could be given to plaintiff.—*Hamfa Bai v. Haji Siddick*, 30 M. 547 : 17 M. L. J. 447 : 3 M. L. T. 11.

An application for leave to appeal as a pauper contained no schedule of any property and was not verified in the manner provided by Or. XXXIII, r. 2. Held, that the Court had no other alternative than to reject the application.—*Muhammad Salamatullah v. Ram Jirah*, 11 Oudh Cases 19.



**Application and memorandum of appeal.**—This rule contemplates the presentation of two separate documents, *viz.*, a memorandum of appeal and an application for leave to appeal as a pauper. The disposal by the Judge of the pauper application does not therefore mean the disposal of the appeal. The Judge may still treat it as an existing appeal if the appellant desires to continue it as an ordinary appeal by paying the full Court-fees. The Judge is under no obligation to dismiss the appeal when he refuses leave to the appellant to appeal as a pauper.—*Bai Ful v. Desai Manorbhai*, 22 B. 849; *Muhammad v. Rahat Ali*, 40 A. 331; *Achut Ramchandra v. Nagappa*, 38 B. 41; *Sajjad Ali v. Jagmohan*, A. I. R. 1926 Oudh 13; 90 I. C. 371. See *Mahoni Dyal Das v. Sundar Das*, 3 L. 35; 65 I. C. 741; A. I. R. 1922 Lah. 225; *Rajendra v. Gopal*, 115 I. C. 678; 9 P. L. T. 613, in which it has been also held that in such a case the application of S. 5 of the Limitation Act would be proper.

The Court need not issue notice to the respondent before granting leave. The practice of the Madras High Court has not been to issue such notice.—*Somasundaram v. Arunachalam*, (1932) M. W. N. 537; 63 M. L. J. 28; A. I. R. 1932 Mad. 523.

There is no provision in Or. XXXIII, which authorizes a Court to reject the application to file an appeal in *forma pauperis* after having issued the notice, on the ground that it sees no reason to think that the decree is contrary to law or some usage having the force of law or is otherwise unjust or erroneous; the Court may try the appeal.—*Hubraji v. Balkaran*, 54 A. 394.

**Questions to be considered before granting leave to appeal in forma pauperis**—Whether proviso to this rule is mandatory.—The language of the proviso to this rule is imperative and a Court of appeal can only grant permission to the applicant who desires to appeal in *forma pauperis* if the applicant is in a position to satisfy the Court that the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.—*Mt. Ahmad-ul-Nisa v. Jagán Nath*, 109 I. C. 391; *Pidyavanti v. Jai Dial*, 89 I. C. 232; A. I. R. 1925 Lah. 391; 7 L. L. J. 214; *Rajendra v. Gopal*, 4 P. 67; A. I. R. 1925 Pat. 442; *Ghulam Nabi v. Secretary of State*, 114 I. C. 80; A. I. R. 1929 Lah. 539. See *San Shwe v. Haji Ko Ishag*, 9 R. 92; 132 I. C. 707; A. I. R. 1931 Rang. 131. Under the proviso to this rule the Court has to proceed upon a perusal of the application and the judgment and decree appealed from; and where after perusing these documents the lower appellate Court comes to a decision that the decree appealed from is not contrary to law and rejects the application the High Court will not interfere with the decision in revision unless it appears that the lower appellate Court has failed to exercise a judicial discretion in coming to such a conclusion.—*Shamsuddin v. Gur Bakhs*, 91 I. C. 96; A. I. R. 1926 Oudh 204. The High Court of Madras has held that this rule does not contemplate that before granting leave to appeal in *forma pauperis*, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or is otherwise erroneous and unjust; it is enough if the Court finds that the appeal raises a substantial question of law, or the appellant has a *prima facie* good case.—*In re Peram Chennamma*, 53 M. 245; 122 I. C. 337; A. I. R. 1931 Mad. 198; 58 M. L. J. 195; 81 M. L. W. 76.

r. 1.

Even after an application for leave to appeal as a pauper is admitted by an *ex parte* order and notice is issued upon the opposite party and the Government, the latter are not precluded from showing that the case does not fulfil the mandatory conditions prescribed in the proviso and the Court is competent to reconsider the point.—*Tilak v. Akhil*, 10 P. 606 (F. B.): 132

v. Cj

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7 P. 825; 114 I. C. 210; A. I. R. 1929 Pat. 27; 10 P. L. T. 46; and referring to the principle laid down by the Privy Council in *Krishnaswami v. Ramaswami*, 45 I. A. 25; 41 M. 412; 43 I. C. 493; 22 C. W. N. 481 that an *ex parte* order cannot take away the vested right of a party who succeeded in the Court below to show that the said *ex parte* order should not have been made; *Ram Sobha v. Ram Surup*, 133 I. C. 125. But see *Hubraji v. Balkaran*, 54 A. 394 noted before.

**Reasons for granting leave to appeal in forma pauperis should be recorded.**—The Judge or Bench admitting a pauper appeal should express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.—*Sakubai v. Ganpat*, 29 B. 451. But reasons for rejecting leave to appeal in *forma pauperis* need not be stated and the absence of them does not vitiate the trial.—*Mt. Deokuwarbai v. Potuprasad*, 120 I. C. 413; A. I. R. 1930 Nag. 53.

**Security for costs from pauper appellant.**—Where leave has been granted to appeal in *forma pauperis* the case is, as a general rule, one in which no order for security for costs can with propriety be made.—*Chhaganlal v. Govind Ram*, 121 I. C. 61; A. I. R. 1930 Nag. 23.

**Leave should not be granted when the applicant enters into agreement with strangers.**—When, at the time of the institution of the suit, the applicant enters into an agreement falling within the terms of S. 407 (e) of the Code, no leave to appeal in *forma pauperis* can be granted. See *Bai v. Haji Siddick*, 30 M. 547; 17 I. C. 100. It is stated even though such agreement was entered into after the commencement of the suit.—*Rameshwar v. Bacchu*, 122 I. C. 831.

**Limitation in pauper appeals.**—The period of limitation for leave to appeal as a pauper is 30 days from the date of the decree appealed from. See *Mahadev v. Lakshman*, 19 B. 48, and Art. 170 of the Limitation Act.

**Appeal**—No appeal lies from an order refusing leave to appeal as a pauper; *Secretary of State v. Jillo*, 21 A. 133 (F. B.), *Ma Mya Thin v. Ma Chu*, A. I. R. 1931 Rang. 129; 9 R. 86

No appeal lies, under Cl. 15 of the Letters Patent, from an order of a single Judge of the High Court refusing an application for leave to appeal in *forma pauperis*.—*Banno Bibi v. Mehdi Husain*, 11 A. 375 (9 M. 253 followed; 9 C. 482 distinguished). See also *In re Rajagopal*, 9 M. 447; and *Appasami Pillai v. Somasundra*, 26 M. 437 (22 M. 109, 23 M. 169 and 24 M. 353 followed). See also *Toolsee Money v. Suderi*, 26 C. 361; *Chappan v. Moidin*,

22 M 68 and *Sabhapathi v. Narayanasami*, 25 M. 555. But see *Tuljaram v. Alagappa*, 35 M. 1, 9, 17 in which a contrary view has been taken.

**Revision.**—An order refusing leave to appeal *in forma pauperis* can be revised.—*Mt. Deokuwarbai v. Potuprasad*, 120 I. C. 413; A. I. R. 1930 Nag. 53. *Ma Mya Thin v. Ma Chu*, A. I. R. 1931 Rang. 129; 9 R. 86; *San Shwe v. Haji Ko Ishaq*, 9 R. 92; 132 I. C. 707; A. I. R. 1931 Rang. 131. (See the case-laws of different High Courts discussed in the last two cases).

**Gross objection by pauper respondent.**—See notes under the heading under Or. XLI, r. 22, *ante*.

**Form.**—For Form of application to appeal *in forma pauperis*, see App. G, Form No. 10. For Form of notice, see Form No. 11.

**2.** The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred:

Inquiry into  
pauperism.

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry. [S. 593.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 593, C. P. Code, 1892, with some verbal alterations.

Appellate Court's order calling for first Court's report on pauperism is not a final disposal of the application for leave.—The order of the Court calling upon the Subordinate Court to report, does not operate as a final disposal of the application, and the High Court which directed an inquiry to be made by the Court of first instance as to the pauperism of the applicant may upon receipt of the report consider whether the case is one in which leave to appeal *in forma pauperis* ought to be granted.—*Hanifa Bai v. Haji Siddick*, 30 M. 547; 17 M. L. J. 447.

# ORDER XLV.

## APPEALS TO THE KING IN COUNCIL.

1. In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order. [S. 594.]
- "Decree" defined.

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 594, C. P. Code, 1882, with some alterations.

The words "*shall include a final order*" have been substituted for the words "*includes also judgment and order,*" which occurred in the old section.

"**Decree—Final Order.**"—For the meaning of the terms "*decree*" and "*final order,*" see notes under Ss. 109-110.

2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of. [S. 598.]
- Application to Court whose decree complained of.

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 598, C. P. Code, 1882, with some alterations. The word "*shall*" has been substituted for the word "*must*", which occurred in the old section. The other alterations are merely verbal.—See notes under S 110.

**Limitation for an application for leave to appeal to the Privy Council**—The application for leave to appeal to the Privy Council must be made within 6 months from the date of the decree appealed from.—See Limitation Act, Art. 179.

The application for leave to appeal to the Privy Council must be made within six months from the date of decree, and in computing the period of limitation the time required for obtaining a copy of the decree cannot be excluded, as S. 12 of the Limitation Act does not apply to such application.—*Moroba Ramchandra v. Ghanasham Nilkant*, 19 B. 301. See also *Lakshmanan v. Peryasami*, 10 M. 373.

The provisions of the second paragraph of S. 5 of Act XV of 1877 (S. 4 of Act IX of 1908) do not extend to applications for leave to appeal to Her Majesty in Council. The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought.—*In the matter of Sita Ram*, 15 A. 14 (6 A. 250, 2 M. 230 and 10 C. 557: 11 I. A. 7 referred to). See also *Shib Singh v. Gandharp Singh*, 28 A. 391: 3 A. L. J. 165 (1 A. 644, 15 M. 159, 15 A. 14, 19 B. 301 followed).

The aforesaid decisions are no longer law and it has now been expressly held that under S. 12 of the Limitation Act of 1908, the time requisite to

obtain a copy of the decrees appealed from is to be excluded.—*Abdullah v. Administrator-General of Bengal*, 42 C. 35; *Ram Sarup v. Jaswant Rai*, 38 A. 82.

Privy Council appeal filed during vacation, when the High Court was closed, but the offices were open. *Held*, that the applicant was entitled to the benefit of para. 2 of S. 5 of the Limitation Act, 1877 (S. 4 of Act IX of 1903).—*Rani Venkata Ramaniam v. Kherode Mull*, 10 C. L. J. 118; *Ravaneswar v. Baij Nath*, 10 C. L. J. 120.

In an application for leave to appeal to the Privy Council, the disability by reason of minority is not to be excluded from the prescribed period of limitation.—*Thurai Rajah v. Jainilabdeen*, 18 M. 484.

Application to appeal to the Privy Council in forma pauperis.—When a person applies for leave to appeal to His Majesty in Council in forma pauperis, he must present an application for that purpose to the High Court, and a separate application to His Majesty in Council.—*Munni Ram v. Sheo Churn*, 7 W. R. (P. C.) 29; 4 M. L. A. 114. Order XLIV, r. 1 does not apply to appeals to His Majesty in Council, and the High Court has no power to grant leave to appeal in forma pauperis to His Majesty in Council.—*Jagadanand v. Rajendra*, 17 C. L. J. 381; *Ram Kishen v. Manna Kumari*, 3 P. L. J. 179; *Amba v. Srinivasa*, 42 M. 32.

3. (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted. [S. 600.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 600, C. P. Code, 1892, with some alterations. The words "shall state" have been substituted for the words "must state"; and in sub-rule (2) the words "shall direct notice" have been substituted for the words "may direct notice," which occurred in the old section. The other alterations are merely verbal.

**Certificate.**—In determining whether leave to appeal has been properly granted or not, the document which the Judicial Committee are bound to consider and act upon is the certificate of leave to appeal and not the order for such certificate and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave they ought to hold that leave has not been properly given.—*Radha Krishn v. Rai Krishn*, 23 A. 415; 28 I. A. 182. See also the cases noted under S. 109 (e), under the heading "Is certified to be a fit one for appeal."

**Petition to state the grounds of appeal.**—The petition of appeal to the Privy Council should distinctly state what the substantial question of law is that it is proposed to submit to the Privy Council.—*Mirza Ali Akbar v. Abdul Latiff*, 12 B. H. C. R. 8.

It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal grounds to shew that there is a substantial case on the merits, and a point of law involved, proper to be determined by the appellate Court. A petition too general and vague was ordered to be dismissed or to stand over for amendment as being too general and vague.—*Goree Monee v. Juggut Indro*, 11 M. I. A. 1.

A petition for special leave to appeal being *ex parte*, it is a universal and most important rule of the Court, that every fact which is material to the determination of the question raised upon the petition should be truly and fairly stated and where there is an omission of material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is the same, if the Court has been induced to make an order which, if the facts had been fully before it, it would not, or might not, have been induced to make.—*Mohun Lall v. Bebee Dess*, 8 M. I. A. 193.

Where a party applies to the Judicial Committee for special leave to appeal, the matter being under the appealable value, he should first apply to the Court below for a certificate under S. 600, C. P. Code, 1882 (Or. XLV, r. 3). But this rule will not bind this Board not to grant such leave in any special case, although that course has not been followed.—*Moti Chand v. Ganga Prasad*, 24 A. 174 (P. C.): 6 C. W. N. 362.

In a suit for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, held, that the question of malice and reasonable and probable cause is a question of fact and not a substantial question of law, and that the certificate was granted by the High Court under a misapprehension.—*Pestonji v. The Queen Insurance Co.*, 25 B. 332 (P. C.).

See notes under S. 110 as to amount or value.

Procedure.—If the applicant fails to take the necessary steps to prosecute his petition for leave to appeal to the Privy Council, it may be struck off for want of prosecution.—*Moorajee Poonja v. Visranjee*, 12 C. 658.

If leave to appeal be granted *ex parte*, the respondent may, as a matter of course, present a counter-petition to dismiss the appeal.—*Sibnarain v. Hulodhur*, 6 M. I. A. 207.

Form.—For Form of Notice under sub-rule (2), see App. G, Form No. 12.

Appeal.—No appeal lies from an order granting a certificate that the case is a fit one for appeal to the Privy Council, because such order is not a judgment within the meaning of Cl. 15 of the Letters Patent.—*Lutf Ali v. Asgur Reza*, 17 C. 455. So also no appeal lies under that clause from an order refusing leave to appeal to the Privy Council, where such refusal is based on the ground that the case did not fulfil the requirements of S. 110.—*Manly v. Patterson*, 7 C. 339.

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided

Consolidation of  
suits.

by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination. [New.]

### COMMENTARY.

**Consolidation of suits decided by the same judgment.**—This rule is now. It has been added to give effect to the following decisions in which it was held that consolidation could not be permitted unless the suits, besides involving the same questions for determination, were decided by the same judgment.—*Moofli Mohummud v. Baboo Mootechund*, 5 W. R. (P. C.) 34; *Khajah Ashanulla v. Karoonamoyi*, 4 C. L. R. 125; *Joogulkishore v. Jotendro*, 8 C. 210; *Byjnath v. Graham*, 11 C. 740; *Deonarain Singh v. Guni*, 34 C. 400.

The word "judgment" in this rule refers to the judgment appealed against, that is, the judgment of the High Court and not the judgment of the trial Court.—*Deiko Nandan v. Narsingh Raut*, 60 I. C. 517; 6 P. L. J. 97; 2 P. L. T. 157; *Sri Rajah Vasi Reddi v. Secretary of State*, 61 M. L. J. 692; 34 L. W. 817.

The requirement of this rule is that the judgment which their Lordships of the Privy Council have to consider and from which an appeal is brought should be the same judgment in the consolidated appeals and not that they should have in the same case or in the same appeal to consider the effect of several separate judgments of the High Court. Where the trial Court disposed of all the analogous suits by one and the same judgment but in one case, valued at over Rs 5,000, the appeal was decided by the High Court and the other cases were decided by the District Court, the appellate judgment, against which leave to appeal to the Privy Council was sought, being not the same, Or. XLV, r. 4 cannot apply, and no consolidation can be granted by the High Court.—*Deiko Nandan v. Narsingh Raut*, noted ante.

Where there were two separate suits before a Subordinate Judge and the evidence in both the suits was taken in one suit, and the issues in both the suits were identical, and the Subordinate Judge's findings on these issues and reasons for the same were as recorded in the judgment in one suit and that judgment was directed to be treated as part of the judgment in the other suit although there was a separate judgment in that other suit on a separate question, and there were appeals against decrees in both these suits and both these appeals were simultaneously heard and the judgments were delivered on the same date and the main judgment of the appellate Court was delivered in an appeal and in the linked appeal the Court referred to the other judgment, it was held that the suits must in the circumstances be taken to have been decided by the same judgment within the meaning of this rule and the appeals could therefore be consolidated for the purpose of pecuniary valuation.—*Jivangiri v. Gajanan*, 50 B. 753; 100 I. C. 143; A. I. R. 1927 Bom 19. Even where the judgments appealed against were separate, if one is merely a copy of the other except for a few alterations, the two should be regarded as the same judgment.—*Sri Rajah Vasi Reddi v. Secretary of State*, ante.

Where two suits were decided by separate judgments but in the appeal in the High Court, the evidence in the two suits was considered as a whole at the request of the parties who were the same, and the High Court came

to a decision on the whole of the evidence in favour of the respondent, and in one of these suits the High Court gave leave to appeal to His Majesty in Council, it was held that although it was contended that in the other suit there was no question of law involved and the value was below Rs. 10,000, it was a proper case in which the procedure sanctioned by Or. XLV, r. 4 should be applied and the parties given an opportunity of having the decision from the highest Court of appeal.—*Bhaqwan v. Bhawani*, 43 A. 223; 59 I. C. 794; 18 A. L. J. 1119.

But where two suits were determined by two distinct judgments in the Court of first instance and appeals therefrom were originally heard together and decided by one judgment but an application for review in one of them was allowed and another judgment given, it was held that the judgments in the suits were different and distinct in both the Courts and consolidation for the purposes of valuation could not be allowed.—*Raja Rajeswar v. Arunachalam*, 73 I. C. 217; A. I. R. 1923 Mad. 602; 44 M. L. J. 424.

Under Or. XLV, r. 4, the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason, they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit—*The Midnapore Co. Ltd. v. Madan Marwari*, 70 I. C. 782; (1923) P. 17.

Order XLV, r. 4 allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. The rule speaks only of the consolidation of different suits decided by the same judgment, but the principle applies where the interests of the two parties are so entirely separate that they are practically defendants in two different suits decided by one judgment.—*Seth Narayandas v. Mt. Kamlabai*, 69 I. C. 525; (1923) Nag. 193.

**Inherent power to consolidate suits**—This rule provides for consolidation of suits "for the purposes of pecuniary valuation" and for this purpose the rule expressly lays down that suits decided by separate judgments shall not be consolidated, and so the High Court cannot exercise inherent power to consolidate such as the obstacle presented by S. 110 of the *Nandan v. Narsingh Raut*, noted under &c.", ante.

See *Hukum Chand v. Kamalanand*, 33 C. 927; 3 C. L. J. 67, in which it has been held that a Court in the exercise of its inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature.

But where there is no question of valuation (e.g., where both the appeals are valued at more than Rs. 10,000) and the certificates as to value and fitness have already been granted, the party exercise inherent power to Council which were in substance one security for costs—*Choudhri Har Prasad v. Brij Kishen*, 45 I. C. 551; 3 P. L. J. 446. See *Nanda Kishore v. Ram Golam*, 40 C. 955 at 959; 16 C. L. J. 508; 18 I. C. 207, in which the High Court's power to consolidate suits and appeals has been mentioned as one of the obvious cases of the exercise of inherent jurisdiction.



See notes under S. 110.

Whether an application for leave to appeal can be made in two separate suits and appeals—There is no provision of law authorizing one application for leave to appeal in two separate suits and appeals. Where one such application is filed, it is not open to the party to file another application out of time, but it is open to him to amend the application by confining his prayer for certificate to one of the cases.—*Gopal Singh v. Johnstone*, 33 P. L. R. 455.

**5.** In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made. [New.]

Remission of dispute to Court of first instance.

### COMMENTARY.

**Dispute regarding value of subject-matter.**—This rule is new. It has given legislative sanction to the practice followed in cases where there was a dispute as to the true value of the subject-matter of the suit. When there is a contest as to the true value of the matter in dispute it has been the invariable practice, a practice sanctioned by the Judicial Committee, to ascertain by evidence and inquiry, what the true value is.—*Amrita Nath v. Abhoy Charan*, 9 O. W. N. 370.

The High Court should not direct any fresh inquiry under this rule where the Court of first instance in the trial of the suit has already made an inquiry as to the value of the subject-matter of the suit and the appellant has acquiesced in the finding of the Court of first instance on this point.—*Anant v. Ramchandra*, 42 B. 609; *Rameshwar v. Siddeshwar*, 45 C. L. J. 225; 101 I. C. 901. A. I. R. 1927 Cal. 418. See also *Hansman v. Bahuji*, 43 C. 225, where it has been held that the Court of first instance should itself hold the inquiry when a reference is made to it under this rule.

Effect of refusal of certificate.

**6.** Where such certificate is refused, the petition shall be dismissed. [S. 601, PARA. 1.]

### COMMENTARY.

**Alterations.**—This rule corresponds to para. 1 of S. 601, C. P. Code 1882. The proviso attached to that section (regarding appeals from orders of refusal) has been relegated to Or. XLIII as Cl. (v).

**Costs.**—Where the petition is made to the High Court and it is dismissed with costs, the proper Court to execute the order is the lower Court.—*Jogendra v. Wazidunnissa*, 34 C. 860.

**Appeal.**—An order made by any Court other than a High Court refusing the grant of a certificate under this rule is appealable under Or. XLIII, r. 1, Cl. (v).

**7. (1)** Where the certificate is granted, the applicant shall, within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow* from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

Security and deposit required on grant of certificate.

(a) furnish security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude ;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and

(4) such other documents as the High Court may direct to be excluded.

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished :

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy.

[S. 602.]

## COMMENTARY.

**Rule amended.**—The italicized words were added into this rule by Act XXVI of 1920. In sub-rule (1) the words originally were "within six months." The period is now reduced to 90 days. The provisos were also added by the same Act.

**"Date of the decree."**—These words in this rule mean the date on which the decree is pronounced, not the date on which it is signed.—*Harendra v. Hari Dasi*, 14 O. W. N. 420: 5 I. C. 844 (following *The Owners of the Ship Brenhilda v. The British Indian Steam Navigation Company*, 7 C. 547 (P. C.)) See Or. XX, r. 7 and notes thereunder.

**Power to enlarge the time specified in this rule.**—The Privy Council laid down that the words in S. 602 of Act X of 1877 (i.e., Or. XLV, r. 7 of this Code) relating to the time within which security was to be given, were directory only; and although they were not to be departed from without cogent reason, the Court from which the appeal was preferred had the right of extending the time.—*Burjore v. Bhagana*, 11 I. A. 7: 10 C. 557 (P. C.). In this case, the Privy Council approved of the decision in *In re Soorjmulji Koer*, 2 C. 272, in which it was held that the requirements as to the deposit of costs were not absolutely imperative and the Court had power in its discretion to modify them, and in which it was also held that when the period of making the deposit expired on a day when the offices of the Court were closed, it was a reasonable exercise of that discretion to allow the deposit to be made on the day they re-opened. See *Fazlunnissa v. Mulo*, 6 A. 250 (F. B.).

The High Court of Madras has held that the "cogent reasons" must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so, not owing to the absence and difficulty of getting funds, but owing to some circumstances, accidental or otherwise, over which he had no control, or owing to mistake which the Court would consider not unreasonable, or caused by negligence.—*Rangasayi v. Mahalakshamma*, 14 M. 391. See *Roy Jotindra Nath v. Rai Prasanna Kumar*, 11 C. W. N. 1104, noted under the heading "Whether this section applies to cases where special leave is granted by Privy Council," *post*.

But the view expressed by the High Court of Madras in *Rangasayi v. Mahalakshamma*, *ante* has been dissented from by the Punjab Chief Court in *Bagga v. Salikon*, 6 I. C. 723: 44 P. R. 1910: 70 P. W. 1910 in which it has been held that the rule laid down by the Madras High Court is a mere gloss upon the Privy Council ruling and is not a necessary consequence of that ruling; and poverty is a sufficient reason for extension of time where the sum of money required is large and the diligence of the petitioner is shown by his having paid in three-fourth of the money required.

Where a petition for filing a security-bond out of time stated that the delay was caused by a misapprehension of the appellants about the date of reopening of the High Court and that none of the appellants' men being present in Calcutta on that date, the bond was not filed, it was held that these were not reasons over which the applicant had no control and that the delay was not due to a mistake which could be regarded as not unreasonable or caused

by negligence and they were therefore not cogent reasons such as would justify the extension of time.—*Harendra v. Hari Dasi*, noted under heading "Date of the decree," ante.

**Effect of the amendment by Act XXVI of 1920 upon Court's power to enlarge the time.**—The provisions of Act XXVI of 1920 do not apply to an appeal from a decree passed before the coming into force of that Act.—*Debi Rai v. Prahlad*, 44 A. 242: 65 I. C. 340: A. I. R. 1922 All. 87: 20 A. L. J. 51.

After the amendment of Act XXVI of 1920, the High Courts of Allahabad, Patna, Madras, Rangoon and the Chief Court of Oudh have held that the Court's discretion to extend the time for furnishing security and making a deposit for translation printing and other charges has been curtailed and limited to the period mentioned in the amendment and so the High Court has no power to extend the period beyond six weeks.—*Ram Dhan v. Prag Narain*, 44 A. 216: 20 A. L. J. 13: A. I. R. 1922 All. 43; *Ashiq Ali v. Arjunanunnisa*, 70 I. C. 937: A. I. R. 1923 Oudh 50; *Kachi Reddi v. Saki Reddi*, (1923) M. W. N. 510: 18 L. W. 29; *J. N. Surty v. T. S. Chettyar*, 4 R. 265: A. I. R. 1927 Rang. 20, and even where the money was not paid into Court within the specified time because of a mistake caused by a bank and because of some delay by the Post Office, the High Court cannot extend the time; but the leave granted should be revoked, and the remedy, if any, of the aggrieved party is to move the Privy Council to restore to him the certificate which had been cancelled—*Joti Prasad v. Harkesh Singh*, 26 A. L. J. 433.

The only discretion which the High Court has under r. 7 is to extend the period of 90 days from the date of the decree to a further period of 60 days, but no discretion is given to the High Court by the rule (as amended by Act XXVI of 1920) to extend it beyond the period of 6 weeks from the date of the grant of the certificate—*Ramani Ranyan v. Durga Dutt*, 9 P. L. T. 305: A. I. R. 1927 Pat. 330; *Jaskissen v. Baynath*, 103 I. C. 213: A. I. R. 1927 Pat. 332; *Kamala Kanta v. Bindhumukhi*, A. I. R. 1929 Pat. 431, in which it has been held that the Privy Council ruling in *Burjore v. Bhagana*, ante, has no longer any application.

But a Full Bench of the High Court of Bombay has held that the provisions of this rule even after the amendment by Act XXVI of 1920 are as directory as before, and on the contrary, the new provisions as to the nature of the security (viz, cash or Government security) and the proviso, that no adjournment shall be granted to an opposite party to contest the nature of such security, indicate that if the Legislature intended to negative the powers of the Court as to extension of time for furnishing security and making the deposit there would have been an express provision to that effect, and under this rule read with r. 9 of the Privy Council rules contained in the Order of His Majesty the King in Council dated February 9, 1920, which are republished as r. 90-A of the Rules of the Appellate Side of the High Court of Bombay, the High Court can enlarge the time for furnishing security and making deposit beyond the period prescribed in this Rule.—*Nil Kanth v. Shri Satchidanand*, 51 B. 430 (F. B.): 101 I. C. 555: A. I. R. 1927 Bom. 217: 29 Bom. L. R. 352. See *Retanshidaya v. Gudnaya*, 133 I. C. 438: A. I. R. 1931 Bom. 278: 33 Bom. L. R. 487.

## COMMENTARY.

Rule amended.—The italicized words were added into this rule by Act XXVI of 1920. In sub-rule (1) the words originally were "within six months." The period is now reduced to 90 days. The provisos were also added by the same Act.

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Power to enlarge the time specified in this rule.—The Privy Council laid down that the words in S. 602 of Act X of 1877 (i.e. Or. XLV, r. 7 of this Code) relating to the time within which security was to be given, were directory only; and although they were not to be departed from without cogent reason, the Court from which the appeal was preferred had the right of extending the time.—*Burjore v. Bhagana*, 11 I. A. 7; 10 C. 557 (P. C.). In this case, the Privy Council approved of the decision in *In re Soorj mukhi Koer*, 2 C. 372, in which it was held that the requirements as to the deposit of costs were not absolutely imperative and the Court had power in its discretion to modify them, and in which it was also held that when the period of making the deposit expired on a day when the offices of the Court were closed, it was a reasonable exercise of that discretion to allow the deposit to be made on the day they re-opened. See *Fazlunnissa v. Mulo*, 6 A. 250 (F. B.).

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Where a petition for filing a security-bond out of time stated that the delay was caused by the petitioner being absent from the date of reopening of the Court at Calcutta, and that these were not reasons over which the applicant had no control and that the delay was not due to a mistake which could be regarded as not unreasonable or caused

by negligence and they were therefore not cogent reasons such as would justify the extension of time.—*Harendra v. Hari Dasi*, noted under heading "Date of the decree," ante.

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After the amendment of Act XXVI of 1920, the High Courts of Allahabad, Patna, Madras, Rangoon and the Chief Court of Oudh have held that the Court's discretion to extend the time for furnishing security and making a deposit for translation printing and other charges has been curtailed and limited to the period mentioned in the amendment and so the High Court has no power to extend the period beyond six weeks.—*Ram Dhan v. Prag Narain*, 44 A. 216: 20 A. L. J. 13: A. I. R. 1922 All. 43; *Ashiq Ali v. Arjunanunnisa*, 70 I. C. 937: A. I. R. 1923 Oudh 50; *Kach Reddi v. Saki Reddi*, (1923) M. W. N. 510: 18 L. W. 29; *J. N. Surty v. T. S. Chettyar*, 4 R. 265: A. I. R. 1927 Rang. 20, and even where the money was not paid into Court within the specified time because of a mistake caused by a bank and because of some delay by the Post Office, the High Court cannot extend the time; but the leave granted should be revoked, and the remedy, if any, of the aggrieved party is to move the Privy Council to restore to him the certificate which had been cancelled.—*Joti Prasad v. Harkesh Singh*, 26 A. L. J. 433.

The only discretion which the High Court has under r. 7 is to extend the period of 90 days from the date of the decree to a further period of 60 days, but no discretion is given to the High Court by the rule (as amended by Act XXVI of 1920) to extend it beyond the period of 6 weeks from the date of the grant of the certificate.—*Ramani Ranyan v. Durga Dutt*, 9 P. L. T. 305. A. I. R. 1927 Pat. 330, *Jakkissen v. Baijnath*, 103 I. C. 213: A. I. R. 1927 Pat. 332, *Kamala Kanta v. Bindhumukhi*, A. I. R. 1929 Pat. 431, in which it has been held that the Privy Council ruling in *Burjore v. Bhagana*, ante, has no longer any application.

But a Full Bench of the High Court of Bombay has held that the provisions of this rule even after the amendment by Act XXVI of 1920 are as directory as before, and on the contrary, the new provisions as to the nature of the security (*viz.* cash or Government security) and the proviso, that no adjournment shall be granted to an opposite party to contest the nature of such security, indicate that if the Legislature intended to negative the powers of the Court as to extension of time for furnishing security and making the deposit there would have been an express provision to that effect, and under this rule read with r. 9 of the Privy Council rules contained in the Order of His Majesty the King in Council dated February 9, 1920, which are republished as r. 90-A of the Rules of the Appellate Side of the High Court of Bombay, the High Court can enlarge the time for furnishing security and making deposit beyond the period prescribed in this Rule.—*Nil Kanth v. Shri Satchidanandi*, 51 B. 430 (F B.): 101 I. C. 555: A. I. R. 1927 Bom. 217: 29 Bom. L. R. 352. See *Revanshidaya v. Gudnaya*, 132 I. C. 438: A. I. R. 1931 Bom. 278: 33 Bom. L. R. 487.

Dissenting from this view it has been held by the High Court of Madras and the Chief Court of Oudh that the High Court has no power to extend the time for furnishing the security beyond that prescribed by Or. XLV, r. 7 as amended by S. 3 of Act XXVI of 1920. Rule 9 of the new Judicial Committee Rules, 1920, has reference only to the procedure in Or. XLV, r. 7. It does not confer on the High Court an unqualified power to extend the time.—*Poornananthacki v. Gopalaswami*, 62 M. L. J. 665 : (1932) M. W. N. 557 : A. I. R. 1932 Mad. 494 (following 18 L. W. 29 ; dissenting from 51 B. 430 (F. B.)). See also *Hukumchand v. Radhakissen*, 136 I. C. 33C. In *Poornananthacki v. Gopalaswami*, A. I. R. 1932 Mad. 494 : 62 M. L. J. 665 : (1932) M. W. N. 557, it has been held that the mere inability of a party to raise the requisite funds is not a sufficient ground to justify an extension of time for furnishing security.

Whether this section applies in cases where special leave is granted by Privy Council.—Although this rule applies to a case where the certificate of leave to appeal to the Privy Council has been granted by the High Court, it has been the invariable practice of the Calcutta High Court to treat it as applying to cases where special leave has been granted by the Privy Council ; and in such cases also the High Court following the decision of the Privy Council in *Burjore v. Bhagana*, noted *ante*, held that it has power to extend the time as provided by this Rule for depositing the estimated cost of translating, transcribing, indexing and transmitting to the Privy Council the record of a case under appeal, but it ought not to do so without some cogent reason.—*Roy Jotindra Nath v. Rai Prasanna Kumar*, 11 C. W. N. 1104. (In this case the only ground for extending the time as stated in the application by the appellants was that they expected that the estimated cost of translating etc., would come from their Zemindari, but instead of that a lesser amount reached them ; and there was no plea of poverty. The Court held there was no cogent reason to extend the time in these circumstances).

Whether the amount deposited for costs of Privy Council appeal and printing charges can be attached in execution of the decree obtained in the High Court.—Where the judgment-debtor appealed to the Privy Council and deposited a sum for the costs of the Privy Council and for printing charges, and the decree-holder applied to attach the amount in execution of the decree which he had obtained from the High Court, the idea underlying the application being that the decree-holder would attach and obtain the amount deposited and would then contend that the judgment-debtor having no necessary deposit the appeal should be dismissed, it was held that such a manoeuvre was grossly improper and an offence to Court.—*Mahant Shantanand v. Mahant Basudevanand*, 119 I. C. 5 : A. I. R. 1929 All. 794. In this case, seeing the impropriety of the application, the counsel for the decree-holder applied to attach so much of the deposit as would eventually be found not to be required for the purpose for which it was entrusted to the Court but did not put any figures to suggest that there was a likelihood of there being any surplus. It was at first held that the application had no substance and even if it did contain any figures the application would have been too premature ; but on a reference to the Full Bench of the Court it was held that it was a mere attachment that was being sought for and not an immediate payment and the position taken by the Court was a

perfectly good one, as the judgment-debtor's interest in the surplus which might remain over was both transferable and attachable and the decree-holder had a right to attach the security, subject of course to the first charge created on it; and the Court had no discretion to refuse a prayer for such attachment merely because it considered that the motive, object or intention behind it was improper.—*Mahant Shantanand v. Mahant Basudevanand*, 52 A. 619 (F. B.); 125 I. C. 477; A. I. R. 1930 All. 225; 28 A. L. J. 402 (referring to *Jaydish v. Ramsakal*, 8 P. 478; 114 I. C. 465; A. I. R. 1929 Pat. 97; 9 P. L. T. 969, in which it has been held that money deposited in Court by an insolvent by way of security for costs of a Privy Council appeal can be attached subject to the result of the appeal).

**Inclusion of unnecessary papers in the record.**—The Privy Council have strongly condemned the inclusion in the record of unnecessary papers and disallowed the costs occasioned thereby.—*Gopal v. Rajani*, 47 C. 415 (P. C.); 46 I. A. 299; 24 C. W. N. 553; 76 I. C. 737.

**Effect of delay in preparing papers for Privy Council appeal.**—If inordinate delay in the preparation of the record for transmission to His Majesty in Council (such as three years) is due to the inaction and want of prosecution on the part of the appellant, the appeal may be certified as not effectually prosecuted in accordance with r. 70 of Rangoon High Court Rules.—*D. R. Saklat v. Bella*, 2 R. 91; A. I. R. 1924 Rang. 217; 80 I. C. 74.

**Security for costs and deposit of printing charges &c., in case of consolidated appeals.**—The word "applicant" as used in this rule is the appellant, and where there are two or more appellants whose appeals must be consolidated before the conditions as to the pecuniary value necessary for granting the application are fulfilled, the security required by the rule is the whole security and not merely the security which the appellants in one of the appeals have to furnish. Therefore where two appeals are consolidated for the purposes of pecuniary jurisdiction, security of costs must be

was no default in respect of it, should not be finally admitted and allowed to proceed under Or. XLV, r. 8.—*Mt. Bibi Nabi v. Rai Baijnath*, 50 I. C. 511; 4 P. L. J. 198. In this case an opportunity was given to the appellant, who had not defaulted, to proceed with his objection to the report of the Subordinate Judge as to the value of the matter of his appeal which was not pressed after the consolidation order made that course unnecessary.

**Security in form other than cash or Government security.**—The High Court, in a fit case, has jurisdiction to accept security in any form other than that prescribed in this rule, but it should be reluctant to do so except for good cause, because any other form (such as personal bond or even a mortgage-bond) cannot be in all respects as effective as the deposit of cash or Government securities. Where the appellant was a minor and the property of his guardian was under attachment so that it was impossible for him to furnish the security in the form of cash or Government securities, and the appellant was prepared to pay the amount of expenses of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record under Cl. (b), r. 7, the High Court



allowed the appellant to furnish a surety who was prepared to execute a mortgage of his property in favour of the Registrar of the High Court as also a personal bond.—*Revanshidaya v. Gudnaya*, 132 I. C. 438; A. I. R. 1931 Bom. 278; 33 Bom. L. R. 487. Such an application to furnish security is a form other than cash or Government security on the ground of special hardship must be made at the time of granting the certificate, and an application made thereafter is out of time.—*Kamala Kanta v. Bindhumukhi*, A. I. R. 1929 Pat. 431.

**Appeal.**—No appeal will lie under Cl. 15 of the Charter from an order refusing to extend the time for furnishing security for costs, and directing the appeal to be struck off for not furnishing security within the prescribed time.—*Kishan Pershad v. Tiluckdhari*, 18 C. 182.

*As to the mode of enforcement, attestation and registration of security-bond, see notes under S. 145.*

**8.** Where such security has been furnished and deposit made to the satisfaction of the Court, the Admission of appeal and procedure thereon. Court shall—

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them. [S. 603.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 603, C. P. Code, 1882, with some alterations.

In the first para. of the rule, the word "*furnished*," has been substituted for the word "*completed*" and the word "*shall*" has been substituted for the word "*may*," which occurred in the old section. The other changes are merely verbal.

"**Made to the satisfaction of the Court.**"—A deposit made out of time is not one made to the satisfaction of the Court within Or. XLV, r. 8.—*Jagmohan v. Sahu Dooki Nandan*, A. I. R. 1923 All. 572.

**Admission of appeal.**—After the admission of an appeal under this rule, only so much of the original record as bore upon, and is material to, the questions decided by the High Court and the subject of the appeal should be printed in the copy.—*Raja Rao Venkata Suriya v. Court of Wards*, 20 M. 395 (P. C.) : 24 I. A. 194.

After the declaration of admission of an appeal under this rule, the High Court refused to stay execution, but the execution of the decree was stayed pending the appeal by an order of the Privy Council.—*Chatrapat Singh v. Dwarkanath*, 22 C. 1 (P. C.).

Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant stay of execution, although the appeal has not as yet been admitted under this rule.—*Janbai v. Sale Mahomed*, 19 B. 10 (dissented from in *Bibi Jarao Kumari v. Gopi Chand*, 5 C. W. N. 562).

The High Court has power to strike off a petition of appeal to Her Majesty in Council for want of prosecution.—*Moorajee Poonja v. Visranjee*, 12 C. 658.

An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest opportunity, but may be entertained at any stage of the appeal and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.—*Gajadhur Pershad v. Widows of Emam Ali*, 15 B. L. R. (P. C.), 221; L. R. 2 I. A. 203.

The High Court passed a separate decree on a cross-appeal, identical in terms with those of a decree passed on the appeal in the suit. From the latter decree an appeal to the Privy Council was declared by the High Court to be admitted, under this rule. Held, that special leave should be granted to appeal from the decree in cross-appeal, without further security being required than had already been taken in respect of the appeal in the other.—*Muhammad Ikramuddin v. Musammat Najiban*, 19 A. 95.

"Give notice thereof to the respondent."—The accidental omission to notify the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for re-hearing provided the respondents in fact knew of the admission.—*Hardit Singh v. Gurmukh Singh*, 4 P. W. R. 1921 : 59 I. C. 7 (P. C.).

Such security.—See notes to r. 7 above and S. 145, *ante*.

Form.—For Form of Notice under Cl. (b) of this rule, see App. G, Form No. 10.

9. At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. [S. 604.]

### COMMENTARY.

This rule exactly corresponds to S. 604, C. P. Code, 1882.

9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party

Power to dispense with notices in case of deceased parties.

or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court :

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.

### COMMENTARY.

**History.**—This rule was added by Act XXVI of 1920.

**10.** Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment. [S. 605.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 605, C. P. Code, 1892, with some verbal alterations.

**"Further payment is required."**—Where it was impossible to say whether certain account-books and papers were material or relevant, or even were part of the evidence in the case, the High Court declined to put the appellant to the expense of translating and transcribing them, but gave the respondent the option of translating them at his own expense, with a view to their being sent to England as an appendix to a record.—*In the matter of Raj Coomar Baboo*, 7 W R. 90.

**11.** Where the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed. [S. 606.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 606, C. P. Code, 1892, with some verbal changes only.

**12.** When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under r. 7. [S. 607.]

Refund of balance  
deposit.

### COMMENTARY.

This rule exactly corresponds to S. 607, C. P. Code, 1882.—*See notes under r. 7.*

**13.** (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court  
pending appeal.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise. [S. 608.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 608, C. P. Code, 1882, with some additions and alterations.

The words "admitting the appeal" which occurred in the first para. of the old section after the word "Court" have been omitted. This change has been intended to amplify the powers of the High Court and to avoid the difference of opinion which had arisen between the Calcutta High Court

and the other High Courts about the power of the Court pending an application for a certificate and before the actual admission of an appeal.—See *Tegha Singh v. Bichitra Singh*, 13 C. W. N. cclxxxix (289-n).

Under the old Code, it was held by the Calcutta High Court that the words "admitting the appeal" indicated that it had no power to stay execution until the appeal was admitted.—*Jarao Kumari v. Gopi Chand*, 5 C. W. N. 562; while the Bombay High Court held that the Court had such power before the appeal was admitted.—*Dome Jonbai v. Sale Mahomed*, 19 B. 10

The omission of the words "admitting the appeal" now makes it clear that the High Court can exercise powers under this rule even before an appeal to the Privy Council is admitted.

Another result of the omission of these words has been that the High Court is now invested with the power to stay execution of a decree pending an appeal to the Privy Council, in a case where the appeal has been admitted by the Privy Council by special leave.—*Nityamoni v. Madhu Sudan*, 38 I. A. 74 · 38 C. 335: 11 I. C. 384.

The words "by the appointment of a receiver or otherwise" have been added in Cl. (d). By the addition of these words the power of the High Court has been enlarged. The other changes are merely verbal.

"The Court."—In this rule and r. 14, "the Court" means the High Court.—*Ram Bahadur v. Radha Krishen*, 3 P. L. J. 40.

Clause (a)—"Impound any moveable property."—In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security as required, to attach any property held by the appellant beyond that decreed.—*Khoroo Lal v. Kant Lal*, 5 W. R. Mis. 37.

Clause (b)—"Taking such security."—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part.—*Jariutool Butool v. Hoseinee Begum*, 10 M. I. A. 196; *Inder Kumari v. Joipal Kumari*, 14 C. 290, 295: 14 I. A. 1; *Narayanan v. Arunachellam*, 19 M. 140, 142; *Khushaldas v. Chimanlal*, 50 B. 453: 96 I. C. 245: A. I. R. 1926 Bom. 425.

The respondent decree-holder's failure to give security will not deprive him of the benefit of S. 15 of the Limitation Act.—*Pandey Satdeo v. Srimati Radhey*, 5 P. L. J. 39: 53 I. C. 9.

Clause (c)—Power of High Court to grant stay pending Privy Council appeal.—When an order was made by the High Court in appeal that a mortgage suit should be stayed, England against that order was admitted and stay of the hearing of the mortgage suit, it was before the Court warranted it, and that Or. XLV, r. 13 covered such a case and under this as also the inherent jurisdiction of the Court an order that may be necessary in the circumstances of a particular case pending the hearing of an appeal to His Majesty in Council may be made by the High Court.—*Kumar Sarat Kumar v. The Official Assignee*, 34 C. W. N. 631: 129 I. C. 833.

Where in a suit for maintenance, a preliminary issue whether the plaintiff could maintain the suit was tried and decided against the defendant, and an appeal from this decision was dismissed on the ground that the decision was not appealable, and thereafter the defendant after obtaining special leave to appeal to the Privy Council applied for stay of all proceedings in the suit pending the final disposal of the Privy Council appeal, it was held that the Court had jurisdiction to accede to such an application but the case was not a fit one for stay of proceedings—*Shri Goverdhanlalji v. Shri Chandraprabharati*, 109 I. C. 139: A. I. R. 1923 Bom 159: 30 Bom. L. R. 126 (distinguishing *Lalitessur v. Bhabessur*, and *Ram Narain v. Harnam Das*, noted under heading "Grant of stay by Privy Council &c.," post).

Where the High Court orders stay of execution upon the appellant to the Privy Council giving security to the satisfaction of the Subordinate Judge, it is advisable to specify definitely the time within which the security must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out.—*Kedar Nath v. Mati Lal*, 24 C. W. N. 265: 57 I. C. 392.

The High Court has power to stay execution before admission of the Privy Council appeal. It has also power to stay execution even when the appeal is admitted by special leave of the Privy Council. See notes under heading "Alterations in the Rule," ante.

The High Court is also competent to make an order for stay of execution in view of an application by the judgment-debtor to the Privy Council for special leave to appeal.—*Nanda Kishore v. Ram Golam*, 40 C. 955: 16 C. L. J. 503: 18 I. C. 207.

In a case where the Court in India which has ample power to deal with the matter according to the circumstances of the particular case and has knowledge of the details which the Judicial Committee cannot possess on an interlocutory application.—*Vasudeva v. Shadagopa*, 33 I. A. 133: 29 M. 379 (P. C.): 4 C. L. J. 101: 10 C. W. N. 945: 16 M. L. J. 239. In this case the High Court was of opinion that it had no power to grant a stay of execution up to the determination of the appeal by the Privy Council but its judgment showed that the stay ought to be granted, and the Privy Council allowed such a stay of execution upon terms.

... Committee is of ... may grant a stay ... nce, it will not appoint a receiver of the property under attachment nor take the security referred to in Cls. (b) and (c) of sub-rule (2). In such cases, the Judicial High Court with to act according to ... *Bejum*, 10 M. I. A. 196, 202.

Where the High Court, having declared the admission of an appeal to the Privy Council from its decree, refused to stay execution pending the appeal, the two Judges constituting the Court differing as to whether or not the case was such that the application should be granted, the Privy Council decided that their discretion had not been exercised; *Chutraput Singh v. Dwarkanath*, 21 I. A. 170: 22 C. 1.

**Grant of stay by Privy Council pending Privy Council appeal.**—This rule gives the High Court power to stay execution of the decree but it does not give the power to stay proceedings under the decree; and so the High Court has no power to stay proceedings in a suit following a preliminary decree for partition against which it has granted leave to appeal to the Privy Council, and the Privy Council which has seizin of the appeal can alone do so.—*Laliteshwar v. Bhabeshwar*, 13 C. W. N. 690: 9 C. L. J. 561: 1 I. C. 812; *Ram Narain v. Harnam Das*, 42 A. 170: 54 I. C. 561: 18 A. L. J. 142. In the first mentioned case the High Court having refused the Privy Council subsequently stayed the proceedings pending the appeal to the Privy Council. See *Laliteshwar v. Bhabeshwar*, 13 C. W. N. cclxxv (275-n.).

A party to a suit in an appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put in possession of the large sums in dispute.—*Inder Kumari v. Jaipal Kumari*, 14 C. 290: 14 I. A. 1 (10 M. I. A. 196 and 322, referred to).

**Clause (d)—"To give such other direction."**—Pending an appeal by special leave to the Privy Council, the High Court, on an application by the appellant, for an *interim* order for continuing a manager under the Encumbered Estates Act until final adjudication, or till respondent furnished proper security, refused it on the ground that the Code gives them no jurisdiction in an appeal not certified by themselves. But the Privy Council, on an application by the appellant ordered stay of proceedings at appellant's request.—*Mohesh Chandra v. Satrugan*, 4 C. W. N. 34: 27 C. 1: 26 I. A. 281.

The plaintiff having obtained a decree, took possession of the property on giving security. On appeal to the High Court the decree was reversed and restitution ordered. The plaintiff then appealed to the Privy Council, and applied to the High Court to be left in possession upon his former security. *Held*, that the High Court had no power to suspend the restitution and plaintiff was not entitled either to keep possession or to require the defendants to give security; but the defendants were entitled to restitution without security.—*Rajkissen v. Baroda*, 6 W. R. Mis. 111: B. L. R. Sup. Vol. 605.

The principle which underlies all orders for the preservation of property pending litigation is this, that the ultimately successful party in the litigation is to reap the fruits of that litigation and not obtain merely a barren success.—*Brij Coomaree v. Ramrick*, 5 C. W. N. 781.

"By the appointment of a receiver"—The High Court has power to appoint a receiver under Cl. (d), notwithstanding that the appeal was admitted by special leave of His Majesty in Council.—*Raja Wazir v. Rani Jagadamba*, 52 I. C. 407 : 4 P. L. J. 482.

High Court's power to amend its decree after grant of leave to appeal to Privy Council.—The High Court is not restricted in any way by Or. XLV, r. 13 from amending its decree even after leave to appeal to Privy Council has been granted.—*Aghora Kumar v. Mahomed Musa*, 11 C. L. J. 155 : 5 I. C. 723 ; *Barhamdeo v. Harmanoge*, 18 C. W. N. 772 : 20 C. L. J. 18 : 23 I. C. 419 ; *Trikha v. Nathu Ram*, 116 I. C. 459 : A. I. R. 1929 Lah. 427 : 30 Pnnj. L. R. 253.

Appeal.—An order refusing to stay execution in the exercise of the discretion given to the Court under this rule, is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under Cl. 15 of the Letters Patent.—*Mohabir Prosad v. Adhikari Kunwar*, 21 C. 473 (8 B. L. R. 433 and 17 C. 455 referred to). See also *Raja Durga Prasada v. Raja Mallikarjuna*, 24 M. 358 (14 M. 88 commented upon and 23 M. 329 distinguished).

14. (1) Where at any time during the pendency of the appeal, the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit. [S. 609]

# COMMENTARY.

Alterations.—This rule corresponds to S. 603, C. P. Code, 1892, with some verbal alterations.



**15.** (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

Procedure to enforce orders of King in Council.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place. [S. 610.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 610, C. P. Code, 1882, with some alterations and omissions.

Paras. 3—4 of the old section which related to execution of decree against the surety and the proviso attached thereto, have been omitted. The reason for the omission is, that S. 145 of the Code contains provisions for enforcement of decrees against sureties.

The words "enforce" and "enforcement," which stood before the words "execute" and "execution" in the old section, have also been omitted.

In sub-rule (3) the words "at the date of the making of the order" have been added before the words "by the Secretary of State". Sub-rule (4) was added by Act XXVI of 1920 in order to prevent delays in the disposal of Privy Council appeals.

"Whoever desires to obtain execution"—An application to obtain execution under sub-rule (1) by some of the plaintiffs does not entitle all of them to apply under sub-rule (3) for execution to the Court to which the order of His Majesty in Council is sent for execution under that sub-rule, unless the decree was passed in favour of all the plaintiffs jointly.—*Maharaja Rameshwar v. Rai Dajinath*, 2 P. L. J. 496: 40 I. C. 508.

Where a party to whom the Order in Council, in accordance with the ordinary practice, was issued, delays or refuses to lodge the order with the High Court, the opponent can apply to the High Court, under Cl. (1) of this rule, with a certified copy of the order and ask for a summary order on the party to lodge the order which had been entrusted to him so that execution might follow in terms of the judgment of the Board.—*Sourendra v. Hari Prasad*, 5 P. 461: 53 I. A. 89: A. I. R. 1926 P. C. 31 94 I. C. 813.

"Execution."—A person desiring to obtain execution, even if it be by way of restitution, must apply in the first instance to the Court indicated by this rule because "execution" includes restitution as stated in S. 144.—*Damodar Das v. Bir Lal*, 37 A. 567. The provisions of this rule are mandatory so that if the petition is presented to a different Court, the execution application is liable to be dismissed; *Bhagwanta v. Zamir*, 3 P. 596: 78 I. C. 766: A. I. R. 1924 Pat. 576.

"To the Court from which the appeal to His Majesty was preferred."—A party in a suit, desirous of executing an order or judgment of Her Majesty in Council, ought to apply to the Court from which the appeal was finally brought to the Queen in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried.—*In re Barlow v. Orde*, 18 W. R. 175.

"Certified copy."—Before a decree-holder in the District Court can obtain execution of a decree which has been affirmed by the Privy Council, he must produce, on the application for execution a certified copy of the order passed by Her Majesty in Council.—*Juggernath Sahoo v. Judoo Roy*, 5 C. 329: 4 C. L. R. 387 (20 W. R. 441 followed).

The provisions of this rule are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council, to a certified copy, on an application for execution made under such rule. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India. When the original order (given to the successful party) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy; held, that a copy, though not certified by him, might accompany a petition for execution under this rule.—*Hurriah Chunder v. Kali Sunderi*, 10 I. A. 4: 9 C. 482: 12 C. L. R. 511 (P. C.).



appeal to the Privy Council does not disentitle him to such relief.—*Balusami Iyer v. Venkatasami Naicken*, 75 I. C. 319.

When the order of His Majesty in Council has been transmitted to the lower Court at the instance of one of the successful parties, it is not necessary that any other person interested in the execution of the decree should obtain a separate transmission of the order.—*Karuppayi v. Ramaswami*, (1932) M. W. N. 582; 62 M. L. J. 628; A. I. R. 1932 Mad. 440.

**Rate of exchange.**—Under Cl. (3) of this rule the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realised or paid or execution taken out, and not the year in which the decree was passed.—*Param Sukh v. Ram Dayal*, 8 A. 650 (dissented from in *Dakhina Mohan v. Saroda Mohan*, 23 C. 357, which has been followed in *Mahomed Abdul Hye v. Gajraj Sahai*, 95 C. 283; 2 C. W. N. 89).

**Costs and mesne profits.**—It is settled law that where a decree is silent as regards interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits.—*Arunachellam v. Arunachellam*, 15 M. 903; *Sadasiva Pillai v. Ramalinga Pillai*, 9 I. A. 219; 15 B. L. R. 383; 24 W. R. 193.

performance of such order as might be made by the Privy Council," and the appeal was subsequently dismissed, no order being made as to mesne profits; held, that the decree-holder was entitled to mesne profits from the date of the decree until he was put in possession and that the amount of such mesne profits should be determined by the execution department.—*Gogun Chunder v. Laidlay*, 5 C. L. R. 189 (15 B. L. R. 383; 2 I. A. 219; 24 W. R. 193 referred to).

When the Privy Council decrees not only a certain specified sum as the costs of the appeal to His Majesty in Council but also awards the costs incurred in the Courts in India, the decree-holder is entitled to the costs of translation of the decree into English.—*Asfur Ali v. Loper*, 9 B. L. R. App. 1; 15 B. L. R. Ap. 23-note; 15 W. R. 356; *Saroda Prasad v. Luchmipat Singh*, 2 B. L. R. 23-note; 18 W. R. 89; and *Nil Madhub v. Bissumbhur*, 21 W. R. 411.

**Costs of printing and translation**, certified by the Deputy Registrar of the High Court, are a necessary part of the costs of an appeal to the Privy Council. The amount of such costs is left to be ascertained by the High Court, and is not assessed by the Privy Council office.—*Ram Coomiar v. Prosunno Coomiar*, 10 C. 106.

A party to a suit whose case has been dismissed in both the lower Courts with costs, is entitled, when the decrees of the lower Courts are reversed by the Privy Council and the case remanded for re-trial, to ap

for a refund of the costs already paid under the decrees of the lower Courts, but not for interest on such costs. Such an application need not be made to the Privy Council, but may be made to the Court in which the suit was instituted — *Dorab Ally v. Abdul Azeer*, 4 C. 229 : 3 C. L. R. 358.

**Limitation for execution of decree of the Privy Council.**—An application for execution under this rule is governed by Art. 183 of the Limitation Act — *Tubikram v. Badri*, 1 P. L. J. 385; *Chutterpat v. Saila*, 20 C. W. N. 430 (F. B.). Where an appeal is preferred to the Privy Council from the decree of a High Court, but the appeal is dismissed for want of prosecution, the order of the Judicial Committee does not amount to a decree for purposes of limitation or for any other purpose — *Abdul Majid v. Jawahar*, 36 A. 359 (P. C.) ; *Batuk Nath v. Munni Dei*, 36 A. 234 : 41 I. A. 104 : 23 I. C. 644 : 18 C. W. N. 740.

As to the mode of enforcement, attestation and registration of security-bond, see notes under S. 145.

**Letters Patent Appeal** —An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of Cl. (15) of the Charter, and is therefore appealable. *Per* Garth, C. J.—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such capacity is not appealable — *Hurrieh Chunder v. Kali Sunderi*, 9 C. 482 : 10 I. A. 4 : 12 C. L. R. 511

**Interest on costs.**—No interest on costs can be allowed by any Court in this country where it is not allowed by the Privy Council.—*Dakhina v. Saroda*, 23 C. 357, *Forester v. Secretary of State*, 4 I. A. 137 : 3 C. 161.

**16.** The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees. [S. 611.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 611, C. P. Code, 1883, with some omissions and alterations. The words "enforce" and "enforcement," which occurred in the old section before the words "execute" and "execution," have been omitted. The other alterations are merely verbal.

# ORDER XLVI.

## REFERENCE.

1. Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court. [S. 617.]

## COMMENTARY.

**Alterations**—This rule corresponds to S. 617, C. P. Code, 1882, with some alterations and omissions; it should be read with S. 113.

The word "*where*" has been substituted for the word "*if*" wherever it occurred in the old section. The words "*not subject to appeal*" have been substituted for the word "*final*," which occurred in the old section. The word "*final*" means, conclusive or decisive, that is, not open to review or revision; hence the words "*not subject to appeal*" have been substituted for it.

The words "on the construction of a document, which construction may affect the merits," have been omitted. The reason for the omission will appear from the following *Report of the Special Committee* :—

"The words "on the construction of a document, which construction may affect the merits," have been omitted, as they appear to be sufficiently covered by the power to refer any question of law."

**Court.**—See notes under S. 113, *ante*.

**Necessary conditions of reference**—**Reasonable doubt.**—The powers of the Subordinate Judiciary to make a reference for the opinion of the High Court are hedged in by certain conditions and limitations which are to be found in this rule. A right of reference is fundamentally different from a right of appeal. The former vests in the Court and the latter vests in the suitor. The High Court cannot entertain a reference from a Subordinate Civil tribunal unless certain requisite conditions are fulfilled and it is necessary that the reference should be made in a pending suit or appeal arising out of a suit in which no appeal or further appeal is permissible, and that it should relate to a question of law on which the Court making the reference has a reasonable doubt.—*Bakhsh v. Dedhiya*, 50 A. 839 : A. I. R. 1928 All. 371 (F. B.) : 26 A. L. J. 729—(Per Sen. J.).

A reference under this rule can only be made when the Judge trying the suit entertains a reasonable doubt on a question of law or usage having the force of law and he cannot ordinarily entertain a reasonable doubt on point of law clearly decided by the rulings of the High Court of his Presidency unless the authority of the decision can be questioned by virtue of anything said or decided in Privy Council.—*Bhanaji Raoji v. Joseph De Brito*, 30 B. 226 (21 B. 193 referred to). See also *Naru Koli v. Chirza Bhosle*, 13 B. 54; *Fillingham v. Dunn*, (1914) Panj. Rec. No. 8, p. 22; 20 I. C. 194. If the Court has no reasonable doubt, it should not make a reference merely because it is asked to make one.—*Dawoodjee v. Municipal Corporation of Rangoon*, 1 R. 220; 76 I. C. 519; A. I. R. 1923 Rang. 193.

Order XLVI, r. 1 applies when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. This rule was not intended to provide for suppositions cases which do not naturally arise in a proper proceeding before the Court.—*Mahammad Haji v. Ahmadbhai*, 25 B. 327. See *Hurish Chunder v. O'Brien*, 14 W. R. 248.

The High Court can only express its opinion upon a matter referred to it when three conditions have been complied with: (1) that the Court referring the matter entertains a reasonable doubt upon some question of law, (2) that it states what the point is upon which the doubt is entertained, and (3) that it gives a statement of the facts containing an expression of opinion on the point which is referred to the decision of the High Court.—*Garling v. Secretary of State*, 30 C. 458.

"In which the decree is not subject to appeal."—A reference to the High Court is authorized by this rule only when the decree is not subject to appeal.—*Baraji v. Bhajji*, 11 B. 57; *Krishna v. Ram Kumar*, 7 C. L. R. 144; *Secretary of State v. Fazal*, 18 C. 234; *Oriental Loan Association Ltd v. Hatch*, 17 B. 735; *Mahant v. Chudasama*, 12 B. 30.

No reference under this rule can be made in a case in which the decrees are subject to an appeal.—*Bhadri Narayan v. Secretary of State*, 107 I. C. 649; A. I. R. 1927 Mad. 1179; 54 M. L. J. 66; 53 M. L. J. 67.

Where, therefore, the applicant presented an application to a Sub-Judge praying that the adjustment of certain decrees might be certified, and the Sub-Judge being of opinion that the application could not be granted, inasmuch as the execution of the decree was then barred by limitation, referred the case to the High Court under this rule. Held, that the question could not be referred, as the order applied for to the Sub-Judge was appealable under Ss. 2 and 47 of the Code.—*Baraji v. Bhajji Harjivan*, 11 B. 57.

Where the lower Court referred to the High Court under this rule the following question, viz., if, after a preliminary decree had been passed in a mortgage suit the sole defendant had died and no steps had been taken in time to bring on record the legal representative, a final decree can nevertheless be passed or the suit abated; held the reference was incompetent since whichever way he might decide the matter, the decree would be appealable.—*Barju Biswal v. Kunja Behari*, 10 P. 471; 133 I. C. 767; A. I. R. 1931 Pat. 353; 12 P. L. T. 909.

A question arising in execution of a decree cannot be referred for the decision of the High Court under S. 617, C. P. Code, 1882, except where the decree is final.—*Oriental Loan Association v. Hotch*, 17 B. 735; *Mahant v. Chudoso*, 12 B. 30.

It is only when a matter cannot come before the High Court as a Court of Appeal that a reference can be made under S. 617, C. P. Code, 1882.—*Krishno Noth v. Ram Kumor*, 7 C. L. R. 144; *Secretary of State v. Fozol*, 18 C. 234.

A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper Court. The District Judge, on appeal, entertaining a doubt upon the question of jurisdiction, made a reference under this rule. *Held* that, as the order of the Munsif is an appealable order and not a final decree in the suit, the High Court had no jurisdiction to entertain the reference.—*Romphul v. Durgo*, 7. A. 815.

A bail-bond was executed to a Munsif, who expressed no doubt as to the amount of duty to be paid, and made no application to have the case referred. The District Judge referred the case to the High Court. *Held* that the District Judge was not authorized to make the reference.—*Reference under The Indian Stamp Act, 1879*, 11 M. 38 (F. B.).

The order made by a District Judge on an application for probate, not being a final order, cannot be referred for the opinion of the High Court under S. 617, C. P. Code, 1882.—*In the matter of Monohur Mookerjee*, 5 C. 766.

The question as to the amount of security required on granting an application to stay execution is a question relating to execution as contemplated by S. 244, C. P. Code, 1882 (S. 47), and therefore an order determining that question is appealable under S. 2, C. P. Code, 1882, and no reference would lie under this rule.—*Ishwargar v. Chudasama*, 12 B. 30.

**Reference not authorised by this rule.**—Order XLVI, r. 1 does not authorize a reference, except on a point arising in a litigation between the parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties. An enquiry into the professional conduct of a pleader with reference to a case cannot be a proper subject of reference under this rule.—*Yashwant Narayan v. Desouza*, 12 B. 78; *Mahomad v. Ahmaddhoi*, 25 B. 327. Nor can any reference be made in a proceeding other than a suit or an appeal in a suit even by virtue of the provisions of S. 141 above.—*Damodoro v. Kittappa*, 36 M. 16 : 10 I. C. 879; *Tancred v. Mullick*, 84 I. C. 543 : A. I. R. 1925 Cal. 391.

This rule does not apply to the trial of the review of judgment suit.—*Bonomolly*

The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial.



made under S. 37 of Act XV of 1882.—*Oakshott v. The British India Steam Navigation Co. Ltd.*, 15 M. 179.

This rule does not contemplate a reference as to the proper Court-fee payable on a memorandum of appeal.—*Pir Baksh v. Faiz Mahomed*, (1906) A. W. N. 180.

The High Court has no power to review a judgment passed by it on a reference from a Sub-Judge with Small Cause Court powers. The judgment of the High Court in such a case is not a decree or order, but it is simply a statement of the grounds in conformity with which the lower Court is to dispose of the case.—*Ram Chandra v. Sitaram*, 10 B. 68.

**Practice and procedure on reference.**—In making a reference under this rule, the precise question of law or usage having the force of law must be formulated; a general question without stating the precise question arising in the case should not be referred.—*Ralli Brothers v. Goculbhai Mulchand*, 15 B. 376. See also *Ishwardas v. Kalidas*, 20 B. 779.

A party requiring a Judge to make a reference to the High Court, must do so before the Judge has delivered his judgment.—*Bank of Bengal v. Vyabhoj Gangji*, 16 B. 618.

The Small Cause Court passed a decree for the plaintiff, but contingent upon the opinion of the High Court, which decided that the plaintiff could not recover: *Held*, that the Small Cause Court, on receipt of the copy of the judgment of the High Court, was bound to enter judgment for the defendant.—*Yule & Co. v. Mahomed Hossain*, 24 C. 129: 1 O. W. N. 71 (dissented from in *Moll v. Luchmi*, 25 C. 505: 2 C. W. N. 283 (F. B)).

On a reference under Ss. 617 and 647, C. P. Code, 1882 (Or. XLVI, r. 1 and S. 141), *held*, that the word 'land' includes land covered by a house, and consequently a suit for house-rent, unless due under a written contract signed by a defeodant is not cognizable in a Village Munsif's Court.—*Narayanamma v. Kamakshamma*, 20 M. 21.

When, upon an application for a new trial, the Judges of the Presidency Small Cause Court differ in their opinion as to any question of law, and the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under S. 69 of Act XV of 1882.—*Seshammal v. Munusami*, 20 N. 359.

On a reference to the High Court under S. 617, C. P. Code, 1882, by a Court of Small Causes, *held*, that Ss. 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangement or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation.—*Raziuddin v. Karim Bakhsh*, 12 A. 169 (9 M. 375 followed).

A reference to the High Court under this rule is not bad, merely because it arises out of the action taken by a third person not a party to the suit. In this case the reference was made at the instance of the Collector, who was not a party to the suit.—*Purshottam v. Balvant*, 32 B. 157: 10 Bom. L. R. 13: 3 M. L. T. 135. -

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference Court may pass decree contingent upon decision of High Court and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference. [S. 618.]

### COMMENTARY.

Alterations.—This rule corresponds to S. 618, C. P. Code, 1882, with some alterations.

In para. 1, the words "make an" have been added before the word "order"; and the word "decision" has been substituted for the word "opinion," which occurred in the old section, before the words "of the High Court."

In para. 2, the words "but no decree or order shall be executed," have been substituted for the words "but no execution shall be issued, property sold, or person imprisoned," which occurred in the old section.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court. [S. 619.]

### COMMENTARY.

This rule corresponds to S. 619, C. P. Code, 1882, with some modifications.

"After hearing the parties."—The words "after hearing the parties if they appear and desire to be heard," have been substituted for the words "shall hear the parties to the case in which the reference is made, in person or by their respective pleaders," which occurred in the old section. The alteration in the language seems to have been made to make it clear that the parties may be heard only when they appear and desire to be heard; but according to the wording of the old section it was incumbent upon the High Court to hear the parties even if they had not appeared.

"Dispose of the case."—The Calcutta Small Cause Court passed a decree for the plaintiff but contingent upon the opinion of the High Court, which decided that the plaintiffs could not recover. The judgment of the High Court was transmitted to the Small Cause Court, and the Small Cause Court Judge, instead of entering judgment for the defendants, allowed the suit to be withdrawn by the plaintiffs to bring a fresh suit. Held, on revision, that the Small Cause Court was not bound to follow the decision of the High Court. of the court.

judgment from the High Court was bound to enter judgment for the defendant and to dispose of the case in conformity with the decision of the High Court.—*Yule & Co. v. Mohamed Hossain*, 21 C. 139.

The High Court has no power to review a judgment passed by it on a reference from a Small Cause Court. The judgment of the High Court in such a case is not a decree or order, but is simply a statement of the ground in conformity with which the lower Court is to dispose of the case as provided by this rule.—*Ramachandra v. Sitaram*, 10 B. 68.

Costs of reference to High Court 4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case. [S. 620.]

### COMMENTARY.

**Alterations**—This rule corresponds to S. 620, C. P. Code, 1882, with some alterations.

The word "the" has been added in the beginning, and the word "decision" has been substituted for the word "opinion," which occurred in the old section.

**Costs**—Under this rule the cost of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.—*Nicol v. Matheora Dass*, 15 C. 507.

5. Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such orders as it thinks fit. [S. 621.]

Power to alter, etc. decree of Court making reference.

### COMMENTARY.

**Alterations**—This rule corresponds to S. 621, C. P. Code, 1882, with some alterations, of a verbal character.

The word "where" has been substituted for the word "when," and the words "or made," have been added after the word "passed."

"For amendment."—Where the three conditions mentioned in Or. XLVI, r. 1 are not complied with, the High Court can under this rule return the case to the lower Court for amendment.—*Garling v. Secretary of State*, 30 C. 458.

**Power of High Court to quash the order of reference.**—This rule is wide enough to enable the High Court to quash the order of reference itself which the Subordinate Court has made.—*Krishnarao v. Lakshman*, 118 I. C. 692; A. I. R. 1929 Bom. 30; 30 Bom. L. R. 1627. In this case reference was made by a Judge of the Small Causes Court without delivering

judgment in connection with a suit involving a small amount, viz., Rs. 300 on certain points of law under the Limitation Act of such a nature as to have caused disagreement between various High Courts in India. Looking at the matter from a practical point of view, there was no likelihood of the reference being heard by the High Court for 18 months or more although the referring Judge requested the matter to be disposed of promptly; the amount involved was very small; there was no possibility of having the advantage of arguments of pleaders as there was no appearance for the respondent and a counsel only appeared to argue on his behalf as *amicus curiæ* at the request of the High Court. Considering these circumstances the High Court cancelled the order of reference and returned the papers to the lower Court with directions to hear and determine the case according to law.

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court questions as to jurisdiction in small causes.

- (2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit. [S. 646-A.]

### COMMENTARY.

**Alterations.**—This section corresponds to S. 646-A of the C. P. Code, 1882, with some verbal changes only.

**"At any time before judgment."**—A reference under Or. XLVI, r. 6 can only be made before judgment.—*Diwalibai v. Sadashivdas*, 24 B. 310.

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

Power to District Court to submit for revision proceedings had, under mistake as to jurisdiction in small causes.

- (2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule. [S. 646-B.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 646-B with some verbal changes only.

**Applicability of this rule.**—This rule does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law or has exercised a jurisdiction not vested in it by law, but only to a restricted number of such cases, namely, those cases, in which a Court of Small Causes has erroneously held a suit to be, or not to be cognizable by it. Where no question as to the Court's jurisdiction was raised by either party, and the Court proceeded to judgment as if the case was properly cognizable by it, the High Court refused to interfere upon a reference under this rule.—*Ram Lal v. Kabul Singh*, 25 A. 135.

Small Cause suit tried as ordinary suit by both the lower Courts.—Or. XLVI, r. 7 is an enabling rule and does not cut down the jurisdiction of the appellate tribunal.—*Sri Raja Simhadri v. Chelasane Bhadrappa*, 30 M. 41; 1 M. L. T. 414.

A plaint in a small cause suit was returned under S. 23 of Act IX of 1887, for presentation in the ordinary Civil Court, which tried the suit and passed a decree. On appeal the decree was reversed on the ground that the Munsif had no jurisdiction to try the suit. *Held*, that, having regard to Ss. 646-A and 646-B of the Code, 1892 (Or. XLVI, rr. 6 and 7) it is doubtful whether the appellate Court would have been right in dismissing the suit for want of jurisdiction.—*Mahamaya v. Nitya Hari*, 23 C. 425.

**Powers of High Court under this rule.**—Notwithstanding S. 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under this rule, full power to consider the matter of jurisdiction, or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit cognizable by a Small Cause Court was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *held*, on a second appeal to the High Court that this rule must be read with S. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in the case wrongly tried by an ordinary Civil Court, and taken in appeal to the District Court.—*Suresh Chunder v. Kristo Rangini*, 21 C. 249 (1 C. 123; 24 W. R. 478 referred to). Followed in *Parameshwaran v. Vishnu*, 27 M. 478 (26 M. 176 not followed). See also *Parameshwari v. Jagat*, 19 C. W. N. 900. A contrary view was however taken by the Madras High Court in *Kollipara v. Kankipati*, 33 M. 323 (F. B.) in which it has been held that the High Court should in such a

case set aside the decree of the District Court as having been made without jurisdiction and then dispose of the case on the merits either restoring or not restoring the decree passed by the Munsif as may in its discretion appear best. The same view was adopted by the Bombay High Court in *Sankarbai v. Somabhai*, 25 B 417. The Allahabad High Court, in *Abdul Majid v. Bedyalhar*, 39 A. 101, followed the above Full Bench decision of the Madras High Court in 33 M. 323 (F. B.).

The Court should state its reasons.—When a reference is made to the High Court under this rule, the Court which makes it should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.—*Chhotu v. Jawahir*, 28 A. 293; 3 A. L. J. 23

"District Court shall submit, if required by a party."—Where a Small Cause Court Judge returned a plaint for presentation to a Munsif, who again returned it, being of opinion that the suit was cognizable by a Court of Small Causes, and the plaintiff then applied to the District Judge to submit the record for the orders of the High Court, held, that the District Judge was bound under this rule on the requisition of the plaintiff, to submit the record, although the plaintiff might have appealed to the District Judge against the order of the Munsif.—*Simson v. Mc Master*, 13 M. 344. See also *Suresh Chunder v. Kristo Rungini*, 21 C. 219 (251).

The Judicial Commissioner's Court of Nagpur has held that under Or. XLVI, r. 7 the District Judge is bound, if required by a party, to submit the record to the High Court with a statement of his reasons. For this purpose it is immaterial whether the order forming the subject-matter is that of a Small Cause Court or by a Subordinate Judge.—*Cantonment Board, Jabulpore v. Phulchand*, 137 I. C. 88; 23 N. L. R. 54; A. I. R. 1932 Nag. 70.

Before a District Court can make a reference under this rule it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that, therefore, the matter is one in which the interference of the High Court should be sought. The word "shall" in S. 646-B, Cl. (1), C. P. Code, 1882 (Or. XLVI, r. 7) is not mandatory, but directory.—*Madan Gopal v. Bhagwan Das*, 11 A. 304.

It would appear from the above rulings that there is a difference of opinion as to whether the reference to the High Court is mandatory or directory. The Madras High Court and the Judicial Commissioner's Court of Nagpur are of opinion that the reference is mandatory if required by a party. The Allahabad High Court is of opinion that the reference is not mandatory but directory.

# ORDER XLVII.

## REVIEW.

Application for  
Review of Judgment.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review. [S. 623.]

## COMMENTARY.

**Alterations**—This rule corresponds to S. 623, C. P. Code, 1892, with some alterations and omissions. It should be read with S. 114. The word "*hereby*," which stood before the word "allowed" in Cls. (a) and (b) of the old section, has been omitted; and in Cl. (c) the word "*decision*" has been substituted for the word "judgment." The words "*or to the Court (if any) to which the business of the former Court has been transferred,*" which occurred in the old section after the words "to the Court which passed the decree or made the order" have been omitted. The omission seems to have been made probably in view of S. 150 of the present Code. (See *Udit Narain v. Mathura*, 35 O. 974; 12 C. W. N. 859).

In sub-rule (2), the word "*order*" has been added after the word "decree."

**Application for review of judgment.**—Any person considering himself aggrieved by a decree or a decision as stated in Cls (a), (b) or (c) of sub-rule (1) is competent to apply for a review of judgment on any of the following grounds: (1) on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of such person or could not be procured by him at the time when the decree was passed or order made, or (2) on account of some mistake or error apparent on the face of the record, or (3) for any other sufficient reason.

**Petition of review involves three stages.**—A petition of review involves three stages of procedure. The first stage commences ordinarily "is rule. The Court may then either grant a rule calling on the other side, be granted. In the second stage, the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case, the whole matter having been re opened, there is a fresh decree.—*Vadilal v. Fulchand*, 30 B. 56: 7 Bom. L. R. 664. Until that fresh decree is passed, the old decree remains in suspense.—*Achyut v. Tapibai*, 48 B. 210: 79 I. C. 753: A. I. R. 1924 Bom. 310.

**"Any person considering himself aggrieved."**—This means a party to the suit against whom a decision has been pronounced, who has suffered some actual loss, or legal grievance, or derogation of some right, or who has failed to obtain some right, title or interest to which he is entitled directly as a matter of legal right. It does not mean any person who is disappointed of benefit which he might have received if some other order had been made.—*Jhabba Lal v. Shub Charan*, 15 A. L. J. 1. But when defendants having separate interests bring separate second appeals which are dismissed, the Court cannot, on an application for review on the part of two of them, modify the decrees in which there is no application of review.—*Pegoo Jan v. Wazooddeen*, 18 W. R. 464.

A Director of a Company is an aggrieved person within the meaning of this rule, and can apply for review of an order made in a proceeding against the Company if the said Company was not represented by any of its Directors or Secretary in that proceeding; and the fact that he was not a party to the original proceedings does not preclude him from filing an application for review.—*Kawdu v. Berar Ginning Co., Ltd.*, 116 I. C. 427: A. I. R. 1929 Nag. 185.

**"By a decree or order."**—An order under Or. XXXIII, r. 7, refusing leave to sue as a pauper is open to review under this rule.—*Adari v. Manikji*, 4 B. 414; so is an order rejecting an application for leave to appeal to His Majesty in Council.—*Nand Kishore v. Ram Gulam*, 39 C. 1037: 16 C. W. N. 1099; so is an *ex parte* order granting letters of administration.—*Parman v. Bohra Nekram*, 13 A. L. J. 441; and an order as to costs.—*Braja v. Jagannath*, 6 P. L. J. 284: 63 I. C. 763. But an order under S. 39 (h) of the Guardians and Wards Act, 1890, is not open to



review.—*Ralla v. Manglan*, 116 P. R. 1912; nor is an order dismissing a second appeal under Or. XLI, r. 11, C. P. Code.—*Rajani v. Kali Prasanna*, 41 C. 809. The provisions of this rule are applicable to an Insolvency Court.—*Challa Abbineddi v. Challa Venkatarreddi*, 51 M. L. J. 60: 94 I. C. 351.

"By a decree or order from which an appeal is allowed".—This rule clearly shows that not only is an application for review by a party who has already appealed disallowed by that rule, but even in the case of a party not appealing no review lies when there is an appeal by some other party on a common ground, or where the former as a respondent is in a position to bring before the appellate Court the matter to be reviewed. The manifest intention of the provision is to avoid a conflict of jurisdiction and to prevent any action on the part of the inferior Court which would have the effect of controlling the powers of the higher Court with reference to the matter actually under appeal. Though a party who has applied for a review is not precluded from appealing, the Code does not provide for the procedure to be followed when an appeal is preferred after the review. Of course both the proceedings cannot go on simultaneously. If the review proceeding is to be continued and the appeal stayed, expediency would require that the party affected by the final order in the review should be enabled to obtain a remedy in the pending appeal notwithstanding that such remedy would be in respect of what was not in existence on the date of the appeal.—*Ramanadhan Chetti v. Narayanan*, 27 M. 603 (606): 14 M. L. J. 321.

Clause (a)—"From which an appeal is allowed but from which no appeal has been preferred."—In appealable cases the review application should be filed before the appeal is lodged.—*Secretary of State v. Hindusthan Co-operative Insurance Society Ltd.*, 36 C. W. N. 40: A. I. R. 1932 Cal 171.

Sub-rule (1) of this rule provides that any person considering himself aggrieved by a decree from which an appeal is allowed, but from which no appeal is preferred, may apply for a review of a judgment to the Court which passed the decree. Hence an application for a review of a decree after an appeal has been preferred against it, is not maintainable; *Muhammad Yusuf v. Raja Ram*, 35 I. C. 867; *Indrajit Pratap v. Amar Singh*, 2 P. 676 (P. C.).

It is however open to the person aggrieved, after an appeal is preferred, to apply for a review, provided his appeal is withdrawn; and the appellate Court may allow the appellant to withdraw the appeal with a view to apply to the lower Court for a review.—*Seo Pandu v. Devji*, 7 B. 287 (relying on *Nanabhai v. Nathabhai*, 9 B. H. C. R. 89 and *Narayan v. Davudbhai*, 9 B. H. C. R. 238); *In the matter of Nand Kishore*, 32 A. 71; *Mariamunni v. Babu Ram*, 45 A. 458: 73 I. C. 1016: A. I. R. 1923 All 541. But when an appeal is actually dismissed, it is in fact preferred and cannot be regarded as not having been preferred. Therefore, when an appeal is summarily dismissed under S. 551 of the Code of 1882 (Or. XLI, r. 11) a ver Court's judgment under this important evidence cannot be  
 125: 8 Bom. L. R. 842. See also  
*Rajani v. Kali Prasanna*, 41 C. 809; *Sailabala v. Gadadhar*, 36 C. L. J. 76; *Hari Ganu v. Hari Ganu*, 118 I. C. 255: A. I. R. 1929 Bom. 225: 31 Bom. L. R. 436. (See the rulings referred to in the last-mentioned case).—

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See also *Sheo Balak v. Mahabir*, 133 I. C. 432 : A. I. R. 1931 All. 704 : 29 A. L. J. 945.

In *Ramappa v. Bharmia* noted *ante*, Jenkins, C. J., observed that the reasoning of the learned Judges who decided the case of *Pandu v. Devji*, noted *ante*, was that as by the cancellation of the order for admission it was to be taken that no appeal had been admitted, so by a withdrawal of the appeal it must be treated as though an appeal had been preferred. Following this observation it has been held in *Ram Prasad v. Asa Ram*, 43 A. 288 : 61 I. C. 334, that where a party to a suit filed an appeal first and then an application for review and after filing the review the applicant withdrew the appeal, the fact of an appeal having been filed and withdrawn was no bar to the hearing of the application for review. But dissenting from this view it has been held that an application for review is not competent if on the date on which it is filed, the appeal from the decree sought to be reviewed is pending, nor can a subsequent withdrawal of the appeal before the application for review comes on for hearing amount to non-preference of this appeal within the meaning of this rule.—*Balling Vithaling v. Shri Devasthan Pandi*, 132 I. C. 446 : A. I. R. 1931 Bom. 232 : 33 Bom. L. R. 378 (distinguishing *Ramappa v. Bharmia*, *ante*).

If an appeal is dismissed for default and an application under Or. XLI, r. 19 has become time-barred, the review is incompetent.—*Manphul Singh v. Hamid Ali*, 21 A. L. J. 416 : 74 I. C. 529 : A. I. R. 1923 All. 576.

**Filing of appeal pending application for review.**—Where after the presentation of an application for review, by a party to the suit, an appeal is preferred from the same decrees, whether by the same party or by the other party to the suit, the Court to which the application for review is made, is not thereby deprived of its jurisdiction to entertain the application.—*Chenna Reddi v. Peddaobi Reddi*, 32 M. 416 : 2 I. C. 802 (F. B.) ; *Narayan v. Laxmibai*, 38 B. 416 : 23 I. C. 513, *Pyari Mohan v. Kalu Khan*, 44 C. 1011 : 41 I. C. 497. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decrees on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with.—*Pyari Mohan v. Kalu Khan*, 44 C. 1011 : 41 I. C. 497 ; *Gour v. Nil Madhab*, 36 C. L. J. 484 : 73 I. C. 34 : A. I. R. 1923 Cal. 113 ; *Shivappa v. Ram Chandra*, 46 B. 1 : 63 I. C. 910 : A. I. R. 1922 Bom. 130. If, on the other hand, the application is passed, the appeal cannot be heard. . . . .  
decree appealed from is superseded by . . . . .  
*v. Baldeo Prasad*, 28 A. 240 ; *Brijbasi v. Sahg Ram*, 34 A. 282 ; *Pyari Mohan v. Kalu Khan*, 44 C. 1011 : 41 I. C. 497. See also *Shudramappa v. Gurushantappa*, 116 I. C. 227 : 31 Bom. L. R. 137 : A. I. R. 1929 Bom. 183.

There is nothing in this rule nor in the other provisions of the Code which would justify the Court in refusing to entertain an application for review merely on the ground that subsequent to the making of the application an appeal had been filed.—*Rang Lal v. Lalawati*, 119 I. C. 561 : A. I. R. 1929 All. 375. Where an appeal is presented after an application for review, the decision on the appeal should be held over pending the decision on the application for review.—(*Ibid*). Where a Court postponed the hearing of the application for review pending the decision of the appeal, the procedure was

wrong and the High Court could interfere under S. 115 and direct the Court to proceed with the application for review—(*Ibid*).

**Deposit of decretal amounts to be made before filing application for review in suits under Provincial Small Cause Courts Act and Bengal Tenancy Act.**—See S. 153-A, of the Bengal Tenancy Act and S. 17 of the Provincial Small Cause Courts Act.

**Power of Small Cause Court to review its decree.**—The provisions of S. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.—*Ramsami v. Kurisu*, 13 M. 178 (F. B.). But see *Jogi Ahir v. Bishen Dayal*, 18 C. 83. See, however, *Jem Mutchi v. Budhram*, 32 C. 339: 1 C. L. J. 43.

An application for a review of judgment by the High Court on a reference from a Small Cause Court, was not admissible under the Code of 1859.—*Doyle v. Khosal*, 3 W. R. S. C. C. Ref. 8.

The High Court has no power to review a judgment passed by it on a reference from a Sub-Judge with Small Cause Court powers. Clause (c) of S. 623, C. P. Code, 1892 (Or. XLVII, r. 1), allows of a review of judgment, on a reference only from a Court of Small Causes.—*Ramchandra v. Silaram*, 10 B. 68.

The Judge of a mofussil Small Cause Court may grant an application for a review of judgment under the Civil Procedure Code.—*Isan Chunder v. Luchun Gope*, 5 C. 699: 5 C. L. R. 559. See also *Ratan Krishen v. Raghu Nath*, 8 C. 287: 10 C. L. R. 275; *Maden Mohon v. Purno Chundra*, 10 C. 297 (in which the distinction between new trial and review has been pointed out).

A *bonafide* mistake of the Official Receiver in allowing an order of discharge to be passed *ex parte* can be reviewed because the general body of creditors should not suffer by the mistake of the Official Receiver.—*Ayyaswami v. Official Receiver*, 61 M. L. J. 719: 34 L. W. 735: (1931) M. W. N. 924.

**Power of Insolvency Court to review its order.**—The Insolvency Court in the mofussil has by virtue of S. 5 of the Provincial Insolvency Act, the power to review its own orders.—*Ayyaswami v. Official Receiver*, (1931) M. W. N. 924: 61 M. L. J. 719: 34 L. W. 735. Larger powers are conferred on the Insolvency Court under S. 8 (1) of the Presidency Towns Insolvency Act for reviewing, rescinding or varying its orders than in proceedings which fall exclusively within Or. XLVII, r. 1 of the Code.—*In re Morarji Jairam Naranji*, 34 Bom. L. R. 1175.

**Power of revenue Court to review its order.**—A Revenue Court has no power to review a judgment because no such power is conferred upon it by the U. P. Land Revenue Act, nor do the provisions of S. 114 and Or. XLVII apply to proceedings in such a Court.—*Must. Siraj Fatima v. Mahmood Ali*, 30 A. L. J. 437 (F. B.): A. I. R. 1932 All. 293.

**Review of ex parte decree.**—It is competent to a party against whom an *ex parte* decree has been made to apply for review of judgment.—*Mutto v. Nahi Begam*, 6 A. 65; *Poresh Nath v. Khettro Monee*, 20 W. R. 284; *Ali Azim v. Ram Manick*, 12 W. R. 195; *Hari Hur v. Buddu*, 13 C. L. R. 254. See also *Amir Hasan v. Ahmad Ali*, 9 A. 36; *Ramchandra v. Draupadi*, 20 B. 281; and *Bamacharan v. Gadadhar*, 56 C. 21: A. I. R. 1929 Cal. 322, in which

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it has been held that against an *ex parte* decree, the party aggrieved has three courses open to him; he may either make an application under Or. IX, r. 9 or r. 13, he may appeal from the decree or apply for a review of the judgment or order passed *ex parte*. Where the only objection is with regard to the non-appearance of a party at the hearing on account of sufficient cause the matter can chiefly be agitated in an application under Or. IX; where the decree is against the record or against law, it can be successfully challenged in an appeal from it; where there is any error which comes within the ambit of Or. XLVII, r. 1, the *ex parte* decree may be questioned by an application for review.

Where an application for setting aside an *ex parte* decree is made on the ground of fraud, the Court should determine whether the alleged fraud was established and constituted "sufficient reason" within the meaning of this rule.—*Nathu Ram v. Ganga Bux*, 128 I. C. 753; A. I. R. 1930 All. 815: 28 A. L. J. 1057.

An appeal was heard and disposed of by the Full Bench in the absence of the respondent. Subsequently, on the application of the respondent, a review was granted on the ground that no notice of reference to the Full Bench was served on him, and that his absence of the hearing came within the words "any other sufficient reason" in this rule.—*Ghansham v. Lal Singh*, 9 A. 61 (F. B.).

**Review from order of dismissal for default.**—When a suit has been dismissed for default under S. 98, C. P. Code, 1882 (Or. IX, r. 3) and the plaintiff neglected to make an application under S. 99 of that Code (Or. IX, r. 4) within 30 days from the date of dismissal to get the suit restored to the file, the Court has no jurisdiction under S. 623 (this rule) to reinstate the case.—*Kailash v. Nabadwip*, 2 C. W. N. 318. But this is strictly applicable only to an order of dismissal made under S. 98 of the Code of 1882 (Or. IX, r. 3) and does not equally apply to an order of dismissal made under S. 102 (Or. IX, r. 8); and when a suit is dismissed for default under S. 102 (Or. IX, r. 8) a judgment of judgment is made by the plaintiff without a jurisdiction to entertain the application for review of judgment.—*Raj Narain v. Ananga Mohan*, 26 C. 598; *Khasomal v. Bacho*, 115 I. C. 314; A. I. R. 1929 Sind 38.

Where on the day of hearing of a suit, the Court, in the presence of pleaders of both parties, dismissed the plaintiff's application for adjournment on the ground that only one out of his six witnesses was present and passed an order thereon dismissing the suit, and then wrote on the plaint dismissing the suit *ex parte* for plaintiff's default, it was held that although the Court had jurisdiction to refuse an adjournment, it had no jurisdiction to dismiss the suit in the presence of the pleaders for the plaintiff without giving the plaintiff an opportunity of arguing the case or of examining the witness who was absent, or of issuing a warrant against the absent witnesses; and the Court had no jurisdiction to pass a second order of dismissal for default of appearance by the plaintiff after the plaintiff's pleader had left the Court; and as such it was a fit case for granting an application for review.—(*Ibid*).

The dismissal of a suit for default on a date not notified to the parties is a ground for review.—*A. T. K. P. L. M. Muthu Pillay v. Lakshminarayan*, 6 R. 254 : 111 I. C. 80 : A. I. R. 1923 Rang. 177.

For distinction between review and revival, see *Jordan Dobey v. Ramdhane*, 23 C. 738 (760 and 764) (F. B.).

**Review of consent Or compromise decree.**—In *Aushootosh v. Tara-prasanna*, 10 C. 612, it has been held that for the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court, there are two available modes of procedure : (1) by suit ; (2) by a review of the judgment sought to be set aside ; the latter being the more regular mode of procedure (followed in *Ram Gopal v. Prosunna Kumar*, 10 C. W. N. 529). Following these two decisions B. B. Ghose, J. held, that fraud discovered after the decree or order complained of is a "new and important matter" within the meaning of Or. XLVII, r. 1, and decree vitiated by fraud (e.g., where a superintendent of the decree-holder's estate who suspended by his master had without any authority fraudulently compromised a case under Or. XXI, r. 90) may be set aside by a suit or by review of judgment, but the latter is the more regular procedure ; but if a party pursued one remedy, he cannot, being unsuccessful, again have recourse to the other ; and therefore, where the lower Court has refused to entertain an application for review of a compromise decree based on an allegation of fraud, the High Court will interfere in revision, in as much as there has been a clear refusal of jurisdiction.—*Khitish v. Nagendra*, 33 C. W. N. 572 : 49 C. L. J. 425 : 119 I. C. 371 : A. I. R. 1929 Cal. 513. Where, however, the party pleaded that he had entered into a compromise by reason of coercion and undue influence, that circumstance may not be a good ground for review, because it would not fall within the phrase "new and important matter"—(*Ibid*). See *Alamelu Ammal v. Rama Iyer*, A. I. R. 1922 Mad. 446 : 43 M. L. J. 290, in which it has been held that a plaintiff, who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose ; the affixing of signature in ignorance of the contents of the document is "new and important matter" within the meaning of this rule. See also *Rasik v. Rajani*, 10 C. W. N. 286, in which it has been held that the ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground for review ; and although a mistake in the matter of copying out the petition of compromise may not, by itself, fall within the scope of S. 623 of the Code of 1882 (i.e., this rule), it might be a good ground for review if it is taken with the other ground stated above. In *Chandra v. Prosunna*, 64 I. C. 259, it has been held that an application for review of a consent decree is maintainable on the ground that the decree was induced by fraud, although in the majority of cases it would be more convenient if relief is sought by way of suit. In the following cases it has been held that when a consent decree is sought to be attacked on the ground of fraud, misrepresentation, mistake, coercion or undue influence, or any similar grounds, the appropriate remedy is by a suit although on the terms of this rule, as also on the authorities, it cannot be said that a Court has no jurisdiction to review a consent decree.—*Murali Rahimbhoy v. Rehmoobhoy*, 15 B. 594 ; *Fool Coomary*

r. 1.

v. Woodoy, 25 C. 649; *Barhamdeo v. Banarsi*, 3 C. L. J. 119; *Gulab Koer v. Badshah Bahadur*, 10 C. L. J. 420: 13 C. W. N. 1197. In *Nathumal v. Baghubir*, 48 A. 160: A. I. R. 1926 All 50: 23 A. L. J. 1029, it has been held that when a compromise has been incorporated into a decree, the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion, in as much as fraud, undue influence or coercion cannot be considered as in any way analogous to either the discovery of a mistake or error apparent on the face of the record or the discovery of new and important evidence.

The High Court of Patna has held that if a decree embodying a compromise is inaccurate or does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree on the ground of mistake or fraud or some other ground *ejusdem generis* therewith; *Ram Lagan v. Ram Birich*, 4 P. L. J. 205 (referring to *Wilding v. Sanderson*, (1897) 2 Cb. D. 534).

Rankin, C. J., approving of this decision held that it is not competent under Or. XLVII, C P Code to obtain a review of a consent decree on the ground that the decree was procured fraudulently, and that the only way by which such a decree can be amended is by a separate suit.—*Galstoun v. Kumar Pramiathanath*, 33 C. W. N. 833. A. I. R. 1929 Cal. 470.

In *Bhagwan v. Ram Dut*, 4 Luck. 76 113 I. C. 483: A. I. R. 1928 Oudh 418: 5 O. W. N. 812, it has been held that where at the hearing of the suit the general agent of the defendant admitted the plaintiff's claim and a decree was passed and the principal thereupon filed a suit to set aside the decree on the ground that the agent had colluded with the plaintiff and that he had no power to make such an admission, it was held that the suit was maintainable and that the remedy of the aggrieved party was not to file a review application because there was no error or mistake on the face of the record.

**Discovery of new and important matter or evidence.**—The word "evidence" in this rule is not confined to documentary evidence but includes oral evidence—*Lalchand v. Imdad Ali*, 108 I. C. 439: A. I. R. 1923 Nag. 279.

The Code of Civil Procedure permits applications for review, on the ground of discovery of new and important evidence, but exacts very strict conditions, so as to prevent litigants lying on their oars when they ought to be looking for evidence. It enjoins the Judge to require the facts as to the absence of the negligence to be strictly proved, and makes the Judge who tried the case final on such application. Where such an application for review was refused by the original Court, but the Court of Appeal, upon a special and preliminary application and before hearing the appeal on the merits, made an order for the admission of the further evidence, held that the appellate Court's order was without jurisdiction—*Kessowji v. G. I. P. Ry. Co.*, 31 B. 381 (P. C.) 11 C. W. N. 721: 6 C. L. J. 5: 17 M. L. J. 347: 4 A. L. J. 461: 34 I. A. 116.

A point which was never raised at the trial at all and on which no evidence was adduced should not be permitted to be raised by an applicant for review.—*Madhuri Saran v. Parbati*, 47 A. 331. The Privy Council has observed that it may perhaps be questioned whether an appellant who had

The dismissal of a suit for default on a date not notified to the parties is a ground for review.—*A. T. K. P. L. M. Muthu Pillay v. Lakshminarayan*, 6 B. 254 : 111 I. C. 80 : A. I. R. 1923 Rang. 177.

For distinction between review and revival, see *Joniridan Dobey v. Ramdhone*, 23 C. 738 (760 and 761) (F. B.).

**Review of consent Or compromise decree**—In *Aushootosh v. Turaprasanna*, 10 C. 612, it has been held that for the purpose of setting aside a decree passed in pursuance of a compromise come out of Court, there are two available modes of procedure: (1) by suit; (2) by a review of the judgment sought to be set aside; the latter being the more regular mode of procedure (followed in *Ram Gopal v. Prosunna Kumar*, 10 C. W. N. 529). Following these two decisions B. B. Ghosh, J. held, that fraud discovered after the decree or order complained of is a "new and important matter" within the meaning of Or. XLVII, r. 1, and decree vitiated by fraud (e.g., where a superintendent of the decree-holder's estate who suspended by his master had without any authority fraudulently compromised a case under Or. XXI, r. 90) may be set aside by a suit or by review of judgment, but the latter is the more regular procedure; but if a party pursued one remedy, he cannot, being unsuccessful, again have recourse to the other; and therefore, where the lower Court has refused to entertain an application for review of a compromise decree based on an allegation of fraud, the High Court will interfere in revision, in as much as there has been a clear refusal of jurisdiction—*Khitish v. Nagendra*, 33 C. W. N. 572: 49 C. L. J. 425: 119 I. C. 371: A. I. R. 1929 Cal. 513. Where, however, the party pleaded that he had entered into a compromise by reason of coercion and undue influence, that circumstance may not be a good ground for review, because it would not fall within the phrase "new and important matter"—(*Ibid.*). See *Alamelu Ammal v. Rama Iyer*, A. I. R. 1922 Mad. 446: 43 M. L. J. 290, in which it has been held that a plaintiff, who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose; the affixing of signature in ignorance of the contents of the document is "new and important matter" within the meaning of this rule. See also *Rasik v. Rajani*, 10 C. W. N. 236, in which it has been held that the ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground for review; and although a mistake in the matter of copying out the petition of compromise may not, by itself, fall within the scope of S. 623 of the Code of 1892 (i.e., this rule), it might be a good ground for review if it is taken with the other ground stated above. In *Chandra v. Prosunna*, 61 I. C. 259, it has been held that an application for review of a consent decree is maintainable on the ground that the decree was induced by fraud, although in the majority of cases it would be more convenient if relief is sought by way of suit. In the following cases it has been held that when a consent decree is sought to be attacked on the ground of fraud, misrepresentation, mistake, coercion or undue influence, or any similar grounds, the appropriate remedy is by a suit although on the terms of this rule, as also on the authorities, it cannot be said that a Court has no jurisdiction to review a consent decree.—*Mirali Rahimbhoy v. Rahmoobhoy*, 15 B. 594; *Fool Coomary*

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v. *Woodoy*, 25 C. 649; *Barhamdeo v. Banarsi*, 3 C. L. J. 119; *Gulab Koer v. Badshah Bahadur*, 10 C. L. J. 420. 13 C. W. N. 1197. In *Nathumal v. Raghubar*, 48 A. 160; A. I. R. 1926 All. 50; 23 A. L. J. 1029, it has been held that when a compromise has been incorporated into a decree, the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion, in as much as fraud, undue influence or coercion cannot be considered as in any way analogous to either the discovery of a mistake or error apparent on the face of the record or the discovery of new and important evidence.

The High Court of Patna has held that if a decree embodying a compromise is inaccurate or does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree on the ground of mistake or fraud or some other ground *ejusdem generis* therewith; *Ram Lagan v. Ram Birich*, 4 P. L. J. 205 (referring to *Wilding v. Sanderson*, (1897) 2 Ch. D. 534).

Rankio, C. J., approving of this decision held that it is not competent under Or. XLVII, C. P. Code to obtain a review of a consent decree on the ground that the decree was procured fraudulently, and that the only way by which such a decree can be amended is by a separate suit.—*Galstaun v. Kumar Pramathananth*, 33 C. W. N. 883; A. I. R. 1929 Cal. 470.

In *Bhagwan v. Ram Dut*, 4 Luck. 76; 113 I. C. 483; A. I. R. 1928 Oudh 418; 5 O. W. N. 812, it has been held that where at the hearing of the suit the general agent of the defendant admitted the plaintiff's claim and a decree was passed and the principal thereupon filed a suit to set aside the decree on the ground that the agent had colluded with the plaintiff and that he had no power to make such an admission, it was held that the suit was maintainable and that the remedy of the aggrieved party was not to file a review application because there was no error or mistake on the face of the record.

**Discovery of new and important matter or evidence.**—The word "evidence" in this rule is not confined to documentary evidence but includes oral evidence.—*Lalchand v. Imdad Ali*, 108 I. C. 439; A. I. R. 1923 Nag. 279.

The Code of Civil Procedure permits applications for review, on the ground of discovery of new and important evidence, but exacts very strict conditions, so as to prevent litigants lying on their oars when they ought to be looking for evidence. It enjoins the Judge to require the facts as to the absence of the negligence to be strictly proved, and makes the Judge who tried the case final on such application. Where such an application for review was refused by the original Court, but the Court of Appeal, upon a special and preliminary application and before hearing the appeal on the merits, made an order for the admission of new evidence, it was held that the appellate Court's order was without error.—*Ry. Co.*, 31 B. 381 (P. C.); 11 C. W. N. 75; 4 A. L. J. 461; 34 I. A. 116.

A point which was never raised at the trial at all and on which no evidence was adduced should not be permitted to be raised by an applicant for review.—*Madhori Sutan v. Parbati*, 47 A. 831. The Privy Council has observed that it may perhaps be questioned whether an appellant who had



not taken a point when the matter first came to be argued, was entitled to raise it by a proceeding in review.—*Jijiboy v. T. S. Chettyar*, 55 I. A. 161: 6 R. 302: 32 C. W. N. 845: 47 C. L. J. 510: 109 I. C. 1: A. I. R. 1928 P. C. 103: 26 A. L. J. 657: 30 Bom. L. R. 842: 54 M. L. J. 696.

As to whether fraud discovered after the decree or order complained is a "new and important matter" within the meaning of this rule. See *Khitish v. Nagendra* noted under heading "Review of consent and compromise decree," ante. See also *Nathumal v. Raghubir* under the same heading.

A review of judgment, on the ground of discovery of new evidence not within the applicant's knowledge at the hearing of the case, should not be admitted without proof of the truth of the ground alleged.—*Umrao Thakur v. Gakul Mandal*, 8 B. L. R. Ap. 34: 16 W. R. 7; *Nolita Mohon v. Denonath*, 11 B. L. R. 427-note; *Khelut Chunder v. Pran Kisto*, 11 B. L. R. 428-note: 12 W. R. 461; *Naffar Chand v. Sandes*, 8 B. L. R. Ap. 35-note: 10 W. R. 432; *Ramdhan v. Jainarayan*, 8 B. L. R. Ap. 36-note: 12 W. R. 536; *Sita Nath v. Shama Sundari*, 8 B. L. R. Ap. 37-note: 14 W. R. 26; *Nudar Chund v. Reeday Mundul*, 11 B. L. R. 424-note: 17 W. R. 458; *Shumshier Ali v. Ram Chunder*, 2 W. R. 174; *Rakub Dass v. Sooraj Mull*, Bourko O. C. 131; *Jhubhoo Sahoo v. Jusoda*, 17 W. R. 230; *Amritraw v. Manaji*, 3 B. H. C. R. 49; *Brojendro Coomar v. Wise*, 19 W. R. 130; *Nissa Bibee v. Abdoor Rukman*, 18 W. R. 413; *Venkataratnam v. Dhanalakata*, 104 I. C. 746: A. I. R. 1928 Mad. 56; *Debi Dayal v. Ambika*, 119 I. C. 99: A. I. R. 1929 All. 515. The "discovery of new and important evidence" in Or. XLVII, r. 1, would refer only to a discovery made since the order sought to be reviewed was passed.—*Musst. Tribeni v. Mohan Lal*, A. I. R. 1922 All. 366: 66 I. C. 558.

Generally speaking, in a case of this kind the only material dates would be those between the institution of the suit and the date on which the decree was pronounced.—*Conally v. Conally*, A. I. R. 1930 Pat. 63: 120 I. C. 465.

A Court's power to review its order depends on a ground which existed on the date when the order was made and cannot be exercised on a ground which had come into existence subsequently.—*Nathu Mal v. Raghubir*, 48 A. 160: 23 A. L. J. 1029: A. I. R. 1926 All. 50; *Kotagiri Venkata v. Vellanki*, 24 M. 1 (P. C.): 27 I. A. 197: 4 C. W. N. 725; *Balwantrao v. Farid Sahib*, A. I. R. 1926 Nag. 10.

A judgment delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based: for "the new and important matter" alleged to have been discovered must have existed at the date of the decree.—*Kaliprasanna v. Bhagabati*, 64 I. C. 324.

The words "or could not be produced by him at the time" in Or. XLVII, r. 1, C. P. Code, must refer to the words which precede, namely, "was not within the knowledge of the applicant." The whole clause means that the new and important matter alleged to have been discovered must have been produced by him at the trial.—*Rameshwardhari v. Sadho Saran*, 75 I. C. 91.

When a review is sought on the ground of the discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment.—*In re Appa Rao*, 10 M. 73, 77. 13 I. A. 155; *Nandalal v. Panchanan*, 45 C. 60 (67-68). But the discovery of evidence not originally available tending to prove that a decree had been obtained by perjury is ground for an application for review — *Munshi Musufil v. Surendra*, 16 C. W. N. 1002; *Abdul Huq v. Abdul Hafez*, 14 C. W. N. 695; *Lakshmi v. Nur Ali*, 38 C. 936. 15 C. W. N. 1010

In *Conally v. Conally*, A. I. R. 1930 Pat. 63; 120 I. C. 465, it has been held that the consideration that if due diligence had been exercised, the evidence subsequently discovered or not then within knowledge of the party would have been found, is not the test for judging if the case falls under Or. XLVII, r. 1. Each case must be judged on its own peculiar circumstances.

If a suit is dismissed on two grounds and the plaintiff applies for a review on the discovery of new evidence on one of the grounds only, the application should be rejected in as much as the reversal of the decision on the ground sought to be reviewed would not lead to the modification or setting aside of the original dismissal of the suit on the other ground.—*Mahabir v. Collector of Allahabad*, 36 A. 277.

The High Court will not accept a review of a judgment in a second appeal dismissed under Or. XLI, r. 11, C. P. Code, on the ground that new evidence to prove a fact has been discovered.—*Sailabala v. Gadadhar*, 36 C. L. J. 76. For other cases on this point see also notes under heading "Cl. (a) from which an appeal is allowed but from which no appeal has been filed."

As a general rule, the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal. When new evidence is discovered, the proper course for the appellant to adopt is to withdraw his special appeal and apply to the lower Court for a review of its judgment.—*Nanabhai v. Nathabhai*, 9 B. H. C. R. 89 (followed in *Ram Chandra v. Krishnaji*, 23 B. 4) See also *Pandurang v. Moro Vasudev*, 6 B. H. C. R. 68; *Pandu v. Devji*, 7 B. 287; and *Raru Kutti v. Mamad*, 18 M. 480.

The High Court cannot, in a review of judgment based on a special appeal, documentary evidence has been discovered, which, if proved, would have led the Court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the discovery of fresh evidence.—*Mariamunnaissa v. Babu Ram*, 45 A. 458; 21 A. L. J. 377.

The decision of the Privy Council in an appeal is "new and important matter" for the purposes of an application for review in respect of a decree made on a subsequent accrual of evidence which the decree appealed against was based on. — *Ram Lal v. Kalka*, 33 A. 566; 14 A. L. J. 330;

The production of a new ruling or authority, which if brought to the notice of the Judge at the first hearing might have altered the judgment is "new and important matter" within the meaning of this rule.—*Ellem v. Basheer*, 1 C. 181; *Abdul Sadiq v. Abdul Aziz*, 21 A. 152, 153.

The objection to the admission of a review of judgment on the strength of a new document was not allowed to prevail in a case where the so-called new document was not the sole reason for the admission of the review.—*Huro Gobind v. Huro Soondarce*, 18 W. R. 316.

The High Court has no authority to admit a review of judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered.—*Bhyrub Nath v. Kally Chunder*, 16 W. R. 112; *Ex parte Bashyanagarulu*, 1 M. H. C. R. 251; *Jackammal v. Palnisappa*, 5 M. H. C. R. 464; *Panchanan v. Radha Nath*, 4 B. L. R. 213.

Where no case of fraud or surprise having been made out, a party to the suit sought for a new trial on the ground of discovery, after judgment, of an important document, which was in the possession of the opposite party but which the party first-named had neglected to obtain discovery before judgment. *Held*, that a new trial should not be lightly granted and in the present case it ought not to be granted.—*Turnbull & Co. v. Duval*, 6 C. W. N. 809 (P. C.).

During the pendency of a suit for rent, a plaintiff applied for postponement on the ground that he was unable to obtain a copy of a document, which he had applied for from the Collectorate. The application was refused, and the plaintiff got a modified decree. He subsequently obtained a review of judgment and a decree in full. *Held*, that the review was properly admitted.—*Goor Dyal v. Deka Noonya*, 22 W. R. 446.

Where new evidence is adduced in an application for review, it need not be *per se* sufficient to show that the previous decision is wrong or such as to cause an overmastering balance of evidence. If there is sufficient ground for receiving the new evidence, the case is to be heard as if it were being originally heard with the materials then before the Court.—*Sahabjan v. Sufdur Ali*, 22 W. R. 288.

**Decree rendered ineffectual by reversal.**—The plaintiffs sued the defendant to recover the amount of assessment paid in respect of land for the years 1872–76, and got a decree. The defendant appealed to the Privy Council. The plaintiffs subsequently filed a second suit to recover the assessment paid in respect of the land for the years 1877–82, and obtained a decree solely on the strength of the former decree. The Privy Council reversed the decree. The defendant thereupon applied for review of the decree in the second suit. *Held*, that the Court had jurisdiction to entertain the application for review. The decision of the Privy Council reversing the first decree was a "new and important matter" within the meaning of this rule.—*Waghela Rai Sangji v. Mastudin*, 13 B. 330 and *Jogesh v. Kali Churn*, 3 C. 30 (F. B.), p. 46. See *Maung Kyaw v. Ko Aye*, 5 R. 261: 103 I. C. 258: A. I. R. 1927 Rang. 189. See also *Satto Saran v. Tarini Gharan*, 3 B. L. R. 287: 12 W. R. 154 (doubted in *Panchanan v. Gurudas*, 9 B. L. R. 187: 18 W. R. 317). But it has been held that a subsequent Full Bench case overruling the authority on which the judgment sought to be

reviewed was based was not a ground for granting an application for review.—*Amrit Lal v. Madho Das*, 6 A. 292. The discovery of a fresh authority was also held to be not a good ground for review.—*Yellaya v. Jaganatha*, 7 M 307. See also *Banee Pershad v. Radha Pershad*, 15 W. R. 143; *Chandi Charan v. Monoranjan*, 17 C L J. 416.

**Mistake or error apparent on the face of the record.**—A review of judgment may be granted for the ends of justice where there is an error of law on the face of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law.—*Sharup Chand v. Pat Dassee*, 14 C 627 (*Rewa Mahton v. Ram Kishen*, 13 I. A. 106; 14 C. 18 referred to; *Chintamani v. Pyari*, 6 B L R 126; 12 W. R. 1 (P. B.) and *Reasul Hossein v. Hadjee Abdoolah*, 3 I. A. 221; 2 C. 131 cited).

The "error" as used in this rule is not limited to one of fact; and an error of law committed by a Judge and apparent on a perusal of the record is a ground for granting a review; and where a Judge dismissed a suit on the ground that as between the plaintiffs who were the nearest agnates and the defendants who were the sister's son of the last male owner, the latter were the preferential heirs under the Mitakshara law prevailing in the Madras Presidency, it was an error apparent on the face of the record and could be reviewed—*Murari v. Balavanth*, 46 M. 955; 76 I. C. 342; A. I. R. 1924 Mad. 98; 45 M. L. J. 309; (1923) M. W. N. 761.

**Failure of the Court to apply the law of limitation to the facts found in the case is an error apparent on the face of the record.**—*Debi Sahai v. Basheshar*, 10 L. 181; 112 I. C. 540; A. I. R. 1928 Lah. 919; *Kawdu v. Berar Ginning Co. Ltd.*, 116 I. C. 427; A. I. R. 1929 Nag. 185; *J. W. Surty v. T. S. Chettyar Firm*, 4 R. 205; 99 I. C. 417; A. I. R. 1927 Rang. 20; *Ma Hta Yi v. Ma Pwa Hnit*, 5 R. 610; 105 I. C. 710; A. I. R. 1928 Rang. 12; *Beli Ram v. Padam Sain*, 116 I. C. 221; A. I. R. 1929 Lah. 26.

Where the question involved is not that the Court had taken a wrong view of the law or misinterpreted the law, but the apposite law had not been applied at all an application for review does *prima facie* lie.—*British Equitable Assurance Co. Ltd. v. Rajaram*, 113 I. C. 896; A. I. R. 1928 Nag. 305. Where an order is made setting aside a sale held in execution of a rent decree on an application to make the deposit without giving a notice of the application as required by the proviso to S. 174-A (2) of the Bengal Tenancy Act, held it was a good ground for review of the order.—*Bholanath v. Maharajadhiraj of Burdwan*, A. I. R. 193; Cal. 265.

Where in a Land Acquisition case the valuation allowed was on a supposed admission of the Government valuer, which had, in fact, no existence, the error was not apparent on the face of the record.—*Secretary of State v. Hindusthan Co-operative Insurance Society Ltd.*, 36 C. W. N. 40; A. I. R. 1932 Cal. 171.

But an error of law to be apparent on the face of the record must relate to some proposition of law which is well settled and beyond controversy so far as the Court which delivered the judgment is concerned, and on which the judgment rests and not merely to a question of law which is debateable and may be shown to be erroneous. Where a judgment was sought to be reviewed on the ground that the Court had misconceived the

The production of a new ruling or authority, which if brought to the notice of the Judge at the first hearing might have altered the judgment is "new and important matter" within the meaning of this rule.—*Ellem v. Basheer*, 1 C. 184; *Abdul Sadiq v. Abdul Aziz*, 21 A. 152, 153.

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The High Court has no authority to admit a review of judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered.—*Bhuyrub Nath v. Kally Chunder*, 16 W. R. 113; *Ex parte Bashiagarulu*, 1 M. H. C. R. 251; *Jackammal v. Palnappa*, 5 M. H. C. R. 464; *Panchanan v. Radha Nath*, 4 B. L. R. 213.

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Where new evidence is adduced in an application for review, it need not be *per se* sufficient to show that the previous decision is wrong or such as to cause an overmastering balance of evidence. If there is sufficient ground for receiving the new evidence, the case is to be heard as if it were being originally heard with the materials then before the Court.—*Sahabjan v. Sufdur Ali*, 22 W. R. 288.

Decree rendered ineffectual by reversal.—The plaintiffs sued the defendant to recover the amount of assessment paid in respect of land for the years 1872—76, and got a decree. The defendant appealed to the Privy Council. The plaintiffs subsequently filed a second suit to recover the assessment paid in respect of the land for the years 1877—82, and obtained a decree solely on the strength of the former decree. The Privy Council reversed the decree. The defendant thereupon applied for review of the decree in the second suit. *Held*, that the Court had jurisdiction to entertain the application for review. The decision of the Privy Council reversing the first decree was a "new and important matter" within the meaning of this rule.—*Waghela Rai Sangji v. Masludin*, 13 B. 330 and *Jogesh v. Kali Churn*, 3 C. 30 (F. B.), p. 46. See *Maung Kyaw v. Ko Aye*, 5 B. 261: 103 I. C. 258; A. I. R. 1927 Rang. 189. See also *Satto Saran v. Tarini Charan*, 3 B. L. R. 287: 12 W. R. 154 (doubted in *Panchanan v. Gurudas*, 9 B. L. R. 187: 18 W. R. 317). But it has been held that a subsequent Full Bench case overruling the authority on which the judgment sought to be

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passed on overlooking the fact that the defendants had admitted a portion of their claim, the case clearly came under Or. XLVII, r. 1 of the Code.—*Probhas v. Nithar*, 29 C. W. N. 928: 84 I. C. 278: A. I. R. 1924 Cal. 1054.

A judgment by the High Court based on a judgment of the Privy Council may be reviewed by the High Court on the ground that after the presentation of the application for review but before its hearing the Privy Council had delivered another judgment in which the case relied on in the judgment of the High Court was construed in a manner which rendered the judgment of the High Court wrong. The expression "error apparent on the face of the record" is wide enough to embrace a case like this.—*Brindaban v. Damodar*, 29 C. W. N. 148: 85 I. C. 65: A. I. R. 1925 Cal. 304.

In *Kamla Prosad v. Kunj Behari*, (1922) P. 1, it has been held that a mere omission to raise a point of law, which had it been raised, might and probably would have brought about a different result is not necessarily a mistake or error apparent on the face of the record for which a review can be claimed.—See *Opporti Padhi v. Paila Ujjula*, 106 I. C. 514: A. I. R. 1927 Mad. 998, in which it has been held that the mere omission on the part of a Judge to consider a decision, however regrettable and however wrong, cannot possibly be regarded as constituting an error apparent on the face of the record affording a proper and sufficient ground for granting review of a judgment. See also *Kishan Chand v. Mukan*, 132 I. C. 815: A. I. R. 1931 All. 91.

A mere incorrect exposition of law is not a good ground for review.—See *Ohhajju Ram v. Neki*, 49 I. A. 144: 3 L. 127: 26 C. W. N. 697: 36 C. L. J. 459: 72 I. C. 566: A. I. R. 1922 P. G. 112: 41 P. L. R. 1022: 17 P. W. R. 1922: 43 M. L. J. 332: 30 M. L. T. 295: 24 Bom. L. R. 1238; *Oankar Lal v. Yadoo*, 107 I. C. 908; *G. I. P. Railway v. Harakchand*, 112 I. C. 653: A. I. R. 1929 Neg. 58; *Gana Manikam v. S. R. Samson*, A. I. R. 1932 Rang. 129; faulty logic or error of law is not a sufficient ground.—*Syed Mahomed v. Janki*, 13 P. L. T. 384; and grounds which might be good grounds of appeal would not support an application for review.—*Gurupada v. Upendra*, 34 C. W. N. 696: 129 I. C. 365: A. I. R. 1930 Cal. 701. Therefore, where there is no mistake in computing the period of notice but only an error in law in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review.—*Akshoy Kumar v. Agarwala*, A. I. R. 1932 Pat. 308.

Granting of a claim as to personal relief, the prayer for which could not be made out clearly upon a construction of a clause of the plaint which is doubtfully worded, is not an error apparent on the face of the record.—*Syed Mahomed v. Janki Saran*, (ants).

Where the Court dismissed an application in chambers in the absence of the applicant, held there is a mistake apparent on the face of the record justifying an application for review.—*Behari Lal v. Abdul Rahaman*, 8 O. W. N. 1267.

The insolvent got himself fraudulently and collusively adjudicated by setting up a bogus creditor. Later on, another creditor, who had sued to enforce his claim, dropped out and another bogus creditor stepped in to continue the proceedings, and put in proof of his claim before the official receiver. This claim having been rejected, the said bogus creditor appealed to the District

regulations of the Company relating to transfer and registry of shares, but it appeared that the effect of those rules was considered by the Court at the hearing of the appeal, and it also appeared that the rules were not so strictly worded as to warrant one construction only. *Held* there was no error of law on the face of the record so as to support an application for review.—*Tinnevely Mills Co. Ltd v. Mohideen*, 117 I. C. 712; A. I. R. 1929 Mad. 209; (1928) M. W. N. 911.

The law as to the liability of the legal representatives under Hindu law for the payment of the debt of the deceased to the extent of the entire estate whether self-acquired or ancestral of the deceased being undisputed, there was no suggestion by the defendant that the ancestral property was not liable for the debt and no issue was framed on the subject and the judgment did not contain any discussion thereon, but the trial Judge added a restrictive clause exempting the ancestral property without assigning any reason. *Held* that this mistake was not the result of any exposition of law and the error committed by him was apparent on the face of the record.—*Ram Das v. Sundar Singh*, 118 I. C. 396; A. I. R. 1929 Lah. 424; 30 Punj. L. R. 593 (distinguishing *Chhaju Ram v. Neki*, 49 I. A. 144; 3 L. 127).

An order that S. 15 of the Code does not apply to an application for "setting aside the dismissal for default of an application under Or. IX, r. 9 is an error apparent on the face of the record", and even if the High Court refuses to interfere under S. 115 with such an order of the Subordinate Judge, an application for review can be made thereafter to the Subordinate Judge, because the refusal of the High Court to interfere in revision cannot be taken as implying an approval of the order.—*Sourendra v. Jatindra*, 32 C. W. N. 811.

Where the provisions of S. 575 para. 2 of the old Code (S. 98, Sub-sec. 2 of this Code) were erroneously applied in a case, it was held that there was a mistake or error apparent on the face of the record and that there was a sufficient cause for granting review.—*Husani Begam v. Collector of Muzaffarnagar*, 11 A 176; and in *Bollapragada Garu v. Bollapragada Janki*, 31 M. 414 it has been held that where a Court passed an order under a wrong section, it has jurisdiction to review the wrong order for sufficient reason and the High Court will not interfere under S. 115 if the right result has been reached and that which was irregularly done has been set right.

A Full Bench of the High Court of Calcutta has held that it cannot be treated as universal that no point can be raised on an application for a review which has been already discussed and decided in the original hearing of the appeal; or that no new point which has not been raised at the hearing of the appeal can be argued on the application for review. In each case the Court to which application is made must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for ends of justice.—*Chintamani v. Pyari*, 6 B. L. R. 126; 15 W. R. 1 (F. B.) (the earlier decisions of the Court considered). Pinhey, J. concurred with this view in *Kalu v. Vishram*, 1 B. 543. The High Court granted an application for review of a judgment on the ground that two previous rulings were not considered therein.—*Jatra Mohan v. Aukhil*, 24 C. 334. Where an application for review of the order passed by the Munsif dismissing a suit, was made on the ground that the said order had been

passed on overlooking the fact that the defendants had admitted a portion of their claim, the case clearly came under Or. XLVII, r. 1 of the Code.—*Probhas v Nithar*, 29 C. W. N. 928: 84 I. C. 278: A. I. R. 1924 Cal. 1054.

A judgment by the High Court based on a judgment of the Privy Council may be reviewed by the High Court on the ground that after the presentation of the application for review but before its hearing the Privy Council had delivered another judgment in which the case relied on in the judgment of the High Court was construed in a manner which rendered the judgment of the High Court wrong. The expression "error apparent on the face of the record" is wide enough to embrace a case like this.—*Brindaban v. Damodar*, 29 C. W. N. 149: 85 I. C. 65: A. I. R. 1925 Cal. 304.

In *Kamla Prasad v. Kunj Behari*, (1922) P. 1, it has been held that a mere omission to raise a point of law, which had it been raised, might and probably would have brought about a different result is not necessarily a mistake or error apparent on the face of the record for which a review can be claimed.—See *Opporti Padhi v. Paila Ujjula*, 106 I. C. 514: A. I. R. 1927 Mad. 998, in which it has been held that the mere omission on the part of a Judge to consider a decision, however regrettable and however wrong, cannot possibly be regarded as constituting an error apparent on the face of the record affording a proper and sufficient ground for granting review of a judgment. See also *Kishan Chand v. Mukan*, 132 I. C. 815: A. I. R. 1931 All. 91.

A mere incorrect exposition of law is not a good ground for review.—See *Chhajju Ram v. Neki*, 49 I. A. 144: 3 L. 127: 26 C. W. N. 697: 36 C. L. J. 459: 72 I. C. 566: A. I. R. 1922 P. C. 112: 41 P. L. R. 1922: 17 P. W. R. 1922: 43 M. L. J. 332: 30 M. L. T. 295: 24 Bom. L. R. 1238; *Oankar Lal v. Yadoo*, 107 I. C. 908; *G. I. P. Railway v. Barakchand*, 112 I. C. 653: A. I. R. 1929 Nag. 59; *Gana Manikam v. S. R. Samson*, A. I. R. 1932 Rang. 129; faulty logic or error of law is not a sufficient ground.—*Syed Mahomed v. Janki*, 13 P. L. T. 384; and grounds which might be good grounds of appeal would not support an application for review.—*Gurupada v. Upendra*, 34 C. W. N. 696: 129 I. C. 365: A. I. R. 1930 Cal. 701. Therefore, where there is no mistake in computing the period of notice but only an error in law in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review.—*Akshoy Kumar v. Agarwala*, A. I. R. 1922 Pat. 303.

Granting of a claim as to personal relief, the prayer for which could not be made out clearly upon a construction of a clause of the plaint which is doubtfully worded, is not an error apparent on the face of the record.—*Syed Mahomed v. Janki Saran*, (ante).

Where the Court dismissed an application in chambers in the absence of the applicant, held there is a mistake apparent on the face of the record justifying an application for review.—*Behari Lal v. Abdul Rahaman*, 8 O. W. N. 1267.

The insolvent got himself fraudulently and collusively adjudicated by setting up a bogus creditor. Later on, another creditor, who had sued to enforce his claim, dropped out and another bogus creditor stepped in to continue the proceedings, and put in proof of his claim before the official receiver. This claim having been rejected, the said bogus creditor appealed to the District



Judge. The District Judge dismissed the appeal and at the same time annulled the adjudication. Thereupon another creditor applied under Or. XLVII, r. 1 for review of the order annulling the adjudication. *Held* that the annulment of the order of adjudication in the absence of a prayer by any of the parties was an error apparent on the face of the record.—*China v. Punnayya*, (1932) M. W. N. 153 (F. B.).

**Any other sufficient reason.**—The words "any other sufficient reason," as pointed out by the Privy Council in *Reasut Hossein v. Hadjee Abdoolah*, 3 I. A. 221: 2 O. 131, confer a wide discretion on the Court to which an application for review is presented and enables it to grant a review for good and sufficient reasons so far as may be requisite for the ends of justice.—*Gobinda Lall v. Shibadas*, 3 C. L. J. 545 (557): 10 C. W. N. 986: 33 O. 1323.

Rule 1 of Or. XLVII of the C. P. Code must be read as in itself definitive of the limits within which review is permitted and reference to practice under former and different statutes is misleading. The words "any other sufficient reason" in Or. XLVII, r. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record.—*Ohhajju Ram v. Neki*, 49 I. A. 144: 3 L. 127: 26 C. W. N. 697: 36 C. L. J. 459: 72 I. C. 566: A. I. R. 1922 P. C. 112: 41 P. L. R. 1922: 17 P. W. R. 1922: 43 M. L. J. 332: 30 M. L. T. 295: 24 Bom. L. R. 1238; *Rama Raghavareddi v. Raja of Venkatagiri*, 52 M. L. J. 123: 99 I. C. 954: A. I. R. 1927 Mad. 355: *In the application of Dwarka Dhis*, 46 A. 245: A. I. R. 1924 All. 398; *Kumar Gopika v. Mahar Ali*, 39 C. L. J. 247; *Galstaun v. Pramatha*, 33 C. W. N. 883: A. I. R. 1929 Cal. 470; *Ganesh Das v. Hari Singh*, 33 P. L. R. 290; *Mt. Rukmini Kuer v. Mt. Ram Piari*, 122 I. C. 184: A. I. R. 1930 All. 126; *Sadasheo v. Vithoba*, 100 I. C. 30: A. I. R. 1927 Nag. 363; *Hiralal v. Lomkaran*, 103 I. C. 750; *Seth Sorabji v. Seth Dwarkadas*, 133 I. C. 887. *See also* *Nem Das v. Kunjbehari*, 126 I. C. 677: A. I. R. 1930 Oudh 392: 7 C. W. N. 741, in which it has also been held that a review cannot be granted against an order deliberately passed by a Bench of the High Court for the benefit of the parties in order to meet the circumstances of a particular case.

Delivery of judgment without previous notice to the parties is illegal, and this is a "sufficient reason" for granting a review of the judgment where, by such illegal procedure, a party is deprived of his right to apply for a certificate for a Letters Patent appeal in a case which is fit for the granting of such certificate.—*Maung Sein Myi v. Maung Tun Pe*, 6 R. 794: 114 I. C. 687: A. I. R. 1929 Rang. 70.

Although the words "any other sufficient reason" mean a reason sufficient on ground at least analogous to those specified immediately previously, it is not necessary that the reason should be *ejusdem generis* with those previously specified. The phrase *ejusdem* is more restricted in its meaning than the word "analogous." The summons to a witness in a case was returned unserved as the witness could not be found. The Court with a view to avoid the case pending idly, declined to adjourn the case for giving a further opportunity to the party concerned to secure his attendance

and decided the suit. The witness was subsequently found out and the party applied for review of the case and the application was granted by the trial Court. Held that there was a sufficient ground for review, and the order of the trial Court granting the application was not illegal.—*K. K. S. A. R. Firm v. Maung Kya Ngun*, 5 R. 675: 107 I. C. 161: A. I. R. 1928 Rang. 31.

The High Court of Patna has held that any other "sufficient reason" is to be read *ejusdem generis*. If the Court comes to know rulings or decisions, not referred to in the arguments, which in its opinion are decisive of the case the Court ought to give the parties an opportunity of arguing on or explaining them. But a failure in this respect is not by itself a sufficient reason for granting a review.—*Syed Mahomed v. Janki Saran*, 13 P. L. T. 384.

The reversal of a judgment of the lower appellate Court was not a "sufficient reason" for review within the meaning of Or. XLVII, r. 1. "Sufficient reason" must be some reason analogous to the reasons which have been stated in Or. XLVII, r. 1.—*Sudnund v. Rakhal*, 31 C. W. N. 822 (*Chhajju Ram v. Neki*, noted *ante*, referred to).

The words "or for any other sufficient reason" mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter on evidence or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases "any other sufficient reason" may depend on a question of law or a question of fact, or mixed question of law and fact.—*Amir Hasan v. Ahmed Ali*, 9 A. 36 (2 C. 131 (P. C.) referred to); *Gangubai v. Ghansaram*, 62 I. C. 253. In *Gopal Chandra v. Solomon*, 13 C. 63 (reversing 11 C. 767), it has been held that although it is difficult to define precisely the meaning of the words "any other sufficient cause" in this rule yet, from the earlier part of the clause, it is clear that a point which might have been, but which has not been, discovered at the trial by the exercise of due diligence, was not intended by the rule to afford any sufficient reason for review. In *Narain v. Chiranjii*, 46 A. 568: 79 I. C. 945: A. I. R. 1924 All. 730, the Allahabad High. Court described the rule in *Chhajju Ram's Case* (49 I. A. 144) as "technical," and said: In our opinion the words in Or. XLVII, r. 1, 'for any other sufficient reason' are not only very wide in themselves, but are intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by a strict adherence to the terms of the decree." Mookerjee, J., in *Gopika v. Mahar Ali*, 39 C. L. J. 247: A. I. R. 1924 Cal. 872, referring to *Chhajju Ram's Case*, said: "Whether any analogy can be discovered between the two grounds specified, *viz.*, the discovery of new and important matter or evidence, and some mistake or error apparent on the face of the record, need not be discussed. But whether a particular reason is analogous to either one or other of these two grounds may obviously lead to very powers exercisable under S. 151 and exclusive (*Probhas v. Nithar Lal*, 23 C.

Cal 1045), and it has been held in the following cases that it is immaterial whether the review was granted under Or. XVII or under the inherent jurisdiction.—*Basanta v. Abhay*, 37 C. L. J. 99: A. I. R. 1923 Cal. 450; *Adit*

*Prasad v. Ram Harakh*, 4 P. 180; A. I. R. 1925 Pat. 435; *Rameshwar v. Dwarka Prasad*, 3 P. 778; A. I. R. 1925 Pat. 36.

The subsequent discovery of a reasonable ground for adjournment by the Court is a good ground for granting review.—*Subbaraya v. Sundaresa*, 140 I. C. 225; (1932) M. W. N. 1262.

It would be a patent misapplication by Court of S. 151 of the Code, if the Court in exercise of its inherent power assumes jurisdiction by way of review where it is expressly forbidden by the Legislature to entertain such an application.—*Sudananda v. Rakhal*, 31 C. W. N. 822; A. I. R. 1927 Cal. 920. See also *Kanai v. Jatindra*, 45 C. 519; 22 C. W. N. 446; 42 I. C. 711; 26 C. L. J. 325.

An appeal was heard and disposed of by the Full Bench in the absence of the respondent. Subsequently, on the application of the respondent, a review was granted on the ground that no notice of reference to the Full Bench was served on him, and that his absence at the hearing came within the words "any other sufficient reason" in this rule.—*Gharasham v. Lal Singh*, 9 A. 61 (F. B.).

Remedy by way of review or revision against an order should not be ordinarily allowed where the obvious remedy for him is to appeal against the order. Therefore, where a surety against whom execution had been ordered applied for a review of the order on the ground that the Court had no jurisdiction to do so without calling upon him to show cause why execution should not be ordered, it was held that as a surety had a right of appeal, it was not open to him to invoke the remedies by way of review or revision.—*Mahomed Sultan v. Nagoji*, A. I. R. 1931 Mad. 828; (1931) M. W. N. 963; 135 I. C. 539.

The proper course for getting the value of improvement where a decree for redemption is passed and the sum is not added to the price of redemption, is not to make an application for review but to make a demand on the opposite party for one of the alternatives mentioned in S. 51 of the Transfer of Property Act, and on his refusal to enforce the demand by suit.—*The Sialkot Mission v. Sir Bisheshardas Daga*, 109 I. C. 95; A. I. R. 1928 Nag. 144.

Where the point sought to be raised in review had not been raised or argued by either party, but was first taken by the Court itself in giving its opinion upon the case referred to it, the Court granted a review observing as follows: "The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances, and on very special grounds we think the review ought to be granted."—*Sulleman Hussein v. New Oriental Bank Corporation Ltd.*, 15 B. 267.

A suit was dismissed on the ground of deficiency of court-fee stamp. Subsequently the Court granted a review having found that the court-fee paid was sufficient. Held that this constituted a most fitting ground for granting a review and was clearly "any other sufficient ground" within the meaning of this rule.—*Ali Akbar v. Khurshed Ali*, 27 A. 695 (followed in *Gopala Aiyar v. Ramasami*, 31 M. 49; 17 M. L. J. 603).

Where an auction-purchaser applied for an order for delivery of possession and the order was made, it was held that it was a sufficient ground for reviewing the order that the application was on the face of it barred by limitation.—*Dhanindar Das v. Bakshi*, 3 P. L. J. 571.

The mere fact that another Judge is inclined to take a different view of the case from that taken by a Judge who originally decided the case, is no ground for review.—*Ma Kyaw v. Ma Kyin*, (1922) U. B. 16; 64 I. C. 895. See *Girdharlal v. Kapadvanj Municipality*, 123 I. C. 19; A. I. R. 1930 Bom. 317; 32 Bom. L. R. 610.

The absence of a pleader is not a ground for review.—*Rama Raghavareddi v. Raja of Venkatagiri*, 52 M. L. J. 123; A. I. R. 1927 Mad. 355 (A. I. R. 1926 Mad. 980 *folld.*).

That the lower Court should have improperly neglected to examine a witness is not a ground for a review of judgment, if the objection was not taken when the case was heard by the Court in regular appeal.—*Munshad Bibee v. Luchmeeput*, 9 W. R. 129.

The fact that the High Court ought to have remanded the case on the ground that the Judge had wrongly decided a point of law is no ground for review.—*Prosunnonath v. Judoonath*, 9 W. R. 599.

It is not a proper ground for granting a review of judgment that a Judge, by going through the evidence a second time, might arrive at a different conclusion.—*Chunder Churn v. Loodunram*, 25 W. R. 324.

The fact that the Court decided a case without granting an adjournment prayed for is no ground for review.—*Trimbak v. Krishna*, 115 I. C. 173; A. I. R. 1929 Nag. 89; 11 N. L. J. 238.

It is not a "sufficient reason" for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong.—*Binda Prasad v. Raghbir*, 37 A. 440.

A review cannot be given merely for the purpose of allowing the parties to re-argue the case upon the evidence, on the chance of eventually throwing doubt upon the decision already passed.—*Koleemooddeen v. Heerun Mundul*, 24 W. R. 186.

The failure to argue a point of law is not a sufficient ground for review.—*Hiralal v. Lomkaran*, 109 I. C. 750.

A review cannot be granted on the ground that, if the facts had been better or more fully placed before the Court, the judgment would have been different, or even on the ground of a subsequent decision of a question of law by the Privy Council in another suit, where there has been no discovery of new evidence such as is contemplated in this rule.—*Jadub Ram v. Ram Lochun*, 19 W. R. 189.

A misconception on the part of the pleader in consequence of which the evidence on a certain point had been shut out and the issue found against the

party, is a matter of considerable importance and would come under the words "for any other sufficient reason."—*Pridhanmal v. Laloo*, 130 I. C. 545; A. I. R. 1931 Sind 3: 25 S. L. R. 242.

Where a Judge had made a mistake as to the subject of certain *daugh* in a Government *chitta*, *held*, that an error of this kind was sufficient ground for entertaining a review.—*Gunesh Ram v. Rohinee Dasee*, 14 W. R. 236.

Where there is no clear decision by the lower appellate Court concerning the correctness or otherwise of the trial Court's finding that theft from running train had occurred, absolving thereby the railway company from liability, and yet the decree of the lower Court is reversed, there is a mistake or error apparent on the face of the record or at any rate a sufficient reason for review analogous to such error.—*Jai Narain v. G. I. P. Railway Co.*, 11 L. 158: 123 I. C. 845; A. I. R. 1930 Lah. 37: 31 P. L. R. 419.

Where a Judge on appeal declined to admit additional evidence on the ground that the application should have been made to the lower Court, *held*, it was a ground for applying for a review of his order pointing out his mistake.—*Ram Lall v. Rung Lall*, 17 W. R. 47.

It is not a sufficient ground for a review of judgment passed on special appeal that the point which was then raised and on which the Court's decision was based, was one not raised in either of the lower Courts, and specially, as in this case, where the question was pointedly raised in the special appeal, and the respondent had ample time to prepare himself to meet the statement therein.—*Cowell v. Mohadeb Mundul*, 17 W. R. 182.

A Munsif granted a review on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order. On an application for revision, *held*, that the proper course was to set aside the District Judge's order and to leave standing the order of the Munsif granting the review, which order, though wrong in principle, was right in its results.—*Abdul Sadiq v. Abdul Aziz*, 21 A. 152.

Where a suit is dismissed for non-joinder of parties, the Court is justified in granting a review of his order and in allowing the plaintiff to bring in all the persons interested.—*Girish Chunder v. Juramoni De*, 5 C. W. N. 83.

An execution application that has been dismissed cannot be restored by way of review.—*Narayana v. Muthu*, 50 M. 67: 97 I. C. 1008; A. I. R. 1926 Mad. 980.

New exposition of law by Privy Council, Full Bench, or Division Bench, or subsequent legislation.—A lower Court admitted a review of judgment on the ground that the decision of a Divisional Bench of the High Court which it had followed in that judgment, had subsequently been overruled by the Full Bench. *Held*, that the lower Court was not authorized to admit a review of judgment on such ground.—*Amrit Lal v. Madho Das*, 6 A. 292.

Because there is a subsequent decision of a superior Court of binding authority on a question of law, the prior judgment passed on a different

view of law is not liable as a matter of course to be reviewed.—*Dawloo Ma v. Ghowdappa*, 126 I. C. 486: A. I. R. 1930 Mad. 579.

A new exposition of the law by a Full Bench after the passing of the original decree is a "just and reasonable cause" for admitting a review after the prescribed period.—*Jonmenjoy v. Dassmoney*, 8 C. 700; *Forbes v. Dyanutoollah*, 10 W. R. 415. *Contra—Madhub Chunder v. Radhika*, 7 W. R. 405; *Dwarkanath v. Manick Chunder*, 9 W. R. 102; *Shama Shurn v. Bindabun*, B. L. R. Sup. Vol. 892: 9 W. R. 181; *Bura Boodho v. Kaylash Chunder*, 6 W. R. 100 and *Allad Monee v. Joy Sunkur*, 7 W. R. 408. But see *Sitaram v. Kaniram*, A. I. R. 1929 Nag. 251 (F. B.) in which it has been held that a review cannot be permitted in such a case because a review is not permitted where new materials come into existence subsequently, and in deciding whether an application for review lies or not the question of hardship to the applicant does not arise.

The ground for review under Or. XLVII, r. 1, must be something which existed at the date of the decree and the rule does not authorize the review of a decision which was right when it was made on the ground of the happening of some subsequent event. Where the lower Court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council, the reversal of the High Court's judgment is not a ground for review of the lower Court's judgment.—*Kotagiri Venkata v. Vellanki Venkatarama*, 27 I. A. 197: 24 M. 1 (P. C.): 10 M. L. J. 221; *Ganna Bathula Venkamma v. Ganna Bathula Ranga Rao*, 43 M. L. J. 33: (1922) M. W. N. 304: 15 L. W. 593 (24 M. 1 (P. C.)), 4 M. L. T. 86 *folld.*; 13 B. 330, 33 A. 566, 31 B. 128, 13 M. L. T. 225, 3 P. L. J. 372 *resd. to*; *Sarfaraj Khan v. Rama Chandra*, 73 I. C. 4; *Sudananda v. Rakhal*, 31 C. W. N. 822: A. I. R. 1927 Cal. 920.

A judgment cannot be reviewed under Or. XLVII, r. 1, on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by a subsequent decision. Even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified, amounts to the discovery of new and important matter or evidence within the meaning of Or. XLVII, r. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant, or could not be produced by him when the decree or order was passed or made. Therefore when a judgment was based on a decision which had been modified by a subsequent decision of the Full Bench, and the latter decision had been reported in the authorised law reports four months before the trial, *held*, (a) that if in fact the Full Bench decision was not within the knowledge of the applicant or his pleader, ignorance of this nature could not, in view of Or. XLVII, r. 1, be pleaded in support of an application for review, and (ii) that an order granting a review in such a case was appealable under Or. XLVII, r. 7 (1) (b).—*Srimati Garabini v. Suraja Narain*, 3 P. 134: 75 I. C. 177: A. I. R. 1924 Pat. 250: 5 P. L. T. 52: (1923) P. 361. See also *Firm of Gurditta v. Balmokand*, 112 I. C. 277, *Lazman v. Mt. Shevantsibai*, 102 I. C. 6: A. I. R. 1927 Nag. 252; *Venkamma v. Rang Rao*, 43 M. L. J. 33: 70 I. C. 741: A. I. R. 1922

Mad. 227; *Ramachandra v. Govind Rao*, A. I. R. 1925 Nag. 266: 23 N. L. R. 53.

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.—*Ellen v. Basheer*, 1 C. 184: 21 W. R. 382; *Sheikh Abdul Aziz v. Musst. Munro*, (1921) P. 152: 1 P. L. T. 561.

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case, but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for this omission, and the application for review was granted.—*Achuta v. Mammavu*, 10 M. 357. See also *Jatra Mohun v. Aukhil*, 21 C. 334 (336).

The fact that the decision proceeds upon a wrong exposition of law or is based upon a ruling which has been disapproved by a later Special Bench is not sufficient reason.—*Gana Manikam v. S. R. Samson*, A. I. R. 1932 Rang. 129.

Although the discovery of a new ruling may not entitle a party to a review of judgment, yet when a Court is satisfied that its judgment has proceeded upon an erroneous view of the law, the provisions of this rule allow review of judgment.—*Vallaya v. Jagannatha*, 7 M. 307.

That one Division Bench of the High Court has decided a point at variance with the decision of another Division Bench is no reason for granting a review of judgment.—*Nobeen Kishen v. Shib Pershad*, 9 W. R. 161 and *Fergusson v. Government*, 9 W. R. 153.

Where the decree sought to be reviewed depended on another decree between the same parties and raising the same questions, which was subsequently reversed by the Privy Council, it was a fit case to be reviewed on the ground of "discovery of new and important matter" within the meaning of this rule.—*Waghela v. Shaik Mastudin*, 13 B. 330.

There were two connected appeals between the same parties one before a Bench of two Judges and the other before a single Judge. The respondent in one was the appellant in the other and the matter at issue was practically connected. The appeal before the two Judges was dismissed under Or. XLI. r. 11 and no notice was issued to the respondent (who was the appellant before the single Judge). The single Judge then heard and decided the other appeal and delivered judgment. Subsequently the appellant before the single Judge having come to know that the point which was decided by the single Judge against him was decided in his favour in the appeal before the Bench of two Judges applied for review. Held, that the case came within the purview of Or. XLVII, r. 1.—*Pittan Singh v. Hukum Singh*, A. I. R. 1930 All. 621.

Where a case was decided by the High Court following the view of the law on the point of the Privy Council, but the Judge had anticipated legislation on the point which was subsequently passed and which was contrary to the view of the Privy Council, it was held that the case could not be reopened simply on this ground, because subsequent legislation does not affect decided cases, nor can the subsequent legislation be said to be a discovery of

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new and important matter justifying review.—*Gyanaji v. Ningappa*, 52 B. 434: 111. I. C. 633: A. I. R. 1923 Bom. 308: 30 Bom. L. R. 668 (following *Kotagiri Venkata v. Vellanki Venkatarama*, and *Waghela v. Shaik Masludin*, noted ante).

For other cases see notes under headings "Mistake or error apparent on the face of the record" and "Any other sufficient reason," ante.

**Review by minors.**—A decree passed against an infant properly represented is binding upon him like a decree passed against an adult, and is not subject to review on his application after attaining majority; but it is open to the infant to impeach such a decree by a suit in cases where his guardian had been guilty of fraud or negligence.—*Cursandas Natha v. Ladvakahu*, 19 B. 571.

The only modes of setting aside a decree, apart from appeal, prescribed by the Code of Civil Procedure are by review under this rule and by suit under S. 9. — *Mirali Rahimbhoy v. Rehmoobhoy*, 15 B. 594 (affirming 13 B. 137). See also *Ram Sarup v. Shah Latifat Hossein*, 29 C. 735, where it has been held that where the next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit re-opened on review. See also *Rakhal Moni v. Adwyta Prasad*, 30 C. 613: 7 C. W. N. 419, and *Ram Gopal v. Prasanna*, 2 C. L. J. 503: 10 C. W. N. 529. But see *Barhamdeo Prasad v. Banarasi Prasad*, 3 C. L. J. 119, where it has been held that if a decree is regular in itself and on the face of it correct, the minor's remedy lies in a fresh suit and not by an application for review. See also *Gulab Koer v. Badshah*, 13 C. W. N. 1197.

**Review of judgment in Letters Patent appeals.**—The High Court has power to review judgments passed in appeals preferred under Cl. 15 of the Letters Patent.—*Venkata Subbarayudu v. Sri Rajah Krishna*, 40 M. 651; *Ratanchand v. Damji Dharsey*, 101 I. C. 766: A. I. R. 1927 Bom. 232. But a contrary view has been taken in *Abhilakha v. Sada Nand*, 132 I. C. 24 (F. B.). A. I. R. 1931 All. 244, and *Inder Mahton v. Ram Kishun*, 134 I. C. 630 A. I. R. 1931 Pat. 409. 12 P. L. T. 652.

**Order made by one Judge cannot be set aside by another Judge.**—One Judge of a High Court cannot set aside an order made by another Judge of that Court although such order might be wrong. The proper remedy in such a case is by review on any of the grounds mentioned in this rule.—*Basanta Kumar v. Kusum Kumari*, 44 C. 23.

**Commissioner.**—A Commissioner for taking accounts has no power of review under this order; but before his report is submitted, he may reopen the enquiry into any item on grounds analogous to those of this rule.—*Fernandez v. Rodrigues*, 47 B. 593 82 I. C. 593: A. I. R. 1924 Bom. 231.

**Court-fee on application for review.**—The proper fee leviable on an application for review of judgment when it refers to a portion of the decree is the fee leviable on the plaint or memorandum of appeal, in which the judgment, review of which is asked for, is passed.—*In re Sheikh Magbul*, 31 A. 294 (4 B. 26 not followed, 3 C. W. N. 292 followed).

Where the price of redemption of property held by the purchaser is fixed by a judgment and the purchaser files an application for review for the



addition to that sum of the price of improvements made in the property by him, the court-fee payable on such application is to be determined by the money value of improvements and not as prescribed under Art. 17 (vi) of the Court-Fees Act.—*The Sialkot Mission v. Sir Bisheshardas Daga*, 109 I. C. 95: A. I. R. 1929 Nag. 144. It has been, however, held in this case that a review is not the proper course to be sought in a case of this kind, but a suit should be instituted.

The stamp-fee on an application for review must be calculated on the amount that would be obtained if the review were granted, and not necessarily on the whole value of the suit.—*In re Manohar G. Tambekar*, 4 B. 26; *Anonymous*, 7 M. H. C. R. Ap. 1. But see *Nobin Chundra v. Mohamed Uzir Ali*, 3 C. W. N. 292, in which a different view has been taken.

An application for review of an interlocutory order is properly stamped with a court-fee of Rs. 2 and neither Art. 4 nor Art. 5 of Sch. I of the Court-Fees Act refers to an interlocutory order.—*Jagan Nath v. Mulchand*, 31 A. 262.

An application for review of judgment, such as is alluded to in Arts. 4 and 5, Sch. I of the Court-Fees Act (VII of 1870), does not include an application for a new trial in a Small Cause Court in the mofussil.—*Gopeenath v. Ram Joy*, 14 W. R. 249.

**Limitation.**—An application for review of judgment must be made within 90 days of the passing of the judgment, and it is only when a sufficient cause is shown that the time can be extended under S. 5, Limitation Act. Where a decree-holder applied for execution on 27th August, 1929, and did not ask the Court that it should review its previous order dated 11th August, 1929, regarding the character of the property sold in execution, and he appended copies of certain sale-deeds to the application for execution with the idea of showing that the property belonged to the judgment-debtor personally and was not his ancestral property, it was held that there was no application for review of judgment, much less there was any statement of circumstances under which the application for review could not be made within 90 days allowed by law, and the application for execution could not be treated as an application for review and therefore the previous order that the property sought to be sold was the ancestral property of the judgment-debtor must stand.—*Bhukhan v. Piare Lal*, 130 I. C. 839: A. I. R. 1931 All. 218: 29 A. L. J. 103.

Under appropriate circumstances an application for review if found to be barred by limitation may be treated as an application under S. 151, if the Court is satisfied that there has been a flagrant abuse of its own process and it is also open to the appellate Court under similar circumstances to treat a barred application for review, made in the first Court, as one made under S. 151 in order to remove an apparent injustice done to the applicant and to prevent an abuse of the process of the Court.—*Kawdu v. Berar Ginning Co. Ltd.*, 116 I. C. 427: A. I. R. 1929 Nag. 185.

Where a Court in an application for review, which is *prima facie* time barred, without determining the question of limitation, proceeds to admit the application for review, the order passed by the Court is not only irregular but possibly without jurisdiction, and the entire proceedings consequent on such a review must be set aside as of no legal effect.—*Nathuram v. Ganga Buz* 128 I. C. 753: A. I. R. 1930 All. 815: 28 A. L. J. 1057.

**2.** An application for review of a decree or order of a Court not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor. [S. 624 and Cl. (c) of S. 626.]

To whom applications for review may be made

### COMMENTARY.

**Scope.**—This rule is not applicable to S. C. Courts.—See, Or. L.

**Alterations.**—The first part of this rule corresponds to S. 624 and the latter part corresponds to Cl. (c) of S. 626 of the C. P. Code, 1882. The wording of the old section has been changed in order to make the provisions more clear.

The words "or the existence of a" have been substituted for the word "some," and the words "or arithmetical mistake" have been added.

Section 624 and S. 626, Cl. (c) are reproduced below for the purpose of comparison:—

"624. Except upon the grounds of the discovery of such new and important matter or evidence as aforesaid, or some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it."

"626 (c) An application, made under S. 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (a) to this section, be disposed of by his successor."

**To whom applications for review may be made.**—Where a decree is passed by a Judge other than a High Court Judge and the review is sought not upon the grounds mentioned above, but upon other grounds the application shall be made to the very Judge who passed the decree; it cannot be made to his successor in office—*Sarangapani v. Narayanasami*, 8 M. 567; *Moheshur Sing v. Bengal Government*, 7 M. I. A. 293 : 3 W. R. (P. C.) 45, *Ram Baran v. Bhagwati*, 47 A. 751 (at pp. 754-756) : 69 I. C. 295 : A. I. R. 1925 All. 804.

A review was intended to be a consideration of the same subject by the same Judge, as distinguished from an appeal, which is a hearing before another tribunal. A review, therefore, should be presented with as much expedition as possible with a view to the re-hearing before the same Judge. The exceptions to this rule are allowable only *ex necessitate*, that is, from the death of the original Judge, or some unexpected or unavoidable cause which prevents him from hearing the review. The causes accounting for delay in applying for a review must, to justify the grant of it, be of grave importance.—*Moheshur Singh v. Government of India*, 3 W. R. (P. C.) 45 : 7 M. I. A. 293 ;

*Shamser Ali v. Jagannath*, 17 C. W. N. 403; *Surul Soonduree v. Rajendur Kishore*, 9 W. R. 125.

A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. It is only the discovery of new evidence or the correction of a patent and indubitable error or omission or some other particular grounds of like description which justifies the granting of a review.—*Roy Meghraj v. Beejoy Gobind*, 1 C. 197: 23 W. R. 433; *In the petition of Mathra Parshad*, 1 A. 296; *Banee Madhub v. Kalee Churn*, 24 W. R. 337; *Muneerooddeen v. Kadir Buksh*, 24 W. R. 410; and *Wolfut v. Nusrutoollah*, 25 W. R. 48; *Silela Din v. Ram Narain*, 6 O. W. N. 707.

Under this rule a review petition, on the ground of an "accidental slip" in the decree, is entertainable before the successor of the Judge who disposed of the case. Only, if the ground is other than an accidental slip or discovery of fresh evidence, such petition cannot be entertained by the successor.—*Kathyumma v. Muhammad Kutty*, 24 L. W. 447: 97 I. O. 545: A. I. R. 1926 Mad. 1033.

If review of a decree passed by a Judge other than a High Court Judge is sought on the ground of a supposed error of judgment, the application for review must be made to the Judge who passed the decree or made the order.—*Behari Loll v. Mangolanath*, 5 C. 110: 4 C. L. R. 371. So also where review is sought on the ground that the order complained of was made by the Judge in the absence of or without notice to a party, the application for review should be made to the Judge who made the order.—*Khema v. Dhanji*, 14 B. 101.

A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant a review on the ground that no leave or consent of the Court under S. 462, C. P. Code, 1882 (Or. XXXII, r. 7), had been given to the guardian-ad-litem to refer the matter in dispute between the parties to the suit to arbitration.—*Ananda Krishna v. Jogendra Nath*, 8 C. L. J. 294.

An application for review of judgment upon a ground other than those mentioned in S. 624, C. P. Code, 1882 (this rule), if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor.—*Karoo Singh v. Deo Narain*, 10 C. 80: 13 C. L. R. 261 (4 A. 278 dissented from); *Fazel Biswas v. Jamadar Sheik*, 13 C. 231; *Ramasami v. Kurisu*, 13 M. 178; and *Ganpat v. Jivan*, 16 B. 603. *Contra*—*Pancham v. Jhinguri*, 4 A. 278.

A Judge of a Mofussil Small Cause Court was held to have jurisdiction to direct a new trial of a case tried by his predecessor. The Judge, however, in dealing with applications for new trial, should have regard to the rule laid down in S. 624, C. P. Code, 1882 (this rule).—*Shumsher Ally v. Kurkut Shah*, 6 C. 236: 6 C. L. R. 549.

An application for review of judgment was presented, on other grounds than those specified in S. 624, C. P. Code, 1882 (this rule), to a District Munsif, who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application. *Held*, it was not competent to the

District Muosif, who had not delivered the original judgment, to entertain the application for review.—*Cheru Kurup v. Cheru Kanda*, 12 M. 509

A suit was decided by the Additional Sub-Judge, who was afterwards transferred to the Court of the permanent Sub-Judge. An application for review was made to the successor of the Additional Sub-Judge, and was subsequently transferred to the same Sub-Judge, who was then the presiding officer of the permanent Court. *Held*, that the requirements of S. 624, C. P. Code, 1882 (this rule), were substantially complied with.—*Sundar Das v. Saroda Charan*, 13 C. W. N. xci (91-n).

*Per* Mahmood, J.—Where a decree has been simply affirmed on appeal, S. 579, C. P. Code, 1882, does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for review of judgment under S. 206, C. P. Code, 1882, by any article of the Limitation Act, which has been granted under S. 206, even where an application for review of judgment under S. 623 upon the same ground would be barred by S. 624, C. P. Code, 1882.—*Muhammad Sulaiman v. Muhammad Yar Khan*, 11 A. 267 (F. B.).

A Judge cannot, by transferring a case to his own file, confer on himself the power to review an order of dismissal pronounced by a principal Sudder Ameen.—*Golam Esha v. Hurrish Chunder*, W. R. (1864) M. 29.

In a pre-emption suit, the moiety was directed to be given to a wrong person and the decree was passed in pursuance of the judgment. An application for review was made to the successor of the Judge who passed the decree. *Held*, the erroneous direction in the decree as to the person to whom the pre-emption price was to be paid was not a clerical mistake apparent on the face of the decree under Or. XLVII, r. 2, and the successor in office cannot entertain such an application.—*Baliram Piraji v. Yeswanta*, 75 I. C. 829.

Where the order is an *ex parte* order issued without hearing the opposite party, it cannot operate as *res judicata* and can be reviewed by the successor of the Judge who made such *ex parte* order.—*Jiwandas v. Khemchand*, 116 I. C. 101; A. I. R. 1929 Sind. 110.

"If the Judge who passed the decree has ordered notice to issue."—An application for review of judgment, upon a ground other than those mentioned in S. 624 of the C. P. Code, 1882 (this rule), if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor.—*Karoo Singh v. Deo Narain*, 10 C. 80; 13 C. L. R. 261. *Fazel Bucas v. Jamadar Shesh*, 13 C. 231. *Ganpat v. Juan*, 16 B. 603. *Ramasami v. Kurisu*, 13 M. 178 (F. B.) *Contra*—*Pancham v. Jhinguri*, 4 A. 278; *Cheru Kurup v. Cheru Kanda*, 12 M. 509.

Form of applications for review.

3. The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review. [S. 625.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 625, C. P. Code, with change of some words.

**Scope.**—This rule is not applicable to Small Cause Courts.—*See Or. L.*

**Form of applications for review.**—Applications for review of judgment should set forth concisely the grounds on which the review is asked for.—*Purna Chandra v. Nil Madhub*, 5 C. W. N. 485.

Applications for review of judgment should set forth concisely the grounds of objection to the decision of which a review is sought, without argument or narrative, and such grounds should be numbered consecutively.—*Mahadaji Ramchandra v. Vithal*, 1 B. H. C. R. 185.

A petitioner applying for review under S. 623, C. P. Code, 1892 must file a copy of the order of which he seeks a review, together with a memorandum of objections.—*Adarji Edulji v. Manikji Edulji*, 4 B. 414. But see *Wajid Ali v. Nawal Kishore*, 17 A. 213 (F. B.).

This rule relates to form and does not enlarge the right. It does not make Or XLIII, r. 1 (t) applicable to a refusal to restore an application for review.—*Girdhari Lal v. Zorawar Singh*, 47 A. 1: 80 I. C. 649: A. I. R. 1925 All. 57.

**4. (1)** Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

**(2)** Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that—

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for: and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. [S. 626.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 626, C. P. Code, 1892, with some alterations and omissions.

In sub-rule (2) which corresponds to para. 2 of the old section, the words “and the Judge shall record with his own hand his reasons for such opinion,” which occurred in the concluding part of para. 2 of the old section,

r. 4.

have been omitted. By the omission, the rulings in 4 C. W. N. 203 (P. C.), 23 M. 496, 3 A. 316 and 22 C. 734 noted below have been rendered obsolete.

Clause (c) of the old section has been detached from this rule and added to the last part of r. 2. The other alterations are merely verbal.

**Sufficient ground for review.**—On application for review of judgment, *held*, a party applying for review of judgment must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing cause (1) no point can be raised which has been already discussed and decided on the original hearing of the appeal, and (2) no new point which has not been raised at the hearing of the appeal can be argued on the application for review.—*Bhawabal Sing v. Rajendra*, 5 B. L. R. 321 : 14 W. R. 105 (upholding on review, 13 W. R. 157); *Janab Ali v. Chandi Charan*, 5 B. L. R. 334-note : 11 W. R. 202; *Gungapersad v. Agra and Masterman's Bank*, 5 B. L. R. 340-note : 15 W. R. (F. B.) 5-note; *Hazra Begum v. Hossein Ali*, 5 B. L. R. 341-note; *Collector of Tippera v. Mafizunnissa*, 5 B. L. R. 341-note : 14 W. R. 84; *Garib Hossein v. Wise*, 5 B. L. R. 342-note; *Mehurunnissa v. Wise*, 15 W. R. (F. B.) 2-note; *Beni Madhab v. Ganga Gabind*, 5 B. L. R. 345-note : 15 W. R. (F. B.) 3-note. But see *Ohintaman v. Pyari Mohan*, 6 B. L. R. 126 : 15 W. R. (F. B.) 1. See also *Kalu Bin v. Vishram*, 1 B. 543; and *Huree Pershad v. Nund Kishore*, 17 W. R. 479.

The Judges are not required to re-adjudicate points considered and adjudicated when brought before them by a pleader then employed, though they may be better argued, and put in a different light by another pleader subsequently, but are to be guided in their admission of reviews by the definite terms of Ss. 377 and 378 of the C. P. Code, 1859.—*Choonee Mundur v. Chundee Lall*, 14 W. R. 334.

Where a Sub-Judge, after deciding a regular appeal, granted an application for review of judgment on the ground that new evidence had been discovered, but without any inquiry or proof that such evidence was not within the knowledge of the applicant, or could not have been adduced by him at the time the decree was passed, *held*, that this was an error or defect in the procedure or investigation of the case which affected the decision, and was a ground of appeal when the decision, upon review, was brought before the High Court on special appeal.—*Bhyrub Chunder v. Madhubram* 11 B. L. R. (F. B.) 423 : 20 W. R. 84; *Nubo Kishore v. Jadub Chunder*, 20 W. R. 426; *Dhunka Devla v. Hira Ramla*, 4 B. H. C. R. 57.

Where, owing to the conduct of the opposite party, who, though served with notice, made no objection, an applicant for review had no opportunity of showing that a new piece of evidence which he adduced was not within his knowledge, and could not be adduced by him when the decree was passed, such opposite party cannot afterwards be allowed to object on the ground of the Full Bench ruling in *Bhyrub v. Madhubram*, 11 B. L. R. 423 : 20 W. R. 84; *Romjoy v. Jugodessuree*, 22 W. R. 399.

**Previous service of notice necessary.**—A proceeding admitting a review, without notice to the opposite party, as required by this rule, is wholly vitiated by such defect, and not binding on that party.—*Golaboo*

v. *Ram Dyal*, 8 W. R. 304. See *In re Huro Mohun Mookerjee*, 16 W. R. 135; *Gurditta v. Muhammad Khan*, 116 I. C. 714.

Notice to the other side is imperative under this rule, and an order without such notice is illegal and not merely an irregularity, and a party is not bound by the illegal order.—*Narayana Chettiar v. Muthu Chettiar*, 51 M. L. J. 219; 97 I. C. 1008; A. I. R. 1926 Mad. 980; *Abdul Hakim v. Hem Chandra*, 42 C. 433; 30 I. C. 165.

In the case of a summary dismissal of an appeal under Or. XLI, r. 11, the order of dismissal may be set aside on an *ex parte* application for review without notice to the respondent because the respondent in such a case cannot be said to mean the "opposite" party within the meaning of Cl. (a) of this rule.—*Janki Nath v. Prabhasini*, 43 C. 178 (42 C. 433 dissented from). *Official Trustee of Bengal v. Benode*, 51 C. 913; 84 I. C. 147; A. I. R. 1925 Cal. 114. But see *Narayana v. Muthu*, 50 M. 67; 97 I. C. 1008; A. I. R. 1926 Mad. 980.

Where the defendant was given every opportunity to raise any objection that he could raise, he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him; it was therefore held that the order granting review should not be set aside by the appellate Court.—*Firm Gopal Mal Ganda Mal v. Hara Chand*, 75 I. C. 656.

The expression "opposite party" in Or. XLVII, r. 4 (2) (a) of the C. P. Code is not limited to cases in which such party has actually appeared before the Court. It means the party interested to support the order or decree sought to be set aside on review. Where an appeal has been dismissed for default in paying court-fees it cannot be restored under Or. XLI, r. 19, which has no application to such a case, nor can it be restored under Or. XLVII, r. 4 (2), without notice to the opposite party.—*Surajpal v. Utim Pandey*, 63 I. C. 99; A. I. R. 1922 Pat. 281; 6 P. L. J. 625.

**Strict proof of such allegation.**—See notes to r. 1 of this Order under the heading "Discovery of new and important matter or evidence."

The provision of S. 626, C. P. Code, 1882, requiring the Judge granting a review to record his reasons, is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it, and the failure to record his reasons is not a ground for granting special leave to appeal to the Privy Council.—*Thakur Shunker Buksh v. Balwant Singh*, 4 C. W. N. 203 (P. C.); 27 C. 333. See also *Manicka Mudaliar v. Gurusami Mudaliar*, 23 M. 496, where it has been held that the provision in S. 626, C. P. Code, 1882, requiring a Judge to record reasons for granting review is rather directory and not mandatory.

Before a review of judgment is granted, an order granting the application for review, and the reasons for granting the same should be recorded.—*Bhairon Din Singh v. Ram Sahai*, 3 A. 316. See also *Gyanund Asram v. Bepin Mohun*, 22 C. 734.

These cases, in so far as they decided that the reasons for granting the review must be recorded, are no longer law.

**Death of party pending review.**—The order granting a review only holds the judgment in suspense. The death of a party does not, therefore, cause the suit or appeal to abate.—*Achyut v. Tapibai*, 48 B. 210: 79 I. C. 753: A. I. R. 1924 Bom. 310.

**Form.**—For Form of Notice, see App. G, Form No. 14.

**Appeal.**—Order XLIII, r. 1, Cl. (w) provides that an appeal lies from an order under this rule granting applications for review. Clause (w), however, should be read with r. 7 of this Order as subject to it.—*Harri Charan v. Baran Khan*, 41 C. 746: 25 I.C. 903; *Ahid v. Mahendra*, 42 C 830; *Nandalal v. Panchanan*, 45 C. 60, 78; *Sundar Mull v. Upendra Nath*, 1 P. L. J. 193; *Sikandar v. Baland*, 8 L. 617; *A. T. K. Muthu v. Lakshminarayan*, 6 R. 254: 111 I. C. 80: A. I. R. 1923 Rang. 177; *Lan Tin v. Ma Mya*, 7 R. 187: 118 I. C. 120: A. I. R. 1929 Rang. 105; *Kunversi v. Pitamberdas*, 29 Bom. L. R. 1355; *Shidramappa v. Gurushantappa*, 31 Bom. L. R. 137: 116 I. C. 227: A. I. R. 1929 Bom 183. See notes under r. 7, *post*. An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice is appealable.—*Garabini v. Surja Naran*, (1923) P. 361: 75 I. C. 177.

It is open to the appellant to prefer an appeal from the order granting the review without taking any steps as regards the decree itself, and in the appeal preferred by him to contend that the order granting the review should be set aside and that the alterations made in the decrees should be cancelled, leaving the original decree to stand as it was before the review was made. No separate appeal need be filed from the final order or decree made after the original one was reviewed, for if the order granting the review falls, all subsequent proceedings taken and orders made fall along with it.—*Radha Krishna v Benimadhab*, 36 C. W. N 212: 55 C L J. 98.

**5.** Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same. [S. 627.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 627, C. P. Code, 1882, with some verbal alterations only.

**Scope**—This rule is not applicable to S. C. Courts.—See Or. L.

**"Attached to the Court"**—A second appeal was heard and decided by two Judges and an application for review was filed with the Registrar. One of the Judges having left India, it was heard and decided by the other  
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of the two Judges sitting alone. *Held*, that he had jurisdiction to hear and dispose of the rule.—*Aubhoy Churn v. Shamont Lochun*, 16 C. 788.

"No other Judge shall hear the same."—A review may be admitted by the sole remaining Judge of the Bench which heard the case originally.—*Jardine, Skinner & Co. v. Dhun Kishen*, 13 W. R. 82.

Where an appeal was heard by two Judges and thereafter on account of the absence of one of them, a review application came before the other Judge sitting with a third new Judge and was granted. *Held*, the proceedings were entirely vitiated, as the terms of Or. XLVII, r. 5 prohibited the new Judge from taking part in the review.—*Chhajju Ram v. Neki*, 41 P. L. R. 1922: 26 C. W. N. 697 (P. C.): 49 I. A. 144 (P. C.)

The language of this rule is imperative. Where an application for review preferred to a District Judge was transferred by him to the Additional District Judge, the procedure was not permitted by this rule. If the District Judge had been transferred to some other place, his successor-in-office could hear the application for review.—*Bansidhar v. Ratanlal*, 128 I. C. 771: A. I. R. 1930 All. 785.

**Application for review in Courts consisting of two or more Judges.**—Application for re-admission of an appeal dismissed on failure to deposit the costs for the preparation of the paper-book under the Rules of the High Court is not an application for review of judgment, and cannot be disposed of by a single Judge of the High Court under this rule.—*Ramhari Sahu v. Madan Mohan*, 23 C. 339. Partially overruled by *Fatimunnissa v. Deoki Pershad*, 24 C. 350 (F. B.): 1 C. W. N. 21.

During the pendency of an appeal preferred by the defendants to the High Court, one of the appellants died. No steps were taken to bring the heirs of the deceased appellant on the record and the fact of his death was not known to the Court at the time of hearing of the appeal. The appeal was decreed by a Division Bench consisting of Newbould and Graham, JJ. and the case was remanded for reconsideration on 6th July, 1925. Thereafter the lower appellate Court decided in favour of the defendants on 17th July, 1926 and the plaintiff preferred a second appeal to the High Court and the heir of the deceased defendant was added as a party respondent for the first time in this appeal. An application was made by the plaintiff appellant before the Division Bench hearing the cases of the group to which the case belonged for vacating the order and decree dated the 6th July, 1925. *Held* the proper procedure should have been one for review under this rule made within limitation and such application should have been made before Graham, J. who was the only member of the Division Bench who decided the appeal on the previous occasion now present in Court.—*Muktaram v. Gomasta*, 47 C. L. J. 623: 112 I. C. 225: A. I. R. 1928 Cal. 654.

**6. (1)** Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

Application where  
rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority. [S. 628.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 623, C. P. Code, 1882, with some verbal changes only.

**Scope.**—This rule is not applicable to S. C. Courts.—See Or. L.

Where two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under Cl. 15 of the Letters Patent —*Hurbans Sahay v. Thakoor Persad*, 10 C. 103 : 13 C. L. R. 295.

Order of rejection not appealable. Objections to order granting application

7. (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4, or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party. [S. 629.]

### COMMENTARY.

**Alterations.**—This rule corresponds to S. 629, C. P. Code, 1882, with some alterations and omissions.

In sub-rule (1), the words "shall not be appealable" have been substituted for the word "final" and the words "but an order granting the application" have been substituted for the words "but whenever such application is admitted, the admission," which occurred in the old section.

The words "the Court shall order it to be restored" in sub-rule (2) have been substituted for the words "the Court may order it to be restored." The word "final" means conclusivo and not open to revision or review, hence it has been replaced by the words "shall not be appealable." There was a diversity of opinion on the point.—See *Gobinda v. Bholanath*, 15 C. 432; *Vaman Sakharam v. Malkari*, 26 B. 485 and *Ram Lal v. Ratan*, 26 A. 572.

Therefore, no appeal lies from an order of a Provincial Small Cause Court Judge granting a review, but the aggrieved party may make an application to the High Court under S. 25 of the Provincial Small Cause Courts Act.

The last para. of S. 629 has been detached from this rule and reproduced in a modified form as r. 9.

The other changes are mere changes of words and phrases.

It should be noted here that, besides the provisions contained in sub-rule (1) for appealing against an order granting review, an appeal has also been allowed by Cl. (w) of Or. XLIII, from an order granting review. Clause (w) seems to be more general and it includes the grounds mentioned in sub-rule (1). For the difference between sub-rule (1) and Cl. (w) of Or. XLIII, see notes under the latter.

**Small Cause Courts.**—This rule is not applicable to S. C. Courts.—See Or. L. The power of the High Court under S. 25 of the Provincial Small Cause Courts Act is, of course, much wider than S. 115 of the Civil Procedure Code, but it has been held that every order to which, in granting a review a Provincial Small Cause Court Judge fails to observe the terms of Or. XLVII, should not be interfered with in revision.—*Venkataratnam v. Dhanalakata*, A. I. R. 1928 Mad. 56; 104 I. C. 746.

An application for review of judgment in a Small Cause Court suit was rejected wrongly, on the ground of a supposed deficiency in the Court-fee paid upon the application. Held that this order was open to revision.—*Willis v. Jawad Husain*, 29 A. 468; 4 A. L. J. 439.

**Order of rejection not appealable.**—Where a Court rejects an application for review its decision is not open to revision.—*Ram Lal v. Ratan*, 26 A. 572 (distinguished in *Willis v. Jawad Husain*, 29 A. 468; 4 A. L. J. 439). See also *Somayya v. Subbamma*, 26 M. 599 (602). But see *Akbar Khan v. Muhammad Ali Khan*, 31 A. 610, where it has been held that the order of rejection is open to revision where it was made on the erroneous view that the Court had no jurisdiction to entertain the application.

No appeal lies even if the application be rejected by a single Judge on the Original Side of the High Court.—*Achaya v. Ratnavelu*, 9 M. 253.

An order rejecting an application for review of an order dismissing an execution case for non-payment of process-fees is not appealable.—*Raja Pudmanund v. Doorga Pershad*, 4 C. W. N. 39. See also *Vadilal v. Fulchand*, 30 B. 56.

Only the order rejecting the application for review is final; but the decision as to whether there was just and reasonable cause for allowing the application to be made after the prescribed period of ninety days is not

final.—*Shama Churn v. Bindabun*, B. L. R. Sup. Vnl. 892: 9 W. R. 181; also *George v. Hamilton & Co.*, 4 N. W. P. 74.

A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded on it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.—*Ramhurry v. Mothoor Mohun*, 20 W. R. (P. C.) 450.

**Order granting review is appealable.**—Under Or. XLIII, r. 1, Cl. (w) an appeal lies from an order granting an application for review, but an order granting a review is not appealable except under the conditions specified in this rule.—*Abdul Sadiq v. Abdul Aziz*, 21 A. 152; *Akbar v. Khurshid Ali*, 27 A. 695; *Hari Charan v. Baran Khan*, 41 C. 746; 25 I. C. 903; *Sundar v. Habib*, 42 A. 626; 18 A. L. J. 838; *Munnu Lal v. Kunj Bihari Lal*, 44 A. 605; 20 A. L. J. 517; *Venkata v. Veena*, 83 I. C. 548; A. I. R. 1924 Mad. 602; 46 M. L. J. 463. (1924) M. W. N. 355; *Beli Ram v. Padam Sain*, 116 I. C. 221; A. I. R. 1929 Lah. 26; *Lan Tin v. Ma Mya*, 118 I. C. 120; 7 R. 187; A. I. R. 1929 Rang. 105. Clause (w) of Or. XLIII, r. 1 has to be read along with the provisions of this rule which specifically lay down that an order granting an application for review can be objected to in appeal only on one or the other of the three grounds specified therein. There is no real inconsistency between the two rules; the former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to. The two provisions of the Code are not mutually inconsistent but are really complementary to each other. The one gives the right to appeal, and the other defines the extent to which that right can be exercised.—*Sikandar Khan v. Baland Khan*, 8 L. 617; A. I. R. 1927 Lah. 435, *Srinivasa v. Official Assignee, Madras*, 50 M. 891; 103 I. C. 377; 52 M. L. J. 682; A. I. R. 1927 Mad. 641. See *Babu Vaidyan v. Murugesan*, (1928) M. W. N. 595. The granting of a review on the ground of production of an authority which was not before the trial Court amounts to granting a review on the ground of discovery of new matter and falls under r. 7 coupled with r. 4 of Or. XLVII and is appealable.—*Ibid.*

Where the review was granted on the ground of an error on the face of the record, the same is not appealable.—*Shidramappa v. Gurushantappa*, 116 I. C. 227; A. I. R. 1929 Bom. 183 31 Bom. L. R. 137.

Where an application for review is granted for "any other sufficient reason", the sufficiency or otherwise of the reason is not a good ground of appeal against the order.—*Gopal Aiyar v. Ramaswami*, 31 M. 49; 17 M. L. J. 603; 2 M. L. T. 519 (27 A. 695, 24 C. 878 followed; 23 M. 314 distinguished); *Benarsi v. Altaf Husain*, 63 I. C. 171.

No appeal lies from an order granting a review of judgment either under this rule or under Cl. 15 of the Letters Patent except under the conditions specified in this rule.—*Aubhoy Churn v. Shamont Lockun*, 16 C. 788; *Bombay and Persia Steam Navigation Co. Ltd v. Zuari*, 12 B. 171; and *Achaya v. Ratnavelu*, 9 M. 253. See also *Harnandan v. Behari*, 22 C. 3; *Barada v. Gobind Proshad*, 22 C. 984; *Ramanadhan Chetty v. Narayanan Chetty*, 27 M. 602 (607); *Daryai Bibi v. Badri Prasad*, 18 A. 44; *Chunilal v. Sonibai*, 21 B. 323; *Munni Ram v. Bishen Perkash*, 24 C. 878; and *Mahabir v. Nathin*, 1 C. W. N. 338;

*Madhori v. Parbati*, 47 A. 881; 88 I. C. 653; A. I. R. 1925 All. 552; 23 A. L. J. 534; *Meah v. Durga*, 29 C. W. N. 1027; 90 I. C. 456; A. I. R. 1926 Cal. 243; *Venkata v. Veena*, 46 M. L. J. 463; 83 I. C. 548; A. I. R. 1924 Mad. 602; (1924) M. W. N. 355; *Bakhtan v. Ghulam*, 9 L. 298; 112 I. C. 518; A. I. R. 1928 Lah. 608.

Under Or. XLVII, r. 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed.—*Nandalal v. Panchanan*, 45 C. 60; 21 C. W. N. 1076.

In an appeal from an order granting a review on the ground of discovery of new evidence, it is not competent to consider whether the new evidence is important or not. That must be left to the discretion of the Court deciding the application for review.—*Saherjan v. Gopal*, 34 C. W. N. 265; 127 I. C. 71; A. I. R. 1930 Cal. 424.

An application under S. 311, C. P. Code, 1882 (Or. XXI, r. 90), to set aside a sale was rejected. Subsequently on review the sale was set aside. The District Judge on appeal set aside the order setting aside the sale. Held, that the order was not appealable, as it was not an order granting an application for review, but one setting aside a sale.—*Bhairon Din Singh v. Ram Sahai*, 3 A. 316.

For other cases see notes under Or. XLIII, r. 1 (w) and Or. XLVII, r. 4, ante

**Second appeal from order passed in appeal under this rule.**—No second appeal lies from an order passed in appeal from an order granting an application for review of judgment.—*Gopal Das v. Alaf Khan*, 11 A. 383; *Than Singh v. Chundun Singh*, 11 C. 296; and *Papayya v. Chelamayya*, 12 M. 125. But see *Bala Natha v. Bhira Natha*, 13 B. 496. This is now clear from the provisions of Or. XLIII, r. 1 (w), read with S. 104, subsec. (2).

No second appeal lies to the High Court from an order setting aside an order granting a review of judgment.—*Kanti Chunder v. Saligram*, 24 C. 319 and 319-note.

The admission of a review presented out of time without any sufficient cause is a good ground of appeal under S. 629, Cl. (c) of the Civil Procedure Code, 1882 (r. 7).—*Purna Chandra v. Nil Madhub*, 5 C. W. N. 485.

Where an order granting a review has been set aside on appeal, the order passed in appeal is final and not open to second appeal.—*Jainal Bibi v. Abdul Jalil*, 6 C. L. J. 225.

**May be objected to in any appeal from the final decree.**—Under this rule it is open to the appellant on appeal from the final decree, to take objection to the order passed on the application for review.—*Ananda Krishna v. Jogendra Nath*, 8 C. L. J. 294.

A suit was at first dismissed, but afterwards a review was applied for by the plaintiff and granted, overruling the objections of the defendant. Both plaintiff and defendant adduced new evidence, and a decree was

given for the plaintiff. *Held*, on special appeal, that the fact of the defendant's having adduced fresh evidence in the Court below, did not debar him from objecting on appeal that the review was wrongly granted.—*Pran Nath v. Sree Kant*, 2 C. L. R. 257.

Sections 584 and 591, C. P. Code, 1882 (Ss. 100 and 105), do not control S. 629, C. P. Code 1882 (r. 7), so as to confer a right of appeal in a case, where the appeal is not based on any of the objections mentioned in this rule. An objection against an order of admission of an application for review cannot be taken in an appeal against the final decree except on one of the grounds mentioned as grounds of objection in this rule.—*Gopal Aiyar v. Ramasami*, 31 M. 49 : 17 M. L. J. 603 : 2 M. L. T. 519 (27 A. 695, 24 C. 878 followed) ; *Khursed v. Rahamatullah*, 40 A. 68 : 43 I. C. 490 : 15 A. L. J. 839 ; *Baroda Charan v. Gobind Prasad*, 22 C. 984.

The provisions of this rule that objection can be taken by appeal against the order or an appeal against the final decree are not controlled by S. 591, C. P. Code, 1882 (S. 105).—*Gyanund Asram v. Bepin Mohun*, 22 C. 734. See also *Manicka v. Gurusami*, 23 M. 496 ; *Radhakrishna v. Benimadhab*, 36 C. W. N. 212 : 55 C. L. J. 98 noted under heading "Appeal" in notes under r. 4, *ante*.

See notes under Or. XLIII, r. 1 (w), *ante*.

Sub-rule (1), Cl. (b) —Application in contravention of the provisions of rule (4) —This clause does not refer to the weight or sufficiency of evidence, and an appellate Court cannot set aside an order of review merely because in its opinion the probative force of the evidence is insufficient to establish the allegations made in support of the application for review, though such evidence had such probative force to the Court granting the review.—*Ahid v. Mahendra*, 42 B. 830 ; *Bas Nematbu v. Bas Nematullabu*, 42 B. 295 ; *Nandalal v. Panchanan*, 45 C. 60 : 42 I. C. 484 : 26 C. L. J. 187.

The appellate Court can interfere if a review has been granted on insufficient grounds.—*Nritya v. Jarit*, 30 C. W. N. 584.

Where the Court of first instance grants an application for review on the ground of discovery of new and important evidence not within the knowledge or power of the applicant at the time of the trial, the appellate Court will not generally consider the evidence afresh and disturb the conclusion of the lower Court.—*Ambika Charan v. Bhani Ram*, 64 I. C. 219.

The appeal under this rule will be confined to a disregard of the provisions of r. 3 or r. 4 only and not to any matter on which the granting of the review is based. Where the ground of attack is that the lower Court was incorrect in thinking that there was mistake or error apparent on the face of the record, no appeal is provided for in such a case under Or. XLVII.—*Shaukat Ali v. Mt. Shakila Bano*, 94 I. C. 78. A. I. R. 1926 All. 492.

Order going beyond the scope of the application for review.—Where a Court in considering an application for review and in granting the same passed an order which went beyond the scope of the application for review, the order was without jurisdiction and can be set aside in appeal.—*Akshoy v. Ashutosh*, A. I. R. 1928 Cal. 73 : 105 I. C. 4.

In *Hafajuddin v. Habi Nasya*, 108 I. C. 246 : A. I. R. 1928 Cal. 416, an objection was taken in the High Court that as the review was granted upon a ground different from that upon which the application for review was based, the subsequent proceedings in the Court below were all vitiated, but the High Court refused to consider the point as it was not taken before the lower appellate Court.

See notes under heading "Appeal" in notes to r. 4, ante.

**Clause (c)—Application after prescribed time.**—Under Arts. 161, 162 and 173 of the Limitation Act, the period for an application for review of judgment by a Provincial Small Cause Court is 15 days, by the High Court in the exercise of its original jurisdiction, 20 days, and by other Courts, 90 days from the date of the decree; and the applicant is entitled, under S. 12 of the Limitation Act, to deduct the time spent in obtaining copy of the decree.—*Fazal v. Umar*, 7 L. L. J. 129 : 88 I. C. 1019 : A. I. R. 1925 Lah. 377. But S. 5 of that Act says that the Court may admit the application if the applicant satisfies the Court that he had "sufficient cause" for not making the application within the prescribed period.

Where a party, applying for a review of judgment after the expiry of the prescribed period, had not shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was held to have been improperly granted, and was set aside with all subsequent proceedings thereon—*Luchmun Singh v. Tirbani Buksh*, 14 B. L. R. 373 (P. C.); *Luleet Mohun v. Sowtra Beebee*, 10 W. R. 42; *Gour Pershad v. Anjub Ali*, 24 W. R. 294; *Fakira v. Basapa*, 8 B. H. C. R. 234; *Gunganarain v. Gonomoonee*, 8 W. R. 184; *Bells v. Bonsi Mundul*, 25 W. R. 343; *Kristo Gobind v. Jugobundhoo*, 12 W. R. 94; *Sreenath v. Kritattomoyee*, 18 W. R. 286. See also *Shama Churn v. Bindabun*, B. L. R. Sup. Vol. 892 : 9 W. R. 181; *Mahomed Gaz v. Dullab Beebee*, 5 B. L. R. 318-note : 11 W. R. 22; *Kasheenath v. Luckheenarain*, W. R. (1864) 91; *Jhubhoo Sahoo v. Jusoda*, 17 W. R. 230.

There seems to be no limit to the time after the expiration of ninety days at which the application for review may be filed, provided the applicant shows just and reasonable ground for review.—*R. 483.*

A new exposition of the law by a Full Bench after the passing of the original decree is not "just and reasonable cause" for admitting a review after the prescribed period. When a review has been granted, the Court is bound to decide the case according to any new exposition of the law by a Full Bench made since the original decision.—*Shama Churn v. Bindabun*, B. L. R. Sup. Vol. 892 : 9 W. R. 181; *Bura Boodho v. Koylash Chunder*, 6 W. R. 100; *Alladmonee v. Joysunkur*, 7 W. R. 408; *Madhub Chunder v. Radhika*, 7 W. R. 405; *Dwarkanath v. Manick Chunder*, 9 W. R. 102. *Contra*—*Forbes v. Dyanutoollah*, 10 W. R. 415; and *Jonmenjoy v. Dassmoney*, 8 C. 700.

An application for review of judgment of a lower Court is not admissible after the limited period merely in consequence of a decision of the High

Court, or of the Privy Council, modifying the law or practice which prevailed at the time when the judgment sought to be reviewed was passed.—*Onoop Chunder v. Ekkowree Singh*, 5 W. R. 167. But see *Banee Pershad v. Radha Pershad*, 15 W. R. 143.

Where an application for review is not made within the prescribed period the pendency of a special appeal is not such a "just and reasonable cause" for the loss of time, as the Court to do is bound to arrive at before it can entertain *v. Stephen*, 9 W. R. 301; *Fakira v. Basapa*, the pendency of the first application for review is a just and reasonable cause for admitting a second application for review out of time.—*Vaman v. Malhari*, 26 B. 485.

An applicant for review cannot plead his ignorance of the effect of the judgment as a justification for his delay.—*Gulam Husen v. Musa Miya*, 8 B. 260.

An application for a review of judgment having been made on the first day after the vacation, after the ninetieth day from the date of the judgment which it was sought to review, it appeared that the ninetieth day fell during the vacation when the High Court was closed. *Held*, that the full fee leviable on the memorandum of appeal must be paid in the first instance, but that the Court, if satisfied that the delay was not caused by the laches of the applicant, might direct a refund of one-half of such fee.—*In the matter of Doorga Prosunno*, 9 C. L. R. 479.

In computing the period of 90 days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal (under Art. 5 of Sch. I of the Court-fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded.—*In re Kota*, 9 M. 134.

The pendency of a second appeal is not a sufficient cause for the delay in filing an application for review.—*Gulam Husen v. Musa Miya*, 8 B. 260.

An insufficiently stamped application for review was presented to the Muosarim of the Court within 90 days, but the deficiency was not supplied till after the expiry of that period. *Held*, that there was no presentation within the prescribed period, and that the Judge had no power to admit the application.—*Munro v. Cawnpore Municipal Board*, 12 A. 57.

Sub-rule (2).—No appeal lies from an order refusing to re-admit an application for review of judgment which has been dismissed for default under sub-rule (2)—*Basrat Ali v. Maung Aung*, 5 R 121-102 I C. 706: A. I. R. 1927 Rang. 204.

Revision.—If review is granted in a case where the Court granting it had no jurisdiction, the order is open to revision under S. 115 as made without jurisdiction but it is doubtful whether in such a case an appeal will lie from the order granting the review.—*Ramanadhan v. Narayanan*, 27 M. 602, 607; *Chunilal v. Sonbas*, 21 B 323.

The discretionary powers of revision vested in the High Court by S. 115 are not in any way controlled by the provisions of Or. XLVII. Such powers are intended to apply to orders disallowing a review application.—*Khasomal v. Bacho*, 115 I. C. 314: A. I. R. 1929 Sind 39.



**8.** When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit. [S. 630]

Registry of application granted, and order for re-hearing.

### COMMENTARY.

**Alterations.**—This rule exactly corresponds to S. 630, C.P. Code, 188

**Court is bound to register application for review if it is granted.**—If an application for review is granted the Court is bound under this rule to make a note in the register that the application for review had been granted. Where there are no materials to determine as to whether the requisition contained in this rule had or had not been complied with, the procedure adopted by the Court is open to criticism.—*Nathu Ram v. Gang Bux*, 128 I. C. 753 : A. I. R. 1930 All. 815 : (1930) A. L. J. 1037.

**What questions may be gone into after grant of review.**—When review of a decision has been admitted, the whole case is thereupon reopened.—*Sainal Ranchhod v. Dullabh*, 10 B. H. C. R. 300.

Where a review of judgment is granted on a particular ground, the Court is not bound to re-hear the whole case under this rule. It is in the discretion of the Court to re-hear the whole case, or only the particular point on which the review has been granted.—*Hurbans Sahay v. Thakoor Purshad*, 9 C. 209 : 12 C. L. R. 64.

Where review was granted for additional evidence to be taken, that evidence should be taken and any relevant evidence in rebuttal, and also any other evidence which the party tendering was prevented from adducing by some cause for which he was not responsible or which it was not reasonable or necessary to call in the absence of that additional evidence. But either party will be allowed to adduce evidence which was available and which with reasonable diligence could have been produced at the trial.—*Bhainram v. Ambica*, 53 C. 856 : 97 I. C. 731.

Under Or XLVII the Court should re-hear the case on the merits after the review is granted. But where the review relates to the connection of an error apparent on the face of the decree all that the Court has to do is to decide after notice to the party whether or not to make the correction.—*Mahmad v. Mugaseth*, (1930) M. W. N. 166.

It is a matter of discretion with the Court to admit certain documents at the re-hearing after a review of trial had been obtained though they were not tendered in evidence at the first trial.—*Hefajuddin v. Habi Nasya*, 108 I. C. 246 : A. I. R. 1928 Cal. 416.

It cannot be treated as a universal rule that no point can be raised on an application for review which has been already discussed and decided on the original hearing of the appeal, or that no new point, which has not been raised on the hearing of the appeal, can be argued on the application for a review. In each case, the Court to which the application is made must consider and decide whether a review is necessary to correct

rr. 8, 9.

any evident error or omission, or is otherwise requisite for the ends of justice—*Chintamani v. Pyari Mohun*, 6 B. L. R. 126 (F. B.); 15 W. R. 1 (F. B.) (followed in *Kalu Bin v. Vishram*, 1 B. 543). See also *Hurce Pershad v. Nund Kishore*, 17 W. R. 479. But see the cases noted under r. 4 of this Order.

**Effect of grant of review on original decrees.**—When the application for review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against the decree can no longer be prosecuted. But the parties can appeal from the final decree passed on review.—*Gour Krishna v. Nilmadhab*, 36 O. L. J. 484; *Nibaran v. Abdul Hakim*, 107 I. C. 75; A. I. R. 1928 Cal. 418.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

[S. 629, LAST PARA.]

## COMMENTARY.

**Alterations**—This section corresponds to the last para. of S. 629, O. P. Code, 1882, with some modifications. The last para. of S. 629 is reproduced here for comparison.—“No application to review an order passed on review or on an application for a review shall be entertained.”

**Second application for review.**—There is nothing in the Civil Procedure Code which prevents a second application for a review being made after a previous application for review has been made and rejected, and such an application can therefore be entertained if it is based on grounds different from those taken in the first application.—*Gobinda Ram v. Bholanath*, 15 C. 432 (distinguished in *Vaman v. Malhari*, 26 B. 485; 4 Bom. L. R. 121). See also *Nasiruddin v. Indro Narain*, B. L. R. Sup. Vol. 367·5 W. R. 93; *Kasheenath v. Luckheenarain*, W. R. (1864) 91; *Fukheeroodin v. Kala Chand*, 1 W. R. 237; *Needoo Monee v. Saroda Monee*, 2 W. R. 61 and 62; *Rash Beharee v. Koonj Beharee*, W. R. (1864) Mis. 31; *Asudooddeen v. Abdool Kureem*, 6 W. R. 110. But see *Vencama v. Pamoo*, 5 M. H. C. R. 323, *Pallia v. Mathura*, 38 A. 290; *Hari Singh v. Muhammad*, 8 L. 54. 102 I. C. 523; A. I. R. 1927 Lah. 200.

# ORDER XLVIII.

## MISCELLANEOUS.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued. [S. 93.]

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 93, C. P. Code, 1882, with some verbal changes.

In sub-rule (2), the word "*chargeable*" has been substituted for the word "*leviable*," and the word "*paid*" has been substituted for the word "*levied*" which occurred in the old section.

"Unless the Court otherwise directs"—This rule does not give a Court any power to depart from the rules of the High Court on the subject of levy of fees or to remit them. The rule relates to the payment of process fees by the parties to a suit, and gives the Court, acting judicially, power to make an order, between party and party only, as to who should pay the process-fees. It does not expressly give power to remit the fees, and to order that the process should be served free, at the expense of Government.—*In the matter of the application of Studd*, 26 C. 124: 3 C. W. N. 82.

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons. [PART OF S. 94.]

## COMMENTARY.

**Alterations**—This rule corresponds to the latter part of S. 94 of the C. P. Code, 1882. The former part of S. 94 has been made a separate section (S. 142). This rule should be read with S. 142.

*The rules for issue and service of summons are given in Or. V.*

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned. [S. 644.]

## COMMENTARY.

**Alterations.**—This rule corresponds to the latter part of S. 644 with some modifications.

# ORDER XLIX.

## CHARTERED HIGH COURTS.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court by any rule or order, directs. [S. 636.]
- Who may serve processes of High Courts.

## COMMENTARY.

**Alterations.**—This rule corresponds to S. 636, C. P. Code, 1882, with some alterations of a verbal character.

"Or by persons employed by them"—There is no provision of law for handing the notice to a village headman to serve upon a party resident in his village. The special employment of an individual does not seem to be contemplated by Or. XLIX, r 1, which might be deemed to refer to persons in the attorney's regular service—*Sugan Chand v. Kanappa Chetty*, 30 C. W. N. 734: 96 I. C. 375: A. I. R. 1926 Cal 977

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court. [NEW.]
- Saving in respect of Chartered High Courts

## COMMENTARY

**History**—Section 633, C. P. Code, 1882, contained provisions for the taking of evidence and recording judgment and orders. The section ran as follows:—"The High Court shall take evidence and record judgments and orders in such manner as it by rule from time to time directs."

The intention of the Legislature, as expressed in S. 633 of the C. P. Code, 1882, was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing, or according to any mode which might appear to it best in the interests of justice—*Sundar Biti v. Bisheshar Nath*, 9 A. 93

**Signing, delivery and pronouncing of judgments**—The provisions of Or. XLI, r 31 and Or. XX, of the Code as to the signing, delivery and pronouncing of judgments do not apply to Chartered High Courts where there were rules already in force when the Code was enacted.—*Banarsi Das v. Sagar Mal*, 116 I. C. 23: A. I. R. 1929 All. 403.

**3.** The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction namely :—

Application of  
rules

- (1) rule 10 and rule 11, clauses (b) and (c), of Or. VII ;
- (2) rule 3 of Or. X ;
- (3) rule 2 of Or. XVI ;
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relate to the manner of taking evidence) of Or. XVIII ;
- (5) rules 1 to 8 of Or. XX ; and
- (6) rule 7 of Or. XXXIII (so far as relates to the making of a memorandum) ;

and r. 35 of Or. XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction. [S. 638.]

### COMMENTARY.

**Alterations.**—This rule corresponds to part of S. 638, C. P. Code, 1882 with some additions, alterations and omissions. The first part and the last part of the old section, are inserted in S. 120, and this rule is to be read with S. 120.

**Power of High Courts.**—This order is to be read with Part IX of this Code, which contains special provisions relating to the Chartered High Courts.

For the power of the High Courts to make rules, see Part X.

# ORDER L.

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## PROVINCIAL SMALL CAUSE COURTS.

1. The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1837, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

(a) so much of this schedule as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;
- (ii) the execution of decrees against immoveable property or the interest of a partner in partnership property;
- (iii) the settlement of issues; and

(b) the following rules and orders—

Order II, r. 1 (frame of suit);

Order X, r. 3 (record of examination of parties);

Order XV, except so much of r. 4 as provides for the pronouncement at once of judgment;

Order XVIII, rr. 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, rr. 2, 3, 5, 6, 7 (review);

Order LI.

[NEW.]

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## ORDER LI.

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### PRESIDENCY SMALL CAUSE COURTS.

1. Save as provided in rr. 22 and 23 of Or. V, rr. 4 and 7 of Or. XXI, and r. 4 of Or. XXVI, and  
Presidency Small Cause Courts by the Presidency Small Cause Courts  
Act, 1882, this schedule shall not extend to any  
suit or proceedings in any Court of Small Causes established in  
the towns of Calcutta, Madras and Bombay. [New.]

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3. He has not paid the same.

4. *E. F.* died on the                      day of                      19                      . By his last will he appointed his brother, the plaintiff, his executor.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff as executor of *E. F.* claims [Relief claimed].

#### No. 4.

**Goods sold at a reasonable price and delivered.**

(Title)

*A B.*, the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.

2. The goods were reasonably worth                      rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed].

#### No. 5.

**Goods made at defendant's request and not accepted.**

(Title.)

*A B.*, the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , *E. F.* agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that *E. F.* should pay for the goods on delivery                      rupees.

2. The plaintiff made the goods, and on the                      day of                      19                      , offered to deliver them to *E. F.* and has ever since been ready and willing so to do.

3. *E. F.* has not accepted the goods or paid for them.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

#### No. 6.

**Deficiency upon a re-sale [goods sold at auction].**

(Title)

*A. B.*, the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , the plaintiff put up at auction sundry [goods], subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [one crate of crockery] at the auction at the price of                      rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards.

5. On the                      day of                      19                      , the plaintiff re-sold the [crate of crockery], on account of the defendant, by public auction, for                      rupees.

6. The expenses attendant upon such re-sale amounted to                      rupees.

7. The defendant has not paid the deficiency thus arising, amounting to                      rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

#### No. 7.

**Services at a reasonable rate.**

(Title.)

*A. B.*, the above-named plaintiff, states as follows:—

1. Between the                      day of                      19                      , and the                      day of                      19                      , at                      , plaintiff [executed



A. B., a firm carrying on business in partnership at \_\_\_\_\_

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*)

A. B. (*add description and residence*), Shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

### (3) PLAINTS.

#### No. 1.

#### Money lent.

(*Title.*)

A. B., the above named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, he lent the defendant rupees \_\_\_\_\_ repayable on the \_\_\_\_\_ day of \_\_\_\_\_

2. The defendant has not paid the same except \_\_\_\_\_ rupees paid on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

[*If the Plaintiff claims exemption from any law of limitation, say:—*]

3. The plaintiff was a minor [*or insane*] from the \_\_\_\_\_ day of \_\_\_\_\_ till the \_\_\_\_\_ day of \_\_\_\_\_

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is \_\_\_\_\_ rupees and for the purpose of court fees is \_\_\_\_\_ rupees.

6. The plaintiff claims \_\_\_\_\_ rupees, with interest at \_\_\_\_\_ per cent. from the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

#### No. 2.

#### Money overpaid.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff agreed to buy and the defendant agreed to sell \_\_\_\_\_ bars of silver at \_\_\_\_\_ annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant \_\_\_\_\_ rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

#### No. 3.

#### Goods sold at a fixed price and delivered.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, E. F. sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods] \_\_\_\_\_

2. The defendant promised to pay \_\_\_\_\_ rupees for the said goods on delivery [or on the \_\_\_\_\_ day of \_\_\_\_\_, some day before the plaint was filed].

3. He has not paid the same.

4. E. F. died on the                      day of                      19     . By his last will he appointed his brother, the plaintiff, his executor.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff as executor of E. F. claims [Relief claimed].

#### No. 4.

Goods sold at a reasonable price and delivered.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19     , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.

2. The goods were reasonably worth                      rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed].

#### No. 5.

Goods made at defendant's request and not accepted.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19     , E. F. agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E. F. should pay for the goods on delivery                      rupees.

2. The plaintiff made the goods, and on the                      day of                      19     offered to deliver them to E. F. and has ever since been ready and willing so to do.

3. E. F. has not accepted the goods or paid for them.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

#### No. 6.

Deficiency upon a re-sale [goods sold at auction].

(Title.)

A. B., the above named plaintiff, states as follows :—

1. On the                      day of                      19     , the plaintiff put up at auction sundry [goods], subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account, on which condition the defendant had notice.

2. The defendant purchased [one crate of crockery] at the auction at the price of                      rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards.

5. On the                      day of                      19     , the plaintiff re-sold the [crate of crockery], on account of the defendant, by public auction, for                      rupees.

6. The expenses attendant upon such re-sale amounted to                      rupees.

7. The defendant has not paid the deficiency thus arising, amounting to                      rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

#### No. 7.

Services at a reasonable rate.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Between the                      day of                      19     , and the                      day of                      19     , at                      , plaintiff [executed]

*sundry drawings, designs and diagrams*] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth \_\_\_\_\_ rupees,

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

### No. 8.

#### Services and materials at a reasonable cost.

(Title.)

A. B., the above-named plaintiff, states as follows:

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_\_, the plaintiff built a house [known as No. \_\_\_\_\_, in \_\_\_\_\_], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth \_\_\_\_\_ rupees,

3. The defendant has not paid the money.

[As in paras. 4 and 5 of form No. 1, and Relief claimed]

### No. 9.

#### Use and Occupation.

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows:—

1. That the defendant occupied the [house No. \_\_\_\_\_ Street], by permission of the said X. Y., from the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, until the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth \_\_\_\_\_ rupees,

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff as executor of X. Y. claims [Relief claimed].

### No. 10.

#### On an Award.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the arbitrators awarded that the defendant should [pay the plaintiff \_\_\_\_\_ rupees].

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

### No. 11.

#### On a Foreign Judgment.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_\_, in the State [or Kingdom] of \_\_\_\_\_, the \_\_\_\_\_ Court of that State [or Kingdom], in a suit therein pending

between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. The defendant has not paid the money.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### Nn. 12.

#### Against Surety for Payment of Rent.

*(Title.)*

A, B, the above-named plaintiff, states as follows :—

1. On the day of 19, E. F. hired from the plaintiff for the term of years, the [house No, Street], at the annual rent of rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3. The rent for the month of 19, amounting to rupees, has not been paid.

*[If, by the terms of the agreement, notice is required to be given to the surety, add :—]*

4. On the day of 19, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 13.

#### Breach of Agreement to Purchase Land.

*(Title.)*

A, B., the above-named plaintiff, states as follows :—

1. On the day of 19, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

*[Or, on the day of 19, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty highas of land in the village of for rupees.]*

2. On the day of 19, the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

*[As in paras 4 and 5 of Form No. 1, and Relief claimed.]*

### Nn. 14.

#### Nnt Delivering Gnnds Sold.

*(Title.)*

A, B, the above-named plaintiff, states as follows :—

1. On the day of 19, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19, and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

## No. 15.

## Wrongful Dismissal.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services \_\_\_\_\_ rupees [monthly].

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services \_\_\_\_\_

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

## No. 16.

## Breach of Contract to serve.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of \_\_\_\_\_ rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above mentioned day, but afterwards on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

## No. 17.

## Against a Builder for defective Workmanship.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

## No. 18.

## On a Bond for the Fidelity of a Clerk.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof, on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendant \_\_\_\_\_ as a clerk \_\_\_\_\_ of debt \_\_\_\_\_ would pay to \_\_\_\_\_

the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of                      rupees, subject to the condition that if E. F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the                      day of                      19                      and the day of                      19                      , E. F. received money and other property, amounting to the value of                      rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

### No. 19.

#### By Tenant against Landlord, with Special Damage.

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , the defendant, by a registered instrument, let to the plaintiff [the house No                      , Street] for the term of                      years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the                      day of                      19                      , during the said term, E. F., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend                      rupees in moving and lost the custom of G. H., and I J., by such removal]

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

### No. 20.

#### On an agreement of Indemnity.

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , the plaintiff and defendant                      ,

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the                      day of                      19                      , [a judgment was recovered against the plaintiff and defendant by E. F., in the High Court of Judicature at                      upon a debt due from the firm to E. F., and on the                      day of                      19                      ,] the plaintiff paid                      rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

### No. 21

#### Procuring Property by Fraud.

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the                      day of                      19                      , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth                      rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of                      rupees.

3. The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [Or, if the goods were not delivered.] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended                      rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

## No. 22.

### Fraudulently procuring Credit to be given to another Person.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19                      , the defendant represented to the plaintiff that E. F. was solvent and in good credit, and worth                      rupees over all his liabilities [or that E. F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit]

2. The plaintiff was thereby induced to sell to E. F. [rice] of the value of                      rupees [on                      months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

4. E. F. [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

## No. 23.

### Polluting the Water under the Plaintiff's Land.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called                      and situate in                      and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the                      day of                      19                      , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[As in paras. 4 and 5 Form No 1, and Relief claimed.]

## No. 24.

### Carrying on a Noxious Manufacture.

(Title )

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called                      , situate in,

2. Ever since the                      day of                      19                      , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 25.

#### Obstructing a Right of Way.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of \_\_\_\_\_].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year.

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or on foot or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. *(State special damage, if any).*

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 26.

#### Obstructing a Highway.

*(Title.)*

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from \_\_\_\_\_ to \_\_\_\_\_ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 27.

#### Diverting a Water-course.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the \_\_\_\_\_, in the village of \_\_\_\_\_, district of \_\_\_\_\_.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than \_\_\_\_\_ sacks per day, whereas, before the said diversion of water, he was able to grind \_\_\_\_\_ sacks per day.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 28.

#### Obstructing a Right to use Water for Irrigation.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.



2. On the            day of            19   , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

*[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]*

### No 29.

#### Injuries caused by Negligence on a Railroad.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. On the            day of            19   , the defendants were common carriers of passengers by railway between            and           .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, nt            *[or near the station of*  
or between the stations of            and           ], a collision occurred on the said railway caused by the negligence and unskillfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any, as]. and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

*[As in paras. 4 and 5 of Form No 1, and Relief claimed.]*

*[Or thus:—*2. On that day the defendants by their servants so negligently and unskillfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para. 3.]*

### No. 30.

#### Injuries caused by Negligent Driving.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoemaker, carrying on business nt           . The defendant is a merchant of           .

2. On the            day of            19   , the plaintiff was walking southward along at about 3 o'clock in the afternoon. He was obliged            a street running into Chowringhee at right angles, just before he could reach the foot-pavement on            of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

*[As in paras 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 31.

#### For malicious Prosecution.

*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. On the            day of            19   , the defendant obtained a warrant of arrest from           

*[a Magistrate of the said city, or as the case may be] on a charge of           , and the plaintiff was arrested thereon, and imprisoned for*

*[days, or hours, and gave bail in the sum of            rupees to obtain his release].*

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the            day of            19            , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, bearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him, or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F.; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

### No. 32.

#### Moveables wrongfully detained.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the            day of            19            , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods], the estimated value of which is            rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the            day of 19            , the plaintiff demanded the same from the defendant, but he refused to deliver them.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or            rupees, in case delivery cannot be had;
- (2)            rupees compensation for the detention thereof

#### The Schedule

### No. 33

#### Against a fraudulent Purchaser and his Transferee with Notice.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the            day of            19            , the defendant C. D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth            rupees over all his liabilities].

2. The plaintiff was hereby induced to sell and deliver to C. D. [one hundred boxes of tea], the estimated value of which is            rupees.

3. The said representations were false, and were then known by C. D. to be so [or at the time of making the said representations, C. D. was insolvent, and knew himself to be so].

4. C. D. afterwards transferred the said goods to the defendant E. F. without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) delivery of the said goods, or            rupees, in case delivery cannot be had;
- (2)            rupees compensation for the detention thereof.

## No. 34.

## Rescission of a Contract on the Ground of Mistake.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19                      , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at                      , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the                      day of                      19                      , the plaintiff paid the defendant rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1)                      rupees, with interest from the                      day of                      19                      ;  
 (2) that the said agreement be delivered up and cancelled.

## No. 35.

## An Injunction Restraining Waste.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [describe the property].

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

## No. 36.

## Injunction Restraining Nuisance.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No.                      , Street, Calcutta.]

2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street                      ].

3. On the                      day of                      19                      , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

[4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

**No. 37.**  
**Public Nuisance.**  
*(Title)*

A. B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General [or of the Collector or other officer appointed in this behalf] to the institution of this suit.

[As in paras. 4 and 5 of Form No 1]

5. The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road;

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

**No. 38.**  
**Injunction against the Diversion of a Water-course.**  
*(Title.)*

A. B., the above-named plaintiff, states as follows:—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

**No. 39**  
**Restoration of Moveable Property threatened with destruction,  
 and for an Injunction.**  
*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

2. On the                      day of                      19                      , be deposited the same for safe-keeping with the defendant.

3. On the                      day of                      19                      , be demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting].

(2) that he be compelled to deliver the same to the plaintiff.

**No. 40.**  
**Interpleader.**  
*(Title.)*

A. B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [describe the property] for [safe-keeping].

2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*].
3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him].
4. The plaintiff is ignorant of the respective rights of the defendants.
5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.
6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9. The plaintiff claims—

- (1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;
- (2) that they be required to interplead together concerning their claims to the said property ;
- [(3) that some person be authorized to receive the said property pending such litigation.]
- (4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto,

### No. 41.

#### Administration by Creditor on behalf of himself and all other Creditors.

(Title)

*A. B.*, the above-named plaintiff, states as follows :—

1. *E. F.*, late of \_\_\_\_\_, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of \_\_\_\_\_

[here insert nature of debt and security, if any].

2. *E. F.* died on or about the \_\_\_\_\_ day of \_\_\_\_\_, By his last will, dated the \_\_\_\_\_ day of \_\_\_\_\_ he appointed *C. D.* his executor [or devised his estate in trust, etc., or died intestate, as the case may be].

3. The will was proved by *C. D.* [or letters of administration were granted, etc.].

4. The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.*, deceased, and that the same may be administered under the decree of the Court

### No. 42.

#### Administration by Specific Legatee.

(Title)

[Alter Form No 41 thus]—

- [Omit paragraph 1 and commence paragraph 2] *E. F.*, late of \_\_\_\_\_, died on or about the \_\_\_\_\_ day of \_\_\_\_\_. By his last will, dated the \_\_\_\_\_ day of \_\_\_\_\_ he appointed *C. D.* his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E. F.*, and, amongst other things, of the said [here name the subject of the specific bequest.]

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest.] or that, etc.

## No. 43.

## Administration by Pecuniary Legatee.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] E. F., late of \_\_\_\_\_, died on or about the \_\_\_\_\_ day of \_\_\_\_\_ By his last will, dated \_\_\_\_\_ he appointed C. D. his executor, and bequeathed to the plaintiff a legacy of \_\_\_\_\_ rupees.

In paragraph 4 substitute "legacy" for "debt".

Another form.

(Title.)

E. F., the above-named plaintiff, states as follows:—

1. A. B. of K, in the \_\_\_\_\_ died on the \_\_\_\_\_ day of \_\_\_\_\_ By his last will,

twenty one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid

2. The will was proved by the defendant on the \_\_\_\_\_ day of \_\_\_\_\_ The plaintiff has not been married.

3 The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property, he has sold some part of the immoveable property.

[As in paras 4 and 5 of Form No. 1]

6 The plaintiff claims—

(1) to have the moveable and immoveable property of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken.

(2) such further or other relief as the nature of the case may require.

## No. 44.

## Execution of Trusts.

(Title.)

A B, the above-named plaintiff, states as follows:—

1. He is one of the trustees under an instrument of settlement bearing date on or about the \_\_\_\_\_ day of \_\_\_\_\_ made upon the marriage of E. F. and G. H., the father and mother of the defendant [or an instrument of transfer of the estate and effects of E. F. for the benefit of C. D., the defendant, and the other creditors of E. F.].

2 A. B. has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. C. D. claims to be entitled to a beneficial interest under the instrument.

[As in paras 4 and 5 of Form No. 1]

6 The plaintiff is desirous to account for all the rents and profits of the said immoveable property (and the proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust); and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of C. D., the defendant, and all other persons who may be interested in such administration, in the presence of C. D. and such other persons

so interested as the Court may direct, or that C. D. may show good cause to the contrary.

[N B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.]

### No. 45.

#### Foreclosure or Sale.

(Title.)

A. B, the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of land belonging to the defendant.

2. The following are the particulars of the mortgage :—

(a) (date) ;

(b) (names of mortgagor and mortgagee) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (amount now due) ;

(g) (If the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add)

3. The plaintiff took possession of the mortgaged property on the \_\_\_\_\_ day of \_\_\_\_\_ and is ready to account as mortgagee in possession from that time.

[As in paras 4 and 5 of Form No. 1.]

6. The plaintiff claims—

(1) payment, or in default [sale or] foreclosure [and possession] ;

[Where Order 34, rule 6, applies.]

(3) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance

### No. 46.

#### Redemption.

(Title.)

A. B, the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

(a) (date) ;

(b) (names of mortgagor and mortgagee) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (If the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add) :

3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]

6 The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof]

## No 47.

## Specific Performance (No. 1).

(Title)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the \_\_\_\_\_ day of \_\_\_\_\_ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of \_\_\_\_\_ rupees

2. The plaintiff has applied in the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

*[As in paras. 4 and 5 of Form No. 1.]*

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit

## No 48.

## Specific Performance (No. 2).

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff tendered \_\_\_\_\_ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff again demanded such transfer [Or the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer

5. The plaintiff is still ready, and willing to pay the purchase-money of the said property to the defendant

*[As in paras. 4 and 5 of Form No. 1.]*

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];

(2) \_\_\_\_\_ rupees compensation for withholding the same.

## No. 49.

## Partnership.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D., the defendant, have been for \_\_\_\_\_ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement]

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [Or the defendant has committed the following breaches of the partnership articles :—

(1)

(2)

(3)

*[As in paras. 4 and 5 of Form No. 1.]*



## 5. The plaintiff claims—

- (1) dissolution of the partnership ;
- (2) that accounts be taken ;
- (3) that a receiver be appointed

(N. B.—In suits for the winding-up of any partnership, omit the claim for dissolution, and instead insert a paragraph stating the facts of the partnership having been dissolved.)

## (4) WRITTEN STATEMENTS.

## General defences.

- Denial.** The defendant denies that (*set out facts*).  
The defendant does not admit that (*set out facts*).  
The defendant admits that                      but says that                      .
- Protest.** The defendant denies that he is a partner in the defendant firm of                      .  
The defendant denies that he made the contract alleged or any contract with the plaintiff.  
The defendant denies that he contracted with the plaintiff as alleged or at all.  
The defendant admits assets but not the plaintiff's claim.  
The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.
- Limitation.** This suit is barred by article                      or article                      of the second schedule to the Indian Limitation Act, 1877.<sup>1</sup>
- Jurisdiction** The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).  
On the                      day of                      a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action
- Insolvency.** The defendant has been adjudged an insolvent.  
The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.
- Minority.** The defendant was a minor at the time of making the alleged contract.
- Payment into Court.** The defendant as to the whole claim (or as to Rs.                      part of the money claimed, or as the case may be) has paid into Court Rs.                      and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid).
- Performance remitted.** The performance of the promise alleged was remitted on the                      (date).
- Rescission.** The contract was rescinded by agreement between the plaintiff and defendant
- Res judicata** The plaintiff's claim is barred by the decree in suit (*give the reference*)
- Estoppel.** The plaintiff is estopped from denying the truth of (*insert statements as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*)
- Ground of defence subsequent to institution of suit.** Since the institution of the suit, that is to say, on the day of                      (*set out facts*).

## No. 1.

## Defence in suits for goods sold and delivered.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

<sup>1</sup> See now the Indian Limitation Act, 1908 (IX of 1908).

3. The price was not Rs.

[or]

4.	} Except as to Rs	, same as	{	1.
5.				2
6.				3

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

## No. 2

### Defence in suits on bonds.

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

## No. 3.

### Defence in suits on guarantees.

1. The principal satisfied the claim by payment before suit

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

## No 4

### Defence in any suit for debt.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

				Rs.
1907, January 25th	...	...	...	150
„ February 1st	...	..	..	50
Total				200

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court.

## No 5.

### Defence in suits for injuries caused by negligent driving.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said .

2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.



3. The suit is barred by article \_\_\_\_\_ of the second schedule to the Indian Limitation Act, 1877.<sup>1</sup>

4. The following payments have been made, viz. :—

				Rs.
(Insert date.)	_____	...	...	1,000
(Insert date.)	_____	...	...	500

5. The plaintiff took possession on the \_\_\_\_\_ of \_\_\_\_\_, and has received the rents ever since.

6. That plaintiff released the debt on the \_\_\_\_\_ of \_\_\_\_\_.

7. The defendant transferred all his interest to A B. by a document, dated \_\_\_\_\_.

### No. 12.

#### Defence to suit for redemption.

1. The plaintiff's right in redeem is barred by article \_\_\_\_\_ of the second schedule to the Indian Limitation Act, 1877.<sup>1</sup>

2. The plaintiff transferred all interest in the property to A B.

3. The defendant, by a document dated the \_\_\_\_\_ day of \_\_\_\_\_ transferred all his interest in the mortgage debt and property comprised in the mortgage to A B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

*(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)*

### No. 13

#### Defence to suit for specific performance.

1. The defendant did not enter into the agreement.

2. A B. was not the agent of the defendant *(if alleged by plaintiff)*.

3. The plaintiff has not performed the following conditions—*(Conditions)*.

4. The defendant did not—*(alleged acts of part performance)*.

5. The plaintiff's title to the property agreed in be sold is not such as the defendant is bound to accept by reason of the following matter—*(State why)*.

6. The agreement is uncertain in the following respects—*(State them)*.

7. *(or)* The plaintiff has been guilty of delay.

8. *(or)* The plaintiff has been guilty of fraud *(or misrepresentation)*.

9. *(or)* The agreement is unfair.

10. *(or)* The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10) *(or as the case may be)*.

12. The agreement was rescinded under Conditions of Sale, No. 11 *(or by mutual agreement)*.

*(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g. the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)*

### No. 14.

#### Defence in administration suit by pecuniary legatee.

1. A B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. \_\_\_\_\_, and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. \_\_\_\_\_.

<sup>1</sup> See now the Indian Limitation Act, 1908 (IX of 1908).

## No. 6.

## Defence in all suits for wrongs.

1. Denial of the several acts [or matters] complained of.

## No. 7.

## Defence in suits for detention of goods.

1. The goods were not the property of the plaintiff.
  2. The goods were detained for a lien to which the defendant was entitled
- Particulars are as follows :—

1907, May 3rd To carriage of the goods claimed from Delhi to Calcutta :—  
 45 mounds at Rs 2 per mound ... .. Rs. 90.

## No. 8.

## Defence in suits for infringement of copyright.

1. The plaintiff is not the author [assignee, etc.]
2. The book was not registered.
3. The defendant did not infringe.

## No. 9.

## Defence in suits for infringement of trade mark.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

## No. 10.

## Defences in suits relating to nuisances.

1. The plaintiff's rights are not ancient [or deny his other alleged prescriptive rights].

2. The plaintiff's rights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [or do what is complained of].

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant or what.]

4. The plaintiff has been guilty of laches of which the following are particulars :—  
 1870. Plaintiff's mill began to work.  
 1871. Plaintiff came into possession  
 1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [If other grounds are relied on, they must be stated, e.g., limitation as to past damage.]

## No. 11.

## Defence to suit for foreclosure.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff [if more than one transfer is alleged, say which is denied].

3. The suit is barred by article \_\_\_\_\_ of the second schedule to the Indian Limitation Act, 1877.<sup>1</sup>

4. The following payments have been made, viz. :—

				Rs.
(Insert date.)	_____	...	...	1,000
(Insert date.)	_____	...	...	500

5. The plaintiff took possession on the \_\_\_\_\_ of \_\_\_\_\_, and has received the rents ever since.

6. That plaintiff released the debt on the \_\_\_\_\_ of \_\_\_\_\_.

7. The defendant transferred all his interest to A B. by a document, dated \_\_\_\_\_.

### No. 12.

#### Defence to suit for redemption.

1. The plaintiff's right to redeem is barred by article \_\_\_\_\_ of the second schedule to the Indian Limitation Act, 1877.<sup>1</sup>

2. The plaintiff transferred all interest in the property to A B.

3. The defendant, by a document dated the \_\_\_\_\_ day of \_\_\_\_\_ transferred all his interest in the mortgage debt and property comprised in the mortgage to A, B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

*(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)*

### No. 13.

#### Defence to suit for specific performance.

1. The defendant did not enter into the agreement.

2. A. B. was not the agent of the defendant *(if alleged by plaintiff)*.

3. The plaintiff has not performed the following conditions—*(Conditions)*.

4. The defendant did not—*(alleged acts of part performance)*.

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—*(State why)*.

6. The agreement is uncertain in the following respects—*(State them)*.

7. (or) The plaintiff has been guilty of delay.

8. (or) The plaintiff has been guilty of fraud (or misrepresentation).

9. (or) The agreement is unfair.

10. (or) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10) *(or as the case may be)*.

12. The agreement was rescinded under Conditions of Sale, No. 11 *(or by mutual agreement)*.

*(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g. the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)*

### No. 14

#### Defence in administration suit by pecuniary legatee.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. \_\_\_\_\_, and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. \_\_\_\_\_.

<sup>1</sup> See now the Indian Limitation Act, 1908 (IX of 1908).

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the       day of       19       , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

---

### No. 15.

#### Probate of will in solemn form.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [or of the Hindu Wills Act, 1870].
2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].
4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being *(state the nature of the fraud)*.
5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will, *as the case may be*].
6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;
- (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

---

### No. 16.

#### Particulars. (Or. 6, r. 5.)

(Title of suit)

The following are the particulars of *(here state the matters in respect of which particulars have been ordered)* delivered pursuant to the order of.

Particulars.                      the                      of

*(Here set out the particulars ordered in paragraphs if necessary.)*

---

## APPENDIX B.

### PROCESS.

#### No. 1.

#### Summons for disposal of suit. (Or. 5, rr. 1, 5.)

(Title)

To

[Name, description and place of residence.]

WHEREAS \_\_\_\_\_ has  
instituted a suit against you for \_\_\_\_\_ you are  
hereby summoned to appear in this Court in person or by a pleader duly instruct-  
ed, and able to answer all material questions relating to the suit, or who shall be  
accompanied by some person able to answer all such questions, on the \_\_\_\_\_ day of  
19\_\_\_\_, at \_\_\_\_\_ o'clock in the  
noon, to answer the claim, and as the day fixed for your appearance is appointed  
for the final disposal of the suit, you must be prepared to produce on that day all the  
witnesses upon whose evidence and all the documents upon which you intend to rely in  
support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the  
suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_, \_\_\_\_\_ Judge.

NOTICE.—1 Should you apprehend your witnesses will not attend of their own  
accord, you can have a summons from this Court to compel the  
attendance of any witness, and the production of any document that  
you have a right to call upon the witness to produce, on applying  
to the Court and on depositing the necessary expenses.

2 If you admit the claim, you should pay the money into Court together  
with the costs of the suit, to avoid execution of the decree, which  
may be against your person or property, or both

#### No 2.

#### Summons for settlement of issues. (Or. 5, rr. 1, 5.)

(Title)

To

[Name, description and place of residence]

WHEREAS \_\_\_\_\_ has  
instituted a suit against you for \_\_\_\_\_ you are  
hereby summoned to appear in this Court in person, or by a pleader duly  
instructed, and able to answer all material questions relating to the suit, or who shall be  
accompanied by some person able to answer all such questions, on the \_\_\_\_\_ day of  
19\_\_\_\_, at \_\_\_\_\_ o'clock in the  
noon, to answer the claim, and you are directed to produce on that day all the documents  
upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit  
will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_, \_\_\_\_\_ Judge.



NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both

### No. 3.

#### Summons to appear in person. (Or. 5, r. 3.)

(Title)

To

[Name, description and place of residence]

WHEREAS has instituted a suit against you for you  
are hereby summoned to appear in this Court in person on the day of  
19, at o'clock in the noon, to answer the claim, and  
you are directed to produce on that day all the documents upon which you intend to rely  
in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the  
suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .  
Judge.

### No. 4

#### Summons in summary suit on Negotiable Instrument. (Or 37, r. 2.)

(Title)

To

[Name, description and place of residence]

WHEREAS has instituted a suit against you under Or XXXVII of  
the Code of Civil Procedure, 1908, for Rs balance of principal and  
interest due to him as the of a of which a copy is hereto  
annexed, you are hereby summoned to obtain leave from the Court within ten days from  
the service hereof to appear and defend the suit, and within such time to cause an  
appearance to be entered for you. In default whereof the plaintiff will be entitled at  
any time after the expiration of such ten days to obtain a decree for any sum not  
exceeding the sum of Rs and the sum of Rs for  
costs<sup>1</sup> [together with such interest, if any, from the date of the institution of the suit as  
the Court may order].

Leave to appear may be obtained on an application to the Court supported by  
affidavit or declaration showing that there is a defence to the suit on the merits, or that  
it is reasonable that you should be allowed to appear in the suit

GIVEN under my hand and the seal of the Court, this day of 19 .  
Judge.

### No. 5.

#### Notice to person who, the Court considers, should be added as co-plaintiff. (Or. 1, r. 10.)

(Title)

To

[Name, description and place of residence]

WHEREAS has instituted the above suit against for  
and, whereas it appears necessary that you should be added as a  
plaintiff in the said suit in order to enable the Court effectually and completely to  
adjudicate upon and settle all the questions involved:

<sup>1</sup> These words were inserted by S 4 of the Negotiable Instruments (Interest) Act, 1926 (XXX of 1926).

Take notice that you should on or before the                      day of                      19                      signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .

---

No. 6.

Summons to legal representative of a deceased Defendant.

(Or. 22, r. 4.)

(Title)

To

WHEREAS the plaintiff                      instituted a suit in this Court on the day of                      19                      against the defendant who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said                      , deceased, and desiring that you be made the defendant in his stead :

You are hereby summoned to attend in this Court on the day of                      19                      at                      A M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .

Judge.

---

No. 7.

Order for Transmission of Summons for Service in the Jurisdiction of another Court. (Or 5, r. 21.)

(Title)

WHEREAS it is stated that defendant in the above suit is at present residing in witness

It is ordered that a summons returnable on the                      day of                      19                      , be forwarded to the                      Court of                      for service on the said defendant with a duplicate of this proceeding witness

The court-fee of                      chargeable in respect to the summons has been realized in this Court in stamps

Dated                      19                      .

Judge

---

No. 8.

Order for Transmission of Summons to be served on a Prisoner.

(Or 5, r. 24.)

(Title)

To

The Superintendent of the jail at                      .

UNDER the provisions of Or. V, r 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is                      a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

---

Judge.

## No. 9.

Order for Transmission of Summons to be served on a Public Servant  
or Soldier. (Or. 5, rr. 27, 28.)

(Title.)

To

UNDER the provisions of Or. V, r. 27 (or 28, as the case may be), of the Code of

endorsed thereon by you.

Judge

## No. 10.

## To accompany Returns of Summons of another Court. (Or. 5, r. 23.)

(Title.)

Read proceeding from the \_\_\_\_\_ forwarding \_\_\_\_\_ of that  
for service on \_\_\_\_\_ in Suit No \_\_\_\_\_ of 19 \_\_\_\_\_  
Court.

Read Serving Officer's endorsement stating that the \_\_\_\_\_  
and proof of the above having been duly taken by me on the oath of \_\_\_\_\_  
and \_\_\_\_\_ it is ordered that the \_\_\_\_\_  
be returned to the \_\_\_\_\_ with a copy of this \_\_\_\_\_  
proceeding. \_\_\_\_\_  
Judge.

NOTE —This form will be applicable to process other than summons, the service of  
which may have to be effected in the same manner.

## No. 11.

Affidavit of Process-server to accompany return of Summons  
or Notice. (Or. 5, r. 18.)

(Title.)

The affidavit of \_\_\_\_\_, son of \_\_\_\_\_,  
I \_\_\_\_\_, make oath and say as  
follows :—

(1) I am a process-server of this Court.

(2) On the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ I received a summons issued by  
the Court of \_\_\_\_\_ in Suit No. \_\_\_\_\_  
of 19 \_\_\_\_\_ in the said Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ for  
service on \_\_\_\_\_

(3) The said \_\_\_\_\_ was at the time personally  
known to me, and I served the said summons on him on the \_\_\_\_\_ day  
of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon  
at \_\_\_\_\_ by tendering a copy thereof to him and requiring his signature to  
the original summons  
notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and  
in whose presence.

(b) Signature of process-server.

(3) The said \_\_\_\_\_ Dr,  
 \_\_\_\_\_ not being personally known to me  
 accompanied me in \_\_\_\_\_ and pointed out to  
 me a person whom he stated to be the said \_\_\_\_\_  
 and I served the said summons on him on the  
 notice her  
 day of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ n'clock in the \_\_\_\_\_ noon  
 at \_\_\_\_\_ by tendering a copy thereof to him and requiring his signature to the  
 her her  
 original summons.  
 notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and  
 in whose presence

(b) Signature of process server.

(3) The said \_\_\_\_\_ Dr,  
 \_\_\_\_\_ and the house in which he ordinarily resides being  
 personally known to me, I went to the said house, in \_\_\_\_\_ and there on the  
 day of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ o'clock in the  
 noon, I did not find the said \_\_\_\_\_

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special  
 reference to Or. V, rr. 15 and 17.

(b) Signature of process-server.

(3) One \_\_\_\_\_ Dr,  
 \_\_\_\_\_ accompanied me to \_\_\_\_\_ and there pointed out to  
 me which he said was the house in which \_\_\_\_\_ I did  
 not find the said \_\_\_\_\_ there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special  
 reference to Or. V, rr. 15 and 17.

(b) Signature of process-server.

\_\_\_\_\_ Dr,  
 If substituted service has been ordered, state fully and exactly the manner in  
 which the summons was served with special reference to the terms of the order for  
 substituted service.

Sworn by the said \_\_\_\_\_ before me this  
Affirmed day of \_\_\_\_\_ 19 \_\_\_\_\_

Empowered under section 139 of the Code of Civil Procedure,  
 1903, to administer the oath to deponents.

## No. 12.

### Notice to defendant. (Or. 9, r. 6.)

(Title.)

To \_\_\_\_\_  
 [Name, description and place of residence]

WHEREAS this day was fixed for the hearing of the above suit and a summons was

Notice is hereby given to you that the hearing of the suit is adjourned this day and  
 that the day of \_\_\_\_\_ 19 \_\_\_\_\_ is now fixed for the hearing of the same; in default

of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this                      day of  
19                      .

*Judge.*

### No. 13.

#### Summons to witness. (Or. 16, rr. 1, 5.)

*(Title.)*

To                      WHEREAS your attendance is required to  
on behalf of the                      in the above suit, you are hereby required  
[personally] to appear before this Court on the                      day of  
19                      at                      o'clock in the forenoon, and to bring with you [or to send to this  
Court]

A sum of Rs                      , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non attendance laid down in r. 12 of Or. XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .  
*Judge,*

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid

(2) If you are detained beyond the day aforesaid, a sum of Rs.                      will be tendered to you for each day's attendance beyond the day specified

### No. 14.

#### Proclamation requiring attendance of Witness. (Or. 16, r. 10.)

*(Title.)*

To                      WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is, therefore, under r. 10 of Or. XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the                      day of  
19                      at                      o'clock in the forenoon and from day to day until  
he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .  
*Judge.*

### No. 15.

#### Proclamation requiring attendance of Witness. (Or. 16, r. 10.)

*(Title.)*

To                      WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is, therefore, under r. 10 of Or. XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the                      day of  
19                      at                      o'clock in the forenoon, and from day to day

until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge*

### No. 16.

## Warrant of Attachment of Property of Witness. (Or. 16, r. 10.) (Title)

To

The Bailiff of the Court.

WHEREAS the witness                      cited  
 by                      has not,  
 after the expiration of the period limited in the proclamation issued for his  
 attendance, appeared in Court, You are hereby directed to hold under attachment  
 property belonging to the said witness to the value of  
 and to submit a return, accompanied with an inventory thereof, within                      days.

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge*

### No. 17.

## Warrant of Arrest of Witness (Or. 16, r. 10.) (Title)

To

The Bailiff of the Court

WHEREAS                      has been duly served with a summons but has failed to  
 attend [absconds and keeps out of the way for the purpose of avoiding service of a sum-  
 mons], You are hereby ordered to arrest and bring the said                      before the Court.

You are further ordered to return this warrant on or before the                      day of  
 19                      with an endorsement certifying the day on and the manner  
 in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge.*

### No. 18.

## Warrant of Committal. (Or. 16, r. 18.) (Title)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has made application  
 to this Court that security be taken for the appearance of                      to  
 give evidence (or to produce a document), on the                      day of                       
 19                      and whereas the Court has called upon the said                      to  
 furnish such security, which he has failed to do; This is to require you to receive the  
 said                      into your custody in the civil prison and to produce him before  
 this Court at                      on the said day and on such other day or  
 days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge.*

## No. 5.

## Affidavit as to Documents. (Or. 11, r. 13.)

(Title as in No. 1, *supra*.)

I, the above-named defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*].

3. I have had but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last mentioned documents were last in my possession or power on [*state when and what has become of them and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

## No. 6.

## Order to produce documents for inspection. (Or. 11, r. 14.)

(Title as in No. 1, *supra*.)

Upon hearing \_\_\_\_\_ and upon reading the affidavit of  
 filed the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ : It is ordered that the  
 do, at all seasonable times, or reasonable notice, produce at \_\_\_\_\_, situate at  
 the following documents, namely, \_\_\_\_\_, and that  
 the \_\_\_\_\_ be at liberty to inspect and peruse the documents so produced,  
 and to make notes of their contents. In the meantime it is ordered that all further  
 proceedings be stayed and that the costs of this application be \_\_\_\_\_.

## No. 7.

## Notice to produce Documents. (Or. 11, r. 16.)

(Title as in No. 1, *supra*.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

[Describe documents required.]

X. Y., Pleader for the

To Z., Pleader for the

## No. 8.

## Notice to inspect Documents. (Or. 11, r. 17.)

(Title as in No. 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the  
 \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ [*except the documents numbered \_\_\_\_\_ in*  
*that notice*] at [*insert place of inspection*] on Thursday, next, the \_\_\_\_\_ instant,  
 between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents  
 mentioned in your notice of the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ on the ground  
 that [*state the ground*]:—

## No. 9.

## Notice to admit Documents. (O. 12, r. 3.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at \_\_\_\_\_ on \_\_\_\_\_ between the hours of \_\_\_\_\_; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies, and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [or agent] for plaintiff  
[or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff]

[Here describe the documents and specially as to each document whether it is original or a copy]

## No. 10.

## Notice to admit Facts. (O. 12, r. 5.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit for the purposes of the suit only the several facts respectively hereunder specified.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son
4. That O. died on the 1st April, 1896.
5. That O. was never married

## No. 11.

## Admission of Facts pursuant to Notice. (O. 12, r. 8.)

(Title as in No. 1, *supra*.)

\_\_\_\_\_ hereby  
admits that \_\_\_\_\_  
\_\_\_\_\_ or  
\_\_\_\_\_ of

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission].

E. F., pleader [or agent] for defendant [or plaintiff].

To G. H., pleader [or agent] for plaintiff [or defendant].



Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890...	1.
2. That he died intestate ... ..	2.
3. That N. was his lawful son ... ..	3. But not that he was his only lawful son.
4. That O. died ... ..	4. But not that he died on the 1st April, 1896.
5. That O. was never married ... ..	5.

## No. 12.

## Notice to Produce (general form). (O. 12, r. 8.)

(Title as in No. 1, *supra*.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G. H., *pleader* [or *agent*] for *plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] for *defendant* [or *plaintiff*].

# APPENDIX D.

## DECREES.

### No. 1.

Decree in Original Suit. (O. 20, rr. 6, 7.)

(Title).

Claim for

THIS suit coming on this day for final disposal before  
 presence of for the plaintiff and of in the  
 is ordered and decreed that for the defendant, it  
 be paid by the to the and that the sum of Rs.  
 the costs of this suit, with interest thereon at the rate of on account of  
 this date to date of realization. per cent. per annum from

GIVEN under my hand and the seal of the Court this day of  
 19

Costs of Suit.

Judge.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ...				Stamp for power ...			
2. Do. for power ...				Do. for petition ...			
3. Do. for exhibits ...				Pleader's fee ...			
4. Pleader's fee on Rs. ...				Subsistence for witnesses ...			
5. Subsistence for witnesses				Service of process ...			
6. Commissioner's fee ...				Commissioner's fee ...			
7. Service of process ...							
Total ...				Total ...			

### No. 2.

Simple Money Decree. (Section 34.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before  
 of for the plaintiff and of in the presence  
 for the defendant, it is ordered that the do pay to the  
 the sum of Rs. with interest thereon at the rate of per cent. per

annum from \_\_\_\_\_ in the date of realization of the said sum and do also pay Rs. \_\_\_\_\_, the costs of this suit, with interest thereon at the rate of \_\_\_\_\_ per cent, per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

## Costs of Suit.

Judge.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ...				Stamp for power ...			
2. Do. for power ...				Do. for petition ...			
3. Do. for exhibits ...				Pleader's fee ...			
4. Pleader's fee on Rs. ...				Subsistence for witnesses ...			
5. Subsistence for witnesses ...				Service of process ...			
6. Commissioner's fee ...				Commissioner's fee ...			
7. Service of process ...							
Total ...				Total ...			

<sup>1</sup>[No. 3.

## Preliminary decree for foreclosure.

(ORDER XXXIV, R. 2.—WHERE ACCOUNTS ARE DIRECTED TO BE TAKEN.)

(Title)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby ordered and decreed that it be referred to \_\_\_\_\_ as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or failing such rate, at the same rate as is payable on the principal, or, failing both such rates at nine per cent per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

<sup>1</sup> Forms 8 to 11 were substituted by S. 8 and Sch. of the Transfer of Property (Amendment) Supplementary Act, 1925 (XXI of 1925).

2. And it is hereby further ordered and decreed that any amount received under Cl. (ii) or adjudged due under Cl. (iv) above, together with interest thereon, shall be paid to the plaintiff under Cl. (i) together

the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court, shall find due, and the sum of Rs. for the costs of the suit awarded to the plaintiff;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plot of land situated at , so required, re- said mortgage and ff or any person claimant under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property;

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and

directions as it thinks fit.

#### SCHEDULE.

*Description of the mortgaged property.*

No. 3-A.

#### Preliminary decree for foreclosure.

(ORDER XXXIV, R. 2 —WHERE THE COURT DECLARES THE AMOUNT DUE.)

#### (Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs. ;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant,

under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

*Description of the mortgaged property.*

#### No. 4.

#### Final decree for foreclosure.

(ORDER XXXIV, R. 3.)

(Title.)

Upon reading the preliminary decree passed in this suit on the \_\_\_\_\_ day of \_\_\_\_\_ and further orders (if any) dated the \_\_\_\_\_ day of \_\_\_\_\_ and \_\_\_\_\_ the parties and it appearing that the p \_\_\_\_\_ not been made by the defendant or any, \_\_\_\_\_ to redeem the said mortgage:

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; \* [and (if the defendant be in possession of the said mortgaged property) that: the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property].

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

#### No. 5.

#### Preliminary decree for sale.

(ORDER XXXIV, R. 4.—WHERE ACCOUNTS ARE DIRECTED TO BE TAKEN.)

(Title.)

This suit coming on this \_\_\_\_\_ day, etc., It is hereby ordered and decreed that it be referred to \_\_\_\_\_ as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable):

\* Words not required to be deleted.

- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum) ;
- (iv) an account of any loss or damage caused in the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2. And it is hereby further ordered and decreed that any amount received under Cl. (ii) or adjudged due under Cl. (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under Cl. (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the                      day of                      , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4. And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the                      day of                      or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs.                      for the costs of the suit awarded to the plaintiff ;

- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of                      of the suit, and such costs, charges and expenses as may be                      ;

or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the                      be mortgaged property or a                      the purposes of such sale the                      it appoints, all documents in                      ;

subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply in the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

No. 6-A.

##### **Preliminary decree for sale.**

(ORDER XXXIV, R. 4—WHEN THE COURT DECLARES THE AMOUNT DUE.)

##### **(Title.)**

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. \_\_\_\_\_ for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. \_\_\_\_\_

2. And it is hereby ordered and decreed as follows.—

(i) that the defendant do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment may be extended by the Court, the said sum of Rs. \_\_\_\_\_

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10 together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule of the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the

for the time being in force) to apply amount of the balance; and that the *ne to time as they may have occasion,* give such directions as it thinks fit.

## SCHEDULE.

*Description of the mortgaged property.*

## No. 6.

## Final decree for sale.

(OR. XXXIV, R. 5.)

(Title.)

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly apportioned after deduction therefrom of

Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

## No. 7.

**Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.**

(OR. XXXIV, R. 7.—WHERE ACCOUNTS ARE DIRECTED TO BE TAKEN.)

(Title.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money payable to the defendant on or before this date (such sums to be computed at the rate of interest of nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive



of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

*Description of the mortgaged property.*

No. 7A.

**Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed.**

(OR. XXXIV, R. 7.—WHERE ACCOUNTS ARE DIRECTED TO BE TAKEN.)

(Title.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 And it is hereby further ordered and decreed that any amount received under

principal.

4. And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs \_\_\_\_\_ for the costs of the suit awarded to the defendant;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the \_\_\_\_\_ property or a \_\_\_\_\_ such sale the \_\_\_\_\_ documents in \_\_\_\_\_

6 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may order to be paid to the defendant \_\_\_\_\_

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as

aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply the amount of the balance; and that the defendant may from time to time as they may have occasion, give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

#### No. 7-B.

### **Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.**

(OR. XXXIV, R. 7.—WHERE THE COURT DECLARES THE AMOUNT DUE.)

#### (Title.)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. \_\_\_\_\_ for the costs of the suit awarded to the defendant, making in all the sum of Rs. \_\_\_\_\_

#### 2. And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment may be extended by the Court the said sum of Rs. \_\_\_\_\_

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall be at liberty to redeem the property; and that they may have such directions as it

#### SCHEDULE.

##### *Description of the mortgaged property.*

#### No. 7-C.

### **Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed.**

(OR. XXXIV, R. 7.—WHERE THE COURT DECLARES THE AMOUNT DUE.)

#### (Title.)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for

interest on the said principal, the sum of Rs.                      for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs.                      for the cost of this suit awarded to the defendant, making in all the sum of Rs.                      .

2 And it is hereby ordered and decreed as follows:—

- (i) that the plaintiff do pay into Court on or before the                      day of                      or any later date up to which time the payment may be extended by the Court the said sum of Rs.                      ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

*Description of the mortgaged property.*

No. 7-D.

**Final decree for foreclosure in a redemption suit on default of payment by mortgagor.**

(Or XXXIV, r. 8)

(Title.)

Upon reading the preliminary decree in this suit on the                      day of                      and further orders (if any) dated the                      day of                      , and the application of the defendant dated the                      day of                      for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage,

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned *\*[and (if the plaintiff be in possession of the said mortgaged property)]* that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2 And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

### No. 7-E.

#### Final decree for sale in a redemption suit on default of payment by mortgagor.

(OR. XXXIV, R. 8.)

(Title.)

Upon reading the preliminary decree passed in this suit on the \_\_\_\_\_ day of \_\_\_\_\_ and further orders (if any) dated the \_\_\_\_\_ day of \_\_\_\_\_ and the application of the defendant dated the \_\_\_\_\_ day of \_\_\_\_\_ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage :

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after payment of the expenses of the sale) in payment of the amount said preliminary decree and under any further suit and in payment of any amount which the defendant for such costs of this suit including the charges and expenses as may be payable under r. 10, together with the subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

### No. 7-F.

#### Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree.

(OR. XXXIV, RR 3, 5 AND 8.)

(Title.)

This suit coming on this \_\_\_\_\_ day for further consideration and it appearing that on the \_\_\_\_\_ day of \_\_\_\_\_ the mortgagor or \_\_\_\_\_ the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the \_\_\_\_\_ day of \_\_\_\_\_ ; It is hereby ordered and decreed that :—

- (i) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor *\*[or, as the case may be, \_\_\_\_\_ who has redeemed the property]* or an acknowledgment of the payment of the amount due in his favour ;
- (ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

- No. 8.

(Title)

No. 9.

**versus**

(OR. XXXIV, RE. 2 AND 4.)

(Title.)

\* Words not required to be deleted.

day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage security with interest thereon and the sum of Rs. \_\_\_\_\_ for the costs of this suit awarded to defendant No. 2, making in all the sum of Rs. \_\_\_\_\_.

(Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.)

2 It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff\* for if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—].

3 And it is hereby ordered and decreed as follows:—

- (i) (a) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment has been extended by the Court the said sum of Rs. \_\_\_\_\_ due to defendant No. 2; and
- (b) that defendant No. 1 do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment has been extended by the Court the said sum of Rs. \_\_\_\_\_ due to the plaintiff; and

(ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such \_\_\_\_\_ together

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int No. 2

shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

\_\_\_\_\_ pays the amount found necessary having regard

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

- (i) "[in the case of an anomalous mortgage] that the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or
- (ii) "[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) "[in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after

\* Words not required to be deleted.

deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV, of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(a) that

*done under clause 4 above*—

\* I (i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

\* [(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6 And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the cost of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same, and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE

*Description of the mortgaged property.*

\* Words not required to be deleted



## No. 11.

## Preliminary decree for sale.

(Plaintiff—Sub or derivative mortgagee

vs.

Defendant No. 1.—Mortgagor.

Defendant No. 2.—Original mortgagee.]

(Or, XXXIV, r. 4.)

(Title.)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this \_\_\_\_\_ day of \_\_\_\_\_ is the sum of Rs \_\_\_\_\_ for principal, the sum of Rs \_\_\_\_\_ for interest on the said principal, the sum of Rs \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs \_\_\_\_\_ for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs \_\_\_\_\_.

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.)

2. And it is hereby ordered and decreed as follows:

- (i) that defendant No. 1 do pay into Court on or before the said \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which time for payment may be extended by the Court the said sum of Rs \_\_\_\_\_ due to defendant No. 2

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount)

- (ii) that, on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11, of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property; and

- (iii) that, upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11 of Or. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance

3 And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff the plaintiff shall bring into the Court all documents, etc. [as in sub clause (ii) of clause 2.]

4 And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale and on such application being made the mortgaged property or a sufficient part

thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in the schedule of the mortgage, and then in payment of the expenses as may be payable under the Mortgage Act, 1908, and due to defendant or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE

##### *Description of the mortgaged property ]*

#### No. 12.

##### **Decree for rectification of instrument.**

###### *(Title.)*

It is hereby declared that the \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_, does not truly express the intention of the parties to such \_\_\_\_\_.

And it is decreed that the said \_\_\_\_\_ be rectified by \_\_\_\_\_.

#### No. 13.

##### **Decree to set aside a transfer in fraud of creditors.**

###### *(Title.)*

It is hereby declared that the \_\_\_\_\_, dated the \_\_\_\_\_ day of 19\_\_\_\_, and made between \_\_\_\_\_ and \_\_\_\_\_ is void as against the plaintiff and all other the creditors, if \_\_\_\_\_ any of the defendant \_\_\_\_\_.

#### No. 14.

##### **Injunction against Private Nuisance.**

###### *(Title.)*

Let the defendant \_\_\_\_\_, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

## No. 15.

## Injunction against building higher than old level.

(Title.)

Let the defendant \_\_\_\_\_, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in \_\_\_\_\_ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

## No. 16.

## Injunction restraining use of Private Road.

(Title.)

Let the defendant \_\_\_\_\_, his agents, servants, and workmen, be perpetually restrained from using or permitting to be used any part of the lane at \_\_\_\_\_ the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever

## No. 17.

## Preliminary Decree in an Administration suit.

(Title.)

It is ordered that the following accounts and inquiries be taken and made; that is to say:—

*In creditor's suit—*

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

*In suit by legatees—*

2 That an account be taken of the legacies given by the testator's will.

*In suits by next-of-kin—*

3 That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of kin [or one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6 An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the \_\_\_\_\_ day of \_\_\_\_\_ next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the \_\_\_\_\_ \*shall find it necessary for carrying out the object of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

\* Here insert name of proper officer.

9. And that Mr. E. F. be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the <sup>\*(and shall give security by bond for the due performance of his duties to the amount of</sup> <sup>rupees)</sup>

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made, and accounts taken, that is to say—

- (a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;
- (b) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof;
- (c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the <sup>\*(and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle</sup>

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the <sup>\*(shall advertise in the newspapers according to the practice of the Court or shall make such inquiries in any other way which shall appear to the</sup> <sup>\*(to give the most useful publicity to such inquiries.</sup>

14. And it is ordered that the above inquiries and account be made and taken, and that all other acts ordered to be done be completed, before the <sup>day of</sup> , and that the <sup>\*(do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the</sup> <sup>day of</sup> .

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the <sup>day of</sup> .

[Such part only of this decree is to be used as is applicable to the particular case.]

## No. 18.

### Final Decree in an Administration-suit by a Legatee.

#### (Title)

1. It is ordered that the defendant <sup>do, on or before the</sup> <sup>day of</sup> pay into Court the sum of Rs. <sup>the balance by the said certificate found to be due from the said defendant on account of the estate of</sup> <sup>the testator, and also the sum of Rs.</sup> <sup>for interest, at the rate of Rs</sup> <sup>per cent. per annum, from the</sup> <sup>day of</sup> <sup>to the</sup> <sup>day of</sup> amounting together to the sum of Rs.

2. Let the <sup>\*(of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs.</sup> <sup>ordered to be paid into Court as aforesaid, as follows:—</sup>

(a) The costs of the plaintiff to Mr. <sup>his attorney [or pleader] or</sup> and the costs of the defendant to Mr. <sup>his attorney [or</sup> <sup>pleader]</sup>

(b) And (if any debts are due) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the schedule to the certificate, of the <sup>\*, together with subsequent</sup>

interest on such of the debts as bear interest, he paid; and after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

### No. 19.

#### Preliminary Decree in an Administration-suit by a Legatee, where an Executor is held personally liable for the payment of Legacies.

(Title)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. \_\_\_\_\_ bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within \_\_\_\_\_ weeks after the date of the certificate of the \_\_\_\_\_, pay to the plaintiff the amount of what the \_\_\_\_\_ shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

### No. 20.

#### Final Decree in an Administration-suit by Next-of-kin.

(Title)

1. Let the \_\_\_\_\_ of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. \_\_\_\_\_, the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said \_\_\_\_\_, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. \_\_\_\_\_, after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows:—

(a) Let the defendant, within one week after the taxation of the said costs by the \_\_\_\_\_ as aforesaid, pay one-third share of the said residue to the plaintiff A. B., and C. D., his wife in her right as the sister and one of the next-of-kin of the said E. F., the intestate.

(b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate.

(c) And let the defendant, within one week after the taxation of the said costs by the \_\_\_\_\_ as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

### No. 21.

#### Preliminary Decree in a Suit for Dissolution of Partnership and the taking of Partnership Accounts.

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows:—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the \_\_\_\_\_ day of \_\_\_\_\_.

\* Here insert name of proper officer.

and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that \_\_\_\_\_ be the receiver of the partnership estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership;
2. An account of the debts and liabilities of the said partnership;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plain-

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the \_\_\_\_\_ day of \_\_\_\_\_ and that the \_\_\_\_\_ do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the \_\_\_\_\_ day of \_\_\_\_\_.

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the \_\_\_\_\_ day of \_\_\_\_\_.

### No. 22.

#### Final Decree in a suit for Dissolution of Partnership and the taking of partnership accounts.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. \_\_\_\_\_, be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the \_\_\_\_\_ amounting in the whole to Rs. \_\_\_\_\_.
2. In payment of the costs of all parties in this suit, amounting to Rs. \_\_\_\_\_.  
[These costs must be ascertained before the decree is drawn up.]
3. In payment of the sum of Rs. \_\_\_\_\_ to the plaintiff as his share of the partnership-assets, of the sum of Rs. \_\_\_\_\_, being the residue of the said sum of Rs. \_\_\_\_\_ now in Court, to the defendant as his share of the partnership-assets.

[Or, And that the remainder of the said sum of Rs. \_\_\_\_\_ be paid to the said plaintiff (or defendant) in part payment of the sum of Rs. \_\_\_\_\_ certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [or plaintiff] do on or before the \_\_\_\_\_ day of \_\_\_\_\_ pay to the plaintiff [or defendant] the sum of Rs. \_\_\_\_\_ being the balance of the said sum of Rs. \_\_\_\_\_ due to him, which will then remain due.

### No. 23.

#### Decree for Recovery of Land and Mesne Profits.

(Title)

It is hereby decreed as follows :—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

\* Here insert name of proper officer.

2. That the defendant do pay to the plaintiff the sum of Rs. : with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

*Or*

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

SCHEDULE.

# APPENDIX E.

## EXECUTION.

### No. 1.

Notice to show cause why a Payment or Adjustment should not be recorded as certified. (Or. 21. r. 2.)

(Title.)

To

Whereas in execution of the decree in the above named suit has applied to this Court that the sum of Rs.                      recoverable under the decree has been paid and should be recorded as certified, this is to give you notice that you are to appear adjusted before this Court on the                      day of                      19                      to show cause why the payment aforesaid should not be recorded as certified. adjustment

Given under my hand and the seal of the Court, this

19 .

day of

Judge.

### No. 2.

Precept. (S. 46.)

(Title.)

Upon hearing the decree-holder it is ordered that this precept be sent to the Court of                      at                      under S. 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Dated the

day of

Schedule.

19 .

Judge.

### No. 3.

Order sending decree for execution to another Court. (Or. 21, r. 6.)

(Title.)

Whereas the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of                      at                      for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Or. XXI, r. 6, of the Code of Civil Procedure, 1908, it is

Ordered:

That a copy of this order be sent to                      with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the

day of

19 .

Judge.

### No. 4.

Certificate of non-satisfaction of Decree. (Or. 21, r. 6.)

(Title.)

Certified that no (1) satisfaction of the decree of this Court in Suit No                      of 19                      a copy of which is herewith attached, has been obtained by execution within the jurisdiction of this Court.

Dated the

day of

19 .

Judge.

(1) If partial, strike out "no" and state to what extent



## No. 8.

## Certificate of Execution of Decree transferred to another Court.

(Or. 24, r. 6.)

(Title.)

Number of suit and the Court by which the decree was passed.	Names of parties	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	Remarks.
1	2	3	4	5	6	7	8	9
					<i>Rs. a. p.</i>	<i>Rs. a. p.</i>		

Signature of Muharrir in charge.

Signature of Judge.

## No. 6

## Application for Execution of Decree. (Or 21, r. 11)

In the Court of

I, *decree-holder*, hereby apply for execution of the decree herein below set forth:—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A. B.—Plaintiff C. D.—Defendant	October 11, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal (interest at 6 per cent. per annum, from date of decree till payment.)	Rs. A. P. 47 10 4 .. .. 8 2 0 .. .. Total 55 12 4	Against the defendant C. D.	<p>[When attachment and sale of moveable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the Principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.</p>

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed \_\_\_\_\_, decree-holder.  
 dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

[When attachment and sale of immoveable property is sought]

*Description and Specification of Property.*

The undivided one-third share of the judgment-debtor in a house situated in the village of \_\_\_\_\_, value Rs. 40, and bounded as follows:—

East by G's house; west by H's house; south by public road, north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed \_\_\_\_\_, decree-holder.

**No. 7.**

**Notice to show Cause why Execution should not issue.**

<sup>1</sup>[(Or. 21, r. 16.)]

(Title.)

To \_\_\_\_\_  
 WHEREAS \_\_\_\_\_ has made application to this Court for execution of decree in Suit No. \_\_\_\_\_ of 19 \_\_\_\_, on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

**No. 8.**

**Warrant of Attachment of Moveable Property in execution of a Decree for Money. (Or. 21, r. 30.)**

(Title)

To \_\_\_\_\_  
 The Bailiff of the Court.

WHEREAS

\_\_\_\_\_ was ordered by decree of this Court passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_,

Decree.			
Principal			
Interest			
Costs			
Costs of execution			
Further interest			
Total			

in Suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_,  
 to pay to the plaintiff the sum of Rs. \_\_\_\_\_ as  
 noted in the margin; and whereas the said sum  
 of Rs. \_\_\_\_\_ has not been paid; These  
 are to command you to attach the moveable  
 property of the said \_\_\_\_\_  
 as set forth in the schedule hereunto annexed,  
 or which shall be pointed out to you by the  
 said \_\_\_\_\_, and  
 unless the said \_\_\_\_\_ shall pay  
 to you the said sum of Rs. \_\_\_\_\_, the  
 together with Rs. \_\_\_\_\_, the  
 costs of this attachment, to hold the same

until further orders from this Court

<sup>1</sup> This reference was substituted for the reference "(Or. 21, r. 22)" by S. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

You are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

## SCHEDULE.

Judge.

## No. 9.

**Warrant for Seizure of Specific Moveable Property  
adjudged by Decree. (Or. 21, r. 31.)**

(Title.)

To

The Bailiff of the Court.

WHEREAS \_\_\_\_\_ was ordered by decree of this Court passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in Suit No. \_\_\_\_\_ of 19\_\_\_\_, to deliver to the plaintiff the moveable property (or a \_\_\_\_\_ share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered;

These are to command you to seize the said moveable property (or a \_\_\_\_\_ share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

## SCHEDULE.

Judge.

## No. 10.

**Notice to state Objections to draft of Document. (Or. 21, r. 34.)**

(Title.)

To TAKE notice that on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of \_\_\_\_\_, whereof a draft is hereunto annexed, of the immoveable property specified hereunder, and that the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

## Description of Property.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

## No. 11.

**Warrant to the Bailiff to give Possession of Land, etc.  
(Or. 21, r. 35.)**

(Title.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of \_\_\_\_\_ has been decreed to \_\_\_\_\_ plaintiff in this suit; You are hereby directed to put the said \_\_\_\_\_ in possession \_\_\_\_\_ the \_\_\_\_\_

of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this                      day of                      19 .

SCHEDULE.

Judge.

### No. 12.

#### Notice to show cause why Warrant of Arrest should not issue. (Or. 21, r. 37.)

(Title.)

To

WHEREAS                      has made application to this Court for execution of decree in suit No.                      of 19                      by arrest and imprisonment of your person, you are hereby required to appear before this Court on the                      day of                      19                      to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      Judge.

### No. 13

#### Warrant of Arrest in Execution. (Or. 21, r. 38.)

(Title.)

To

The Bailiff of the Court

WHEREAS

Decree.			
Principal . . .			
Interest . . .			
Costs . . .			
Execution . . .			
Total . . .			

was adjudged by a decree of the Court in suit No.                      of 19                      dated the                      day of                      19                      to pay to the decree holder the sum of Rs.                      as noted in the margin, and whereas the said sum of Rs.                      has not been paid to the said decree-holder in satisfaction of the said decree; These are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs.                      together with Rs.                      for the costs of executing this process, to bring the said defendant before the Court with all convenient speed.

You are further commanded to return this warrant on or before the day of                      19                      with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      Judge.

### No. 14.

#### Warrant of Committal of Judgment-debtor to Jail. (Or. 21, r. 40.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS                      who has been brought before this Court this                      day of                      19                      under a warrant in execution of a decree which was made and pronounced by the said Court on the

said day of 19 and by which decree it was ordered that the  
 should pay ;  
 And whereas the said has not obeyed the decree nor  
 satisfied the Court that he is entitled to be discharged from custody ; You are hereby, in  
 the name of the King-Emperor of India, commanded and required to take and receive the  
 said into the  
 eding or  
 shall be otherwise  
 58 of the Code of  
 annas per diem

day of 19  
 Judge

### No. 15.

**Order for the Release of a person imprisoned in execution  
 of a Decree. (Ss. 58, 59.)**  
 (Title.)

To The Officer in charge of the Jail at  
 UNDER orders passed this day, you are hereby directed to set free  
 judgment-debtor now in your custody.  
 Dated

Judge.

### No. 16.

#### Attachment in Execution.

**Prohibitory Order, where the Property to be attached consists of  
 Moveable Property to which the defendant is entitled subject  
 to a Lien or Right of some other person to the immediate pos-  
 session thereof. (Or. 21, r. 46.)**

To (Title.)  
 WHEREAS has failed  
 to satisfy a decree passed against on the  
 day of 19 in Suit No. of 19  
 in favour of for Rs. ; It is ordered that the  
 defendant be, and is hereby, prohibited and restrained until the further order of this  
 Court, from receiving from the following property in the possession  
 of the said , that is to say,  
 , to which the defendant is entitled, subject to any claim of the  
 said , and the said is hereby prohibited  
 and restrained, until the further order of this Court, from delivering the said property  
 to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 19  
 Judge.

### No. 17.

#### Attachment in Execution.

**Prohibitory Order, where the Property consists of Debts not  
 secured by Negotiable Instruments. (Or. 21, r. 46)**  
 (Title)

To WHEREAS has failed to  
 satisfy a decree passed against on the day of  
 19 in Suit No. of 19 in favour of  
 for Rs. ; It is ordered that the defendant be, and is

hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said  
 he, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of ;

19  
 Judge.

### No. 18.

#### Attachment in Execution.

**Prohibitory Order, where the Property consists of Shares in the Capital of a Corporation. (Or. 21, r. 46.)**

(Title.)

To  
 of \_\_\_\_\_ Defendant and to \_\_\_\_\_, Secretary  
 of \_\_\_\_\_ Corporation.

WHEREAS \_\_\_\_\_ has failed to satisfy a decree passed of against \_\_\_\_\_ on the \_\_\_\_\_ day of 19 \_\_\_\_\_, in Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_, in favour of \_\_\_\_\_, for Rs. \_\_\_\_\_; It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of \_\_\_\_\_ shares in the aforesaid Corporation, namely, \_\_\_\_\_, or from receiving payment of any dividends thereon; and you, \_\_\_\_\_, the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19 \_\_\_\_\_.

Judge.

### No. 19.

**Order to attach Salary of Public Officer or Servant of Railway Company or Local Authority. (Or. 21, r. 48.)**

(Title.)

To  
 WHEREAS \_\_\_\_\_

Court.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

Judge.

### No. 20.

**Order of Attachment of Negotiable Instrument. (Or. 21, r. 51.)**

(Title.)

To  
 The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the \_\_\_\_\_ day of 19 \_\_\_\_\_, for the attachment of \_\_\_\_\_; You are

day of  
 ; You are

Whereby directed to seize the said same into Court. and bring the  
GIVEN under my hand and the seal of the Court, this day of  
19 Judge.

No 21.  
Attachment.

Prohibitory Order, where the Property consists of Money or of any Security in the custody of a Court of Justice or Officer of Government. (Or. 21, r. 52.)  
(Title)

To  
SIR,  
The plaintiff having applied, under r. 52 of Or. XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (here state how the money is supposed to be in the hands of the person addressed, on what account, etc.), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,  
SIR,  
Your most obedient Servant,  
Judge.

Dated the day of 19

No. 22.

Notice of attachment of a Decree to the Court which passed it.  
(Or. 21, r. 53.)  
(Title)

To  
The Judge of the Court of  
SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 by in Suit No of 19 in which he was and was has been attached by this Court on the application of the in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,  
Judge.

Dated the day of 19

No 23.

Notice of attachment of a decree to the Holder of the Decree.  
(Or. 21, r. 53.)  
(Title)

To  
WHEREAS an application has been made in this Court by the decree holder in the above suit for the attachment of a decree obtained by you on the day



of \_\_\_\_\_ 19 , in the Court of \_\_\_\_\_  
 in Suit No. \_\_\_\_\_ of 19 , in which \_\_\_\_\_  
 and \_\_\_\_\_ was \_\_\_\_\_ ; It is ordered  
 that you, the said \_\_\_\_\_, be, and you are hereby, prohibited and  
 restrained, until the further order of this Court, from transferring or charging the same  
 in any way.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 .  
 \_\_\_\_\_ Judge.

### No. 24.

#### Attachment in Execution.

#### Prohibitory Order where the Property consists of Immoveable Property. (Or. 21, r. 54.)

(Title.)

To \_\_\_\_\_ Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the  
 day of \_\_\_\_\_ 19 , in suit No. \_\_\_\_\_  
 of 19 , in favour of \_\_\_\_\_ for Rs. \_\_\_\_\_

; It is ordered that you, the said \_\_\_\_\_  
 , be, and you are hereby, prohibited and restrained, until the further  
 order of this Court, from transferring or charging the property specified in the schedule  
 hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are  
 hereby, prohibited from receiving the same by purchase, gift or otherwise

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 .  
 \_\_\_\_\_ Judge.

#### SCHEDULE.

### No. 25.

#### Order for Payment to the Plaintiff, etc., of Money, etc., in the hands of a third party. (Or. 21, r. 56.)

(Title.)

To \_\_\_\_\_  
 WHEREAS the following property \_\_\_\_\_ has been attached in execution  
 of a decree in Suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 , passed on the \_\_\_\_\_  
 day of \_\_\_\_\_ 19 , in favour of \_\_\_\_\_ for Rs. \_\_\_\_\_

; It is ordered that the property so attached, consisting of Rs. \_\_\_\_\_  
 in money and Rs. \_\_\_\_\_ in currency-notes, or a  
 sufficient part thereof to satisfy the said decree, shall be paid over by you, the said  
 \_\_\_\_\_ to \_\_\_\_\_

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 .  
 \_\_\_\_\_ Judge.

### No. 26.

#### Notice to Attaching Creditor. (Or. 21, r. 58.)

(Title.)

To \_\_\_\_\_  
 WHEREAS \_\_\_\_\_ has made application to this Court for the  
 removal of attachment on \_\_\_\_\_ placed at your instance in execution  
 of the decree in Suit No. \_\_\_\_\_ of 19 , this is to give you notice to appear before  
 this Court on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ 19 ,  
 either in person or by a pleader of the Court duly instructed to support your claim, as  
 attaching creditor.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 .  
 \_\_\_\_\_ Judge.

## No. 27.

## Warrant of sale of Property in Execution of a Decree for Money.

(Or. 21, r. 66.)

(Title.)

To

The Bailiff of the Court.

THESE are to command you to sell by auction, after giving \_\_\_\_\_ days' previous notice, by affixing the same in this Court-house, and after making the proclamation, the \_\_\_\_\_ property attached under a warrant from this Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, in execution of a decree in favour of \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_, or so much of the said property as shall realize the sum of Rs. \_\_\_\_\_, being the \_\_\_\_\_ of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, Judge.

## No 28.

## Notice of the day fixed for settling a Sale Proclamation.

(Or. 21, r. 66.)

(Title.)

To

Judgment-debtor.

WHEREAS in the above-named suit \_\_\_\_\_, the decree-holder, has applied for the sale of \_\_\_\_\_; You are hereby informed \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ that the \_\_\_\_\_ has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, Judge.

## No. 29.

## Proclamation of Sale. (Or. 21, r. 66)

(Title.)

Notice is hereby given that, under r. 64 of Or. XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) \_\_\_\_\_ of \_\_\_\_\_ in which \_\_\_\_\_ mentioned in the margin, amounting with costs and interest \_\_\_\_\_ up to date of sale to the sum of \_\_\_\_\_ decided by the \_\_\_\_\_ was plaintiff and \_\_\_\_\_ was defendant.

The sale will be by public \_\_\_\_\_ and the property will be put up for sale in the lots specified in the schedule. \_\_\_\_\_ above-named as mentioned in the \_\_\_\_\_ to the said property, so far as \_\_\_\_\_ schedule against each lot.

In the absence of any order of postponement, the sale will be held by \_\_\_\_\_ at the monthly sale commencing at \_\_\_\_\_ o'clock on the \_\_\_\_\_ at \_\_\_\_\_ In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment creditors above-mentioned,

however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

*Conditions of Sale.*

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of r. 69 of Or. XXI.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immovable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this

day of

19

Judg.

*Schedule of Property.*

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

## No. 30.

Order on the Nazir for causing service of Proclamation of Sale  
(Or 21, r. 66.)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 , has been fixed for the sale of the said property copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published

Dated the                      day of                      19 .

SCHEDULE.

Judge.

## No. 31.

Certificate by Officer holding a Sale of the Deficiency  
of Price on a Re-sale of Property by reason of  
the Purchaser's Default. (Or. 21, r. 71.)

(Title)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of                      purchaser, there was a deficiency in the price of the said property amounting to Rs.                      , and that the expenses attending such re sale amounted to Rs.                      making a total of Rs.                      , which sum is recoverable from the defaulter.

Dated the                      day of                      19 .

Officer holding the sale.

## No. 32.

Notice to Person in Possession of Moveable Property  
sold in execution. (Or. 21, r. 79.)

(Title)

To

WHEREAS                      has become the purchaser at a public sale in execution of the decree in the above suit of                      now in your possession, you are hereby prohibited from delivering possession of the said                      to any person except the said                     

GIVEN under my hand and the seal of the Court, this                      day of                      19 .

Judge.

## No. 33.

Prohibitory Order against payment of Debts sold in Execution to  
any other than the Purchaser. (Or. 21, r. 79.)

(Title.)

To                      and to

WHEREAS                      has become the purchaser at a public sale in execution of the decree in the above suit of

being debts due from you  
to you ; It is ordered that you  
be, and you are hereby, prohibited from receiving, and you  
from making payment of, the said debt to any persons  
or persons except the said

GIVEN under my hand and the seal of the Court, this  
19.

day of

Judge.

### No. 34.

#### Prohibitory Order against the Transfer of shares sold in Execution. (Or. 21, r. 79.)

(Title.)

To  
and  
Secretary of  
Corporation,

WHEREAS has become the purchaser at a public sale  
in execution of the decree, in the above suit, of certain shares in the above Corporation  
that is to say, of standing in the name of your  
; It is ordered that you be, and you  
are hereby, prohibited from making any transfer of the said shares to any person except  
the said the purchaser aforesaid, or from receiving any dividends  
thereon; and you the said Corporation, from permitting any such transfer or making any such payment to  
any person except the said the purchaser,  
aforesaid.

GIVEN under my hand and the seal of the Court, this  
19.

day of

Judge.

### No. 35.

#### Certificate to Judgment-debtor authorizing him to mortgage, lease or sell Property. (Or. 21, r. 83.)

(Title.)

WHEREAS in execution of the decree passed in the above suit an order was made on  
the day of 19, for  
the sale of the under-mentioned of the Judgment-debtor  
and who said judgment-  
debtor, postponed the said sal decree by mort-  
gage, lease or private sale

This is to certify that the Court doth hereby authorize the said judgment-debtor to  
make the proposed mortgage, lease or sale within a period of  
from the date of this certificate; provided that all monies payable under such mortgage,  
lease or sale shall be paid into this Court and not to the said judgment-debtor.

*Description of property.*

GIVEN under my hand and the seal of the Court, this

day of

19  
Judge.

### No. 36.

#### Notice to show Cause why Sale should not be set aside. (Or. 21, rr. 90, 92.)

(Title.)

To  
WHEREAS the under-mentioned property was sold on the day of 19  
in execution of the decree passed in the above-named suit, and whereas the

decree-holder [or judgment-debtor], has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the \_\_\_\_\_ day of 19\_\_\_\_, when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19\_\_\_\_.

*Description of property.*

*Judge.*

### No. 37.

Notice to show Causa why Sale should not be set aside.  
(Or. 21, rr. 91, 92.)

*(Title.)*

To  
WHEREAS \_\_\_\_\_, the purchaser of the under-mentioned property sold on the \_\_\_\_\_ day of 19\_\_\_\_, in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that \_\_\_\_\_, the judgment-debtor, had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the \_\_\_\_\_ day of 19\_\_\_\_, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19\_\_\_\_.

*Description of property.*

*Judge.*

### No. 38.

Certificate of Sale of Land. (Or. 21, r. 94.)

*(Title.)*

THIS is to certify that \_\_\_\_\_ has been declared the purchaser at a sale by public auction on the \_\_\_\_\_ day of 19\_\_\_\_, of \_\_\_\_\_ in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19\_\_\_\_.

*Judge.*

### No. 39.

Order for Delivery to certified Purchaser of Land at a Sale in Execution. (Or. 21, r. 95)

*(Title.)*

To  
The Bailiff of the Court.

WHEREAS \_\_\_\_\_ has become the certified purchaser of \_\_\_\_\_ at a sale in execution of decree in suit No. \_\_\_\_\_ of 19\_\_\_\_; You are hereby ordered to put the said the certified purchaser, as aforesaid, in possession of the same.

GIVEN under my hand and the seal of the Court this \_\_\_\_\_ day of 19\_\_\_\_.

*Judge.*

## No. 40.

Summons to appear and answer Charge of Obstructing  
Execution of Decree. (Or. 21, r. 97.)

(Title.)

To

WHEREAS \_\_\_\_\_, the decree-holder in the above suit  
has complained to this Court that you have resisted (or obstructed) the officer charged  
with the execution of the warrant for possession:

You are hereby summoned to appear in this Court on the \_\_\_\_\_ day of  
19 \_\_\_\_ at \_\_\_\_\_ A.M. to answer the said complaint.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19 \_\_\_\_

Judge.

## No 41.

## Warrant of Committal. (Or. 21, r. 98.)

(Title.)

To

The Officer in Charge of the Jail at \_\_\_\_\_

WHEREAS the undermentioned property has been decreed to \_\_\_\_\_, the plaintiff  
in this suit, and whereas the Court is satisfied that \_\_\_\_\_ without any just cause  
resisted (or obstructed) and is still resisting (or obstructing) the said \_\_\_\_\_ in  
obtaining possession of the property, and whereas the said \_\_\_\_\_ has made  
application to this Court that the said \_\_\_\_\_ be committed to the civil prison;

You are hereby commanded and required to take and receive the said  
into the civil prison and to keep him imprisoned therein for the period of \_\_\_\_\_ days.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

Judge.

## No. 42.

## Authority of the Collector to stay Public Sale of Land. (S. 72.)

(Title.)

To

\_\_\_\_\_, Collector of \_\_\_\_\_

Sir,

In answer to your communication No. \_\_\_\_\_, dated \_\_\_\_\_, representing  
that the sale in execution of the decree in this suit of \_\_\_\_\_ land situate within  
your district is objectionable, I have the honour to inform you that you are authorized to  
make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,

Sir,

Your Most Obedient Servant,

Judge.

# APPENDIX F.

## SUPPLEMENTAL PROCEEDINGS.

### No. 1.

#### Warrant of Arrest before Judgment. (Or. 38, r. 1.)

(Title)

To  
The Bailiff of the Court

WHEREAS

the plaintiff in the above suit, claims the sum of Rs. as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to

Principal	.	.	.	.		
Interest	.	.	.	.		
Costs	.	.	.	.		
Total	.	.	.	.		

These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs.

for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

### No. 2.

#### Security for Appearance of a Defendant arrested before Judgment. (Or. 38, r. 2.)

(Title)

WHEREAS at the instance of the plaintiff in the above suit, the defendant, has been arrested and brought before the Court;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19

Witnesses.

1.  
2.

(Signed)



## No. 3.

Summons to Defendant to appear on Surety's Application  
for Discharge. (Or. 38, r. 3.)

(Title.)

To  
WHEREAS \_\_\_\_\_, who became surety on the \_\_\_\_\_ day of  
19 \_\_\_\_\_ for your appearance in the above suit, has applied to this  
Court to be discharged from his obligation ;

You are hereby summoned to appear in this Court in person on the  
day of 19 \_\_\_\_\_ at \_\_\_\_\_ A M, when the said application will be heard and  
determined

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
Judge.

## No. 4.

## Order for Committal. (Or. 38, r. 4.)

(Title.)

To  
WHEREAS \_\_\_\_\_, plaintiff in \_\_\_\_\_, has applied to the Court that  
security be taken for the appearance of  
that may be passed against him in the  
defendant to furnish such security,  
which he has failed to do; it is ordered that the said defendant \_\_\_\_\_ be com-  
mitted to the civil prison until the decision of the suit; or, if judgment be pronounced  
against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
Judge.

## No. 5.

Attachment before Judgment, with Order to call for Security for  
Fulfilment of Decree. (Or. 38, r. 5.)

(Title.)

To  
The Bailiff of the Court.

WHEREAS \_\_\_\_\_ has proved to the satisfaction of the Court that the  
defendant in the above suit \_\_\_\_\_ ;

These are to command you to call upon the said defendant \_\_\_\_\_ on or before the  
day of 19 \_\_\_\_\_ either to furnish security for the sum of rupees \_\_\_\_\_  
to produce and place at the disposal of this Court when required \_\_\_\_\_ or  
the value thereof, or such portion of the value as may be sufficient to satisfy any decree  
that may be passed against him; or to appear and show cause why he should not furnish  
security; and you are further ordered to attach the said \_\_\_\_\_ and keep the same  
under safe and secure custody until the further order of the Court; and you are further  
commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
with an endorsement certifying the date on which and the manner in which it has been  
executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
Judge.

## No. 6.

## Security for the Production of Property. (Or. 38, r. 6.)

(Title.)

WHEREAS at the instance of \_\_\_\_\_, the plaintiff in the above suit,  
the defendant has been directed by the Court to furnish security in the sum of  
Rs. \_\_\_\_\_ to produce and place at the disposal of the Court the property specified  
in the schedule hereunto annexed ;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs \_\_\_\_\_ or such sum not exceeding the said sum as the said Court may adjudge.

## SCHEDULE.

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
(Signed).

Witnesses.

1.

2

## No. 7.

## Attachment before Judgment, on Proof of Failure to furnish Security. (Or. 38, r. 6.)

(Title.)

To

The Bailiff of the Court.

WHEREAS \_\_\_\_\_ the plaintiff in this suit, has applied to the Court to call upon \_\_\_\_\_ the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said \_\_\_\_\_ to furnish such security, which he has failed to do; These are to command you to attach \_\_\_\_\_ the property of the said \_\_\_\_\_ and keep the same under safe and secure custody until the further order of the Court, and you are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
Judge.

## No. 8.

## Temporary Injunctions. (Or. 39, r. 1.)

(Title.)

Upon motion made unto this Court by \_\_\_\_\_, Pleader of [or Counsel for] the plaintiff A. B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the \_\_\_\_\_ day of \_\_\_\_\_, or the written statement of the said plaintiff filed on the \_\_\_\_\_ day of \_\_\_\_\_] and upon hearing the evidence of \_\_\_\_\_ and \_\_\_\_\_ in support thereof [if after notice and defendant not appearing; add, and also the evidence of \_\_\_\_\_ as to service of notice of this motion upon the defendant C. D.]: This Court doth order

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
Judge.

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus:—]

to restrain the defendants \_\_\_\_\_ and \_\_\_\_\_ from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the \_\_\_\_\_

, etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing or vending a book, called \_\_\_\_\_, or any part thereof, until the, etc.

[Where part only of a book is to be restrained.]

to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book as the plaintiff [or petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled \_\_\_\_\_ and also that part which is entitled \_\_\_\_\_ [or which is contained in page \_\_\_\_\_ to page \_\_\_\_\_ both inclusive] until \_\_\_\_\_, etc.

[In Patent cases] to restrain the defendant C. D., his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents to the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[To restrain the defendant C. D., his agents, servants, agents

\_\_\_\_\_

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 1[9].

Appointment of a Receiver (Or. 40, r. 1).

(Title.)

To

WHEREAS \_\_\_\_\_ has been attached in execution of a decree passed in the above suit on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in favour of \_\_\_\_\_; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Or. XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on \_\_\_\_\_ You will be entitled to remuneration at the rate of \_\_\_\_\_ per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.  
Judge.

<sup>1</sup> Forms 6 and 7 were renumbered 9 and 10, respectively, by S. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

No. <sup>1</sup>[10].

## Bond to be given by Receiver. (Or. 40, r. 3.)

(Title)

KNOW all men by these presents, that we, \_\_\_\_\_ and \_\_\_\_\_ and \_\_\_\_\_, are jointly and severally bound in \_\_\_\_\_ of the Court of \_\_\_\_\_ in Rs \_\_\_\_\_ to be paid to the said \_\_\_\_\_ or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

Whereas a plaint has been filed in this Court by \_\_\_\_\_ against \_\_\_\_\_ for the purpose of [*here insert the object of suit*]:

And whereas the said \_\_\_\_\_ has been appointed, by order of the above-mentioned Court to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of \_\_\_\_\_ in the said plaint named:

Now the condition of this obligation is such, that if the above-bonded \_\_\_\_\_ shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said \_\_\_\_\_ at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above bounden in the presence of \_\_\_\_\_

*Note*—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

<sup>1</sup> Forms 6 and 7 were renumbered 9 and 10, respectively, by S. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

## APPENDIX G.

### APPEAL, REFERENCE AND REVIEW.

#### No. 1.

#### Memorandum of Appeal. (Or. 41, r. 1.)

(Title.)

The  
at  
dated the  
objection to the decree appealed from, namely :—

above-named appeals to the  
from the decree of  
day of  
19, and sets forth the following grounds of  
in Suit No. of 19, Court

#### No. 2.

#### Security Bond to be given on order being made to stay Execution of Decree. (Or. 41, r. 5.)

(Title.)

To  
witnesseth :—

That . . . the plaintiff in Suit No. . . of 19, having sued . . . day of . . . an appeal from the . . .

By . . . the plaintiff . . . to execute the decree, the defendant . . . upon to furnish . . . of Rs. . . d covenant that . . . Court the said . . . defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this . . . day of . . . 19 . . .

#### SCHEDULE.

Witnessed by

1  
2

(Signed.)

#### No. 3.

#### Security Bond to be given during the Pendency of Appeal (Or. 41, r. 6.)

(Title.)

To  
witnesseth :—

That . . . the plaintiff in Suit No. . . of 19, having sued . . . the defendant, in this Court and a decree having been passed on the . . .

day of 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or restore any property which may be or shall duly act in accordance with the ver may be payable by him thereunder, payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

## SCHEDULE.

Witnessed by

(Signed)

1

2

## No. 4

## Security for Costs of Appeal. (Or. 41, r. 10)

(Title)

To

This security bond for costs of appeal executed by witnesseth:—

This appellant has preferred an appeal from the decree in Suit No. of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of

pay the balance of costs of  
of 19 .

## SCHEDULE.

Witnessed by

(Signed)

1.

2.

## No. 5.

## Intimation to Lower Court of Admission of Appeal. (Or. 41, r. 13.)

(Title)

To

You are hereby directed to take notice that , the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

## No. 6.

**Notice to Respondent of the Day fixed for the Hearing  
of the Appeal. (Or. 41, r. 14.)**

(Title.)

APPEAL from the  
day of 19 .  
To

of the Court of

dated the

*Respondent.*

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

[Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

## No. 7.

**Notice to a Party to a Suit not made a Party to the Appeal  
but joined by the Court as a Respondent. (Or. 41, r. 20)**

(Title.)

To

WHEREAS you were a party in suit No. of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal:

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 , at A.M. If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

## No. 8.

**Memorandum of Cross-Objection. (Or. 41, r. 22.)**

(Title.)

WHEREAS the has preferred an appeal to the , Court at from the decree of in Suit No. of 19 , dated the day of 19 , and whereas notice of the day fixed for hearing the appeal was served on the on the day of 19 , the files this memorandum of cross-objection under rule 22 of Or. XLI of the Code of Civil Procedure, 1918, and sets forth the following grounds of objection to the decree appealed from, namely:—

## No. 9.

## Decree in appeal. (Or. 41, r. 35.)

(Title.)

Appeal No. \_\_\_\_\_ of 19 \_\_\_\_\_ from the decree of the Court of \_\_\_\_\_  
dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
Memorandum of Appeal

Plaintiff.  
Defendant.

The above-named appeals to the Court at \_\_\_\_\_  
from the decree of \_\_\_\_\_ in the above suit, dated the  
day of \_\_\_\_\_ 19 \_\_\_\_\_, for the following reasons, namely:—

This appeal coming on for hearing on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
before \_\_\_\_\_, in the presence of \_\_\_\_\_ for the appellant  
and of \_\_\_\_\_ for the respondent, it is ordered:—

The costs of this appeal, as detailed below, amounting to Rs. \_\_\_\_\_, are to be  
paid by \_\_\_\_\_. The costs of the original suit are to be paid by \_\_\_\_\_.  
GIVEN under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

Judge.

## Costs of appeal.

Appellant	Amount.			Respondent.	Amount.		
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for memorandum of appeal				Stamp for power			
2. Do. for power				Do. for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
TOTAL				Total			

## No. 10

## Application to appeal in forma pauperis. (Or. 44, r. 1.)

(Title.)

I, \_\_\_\_\_ the above-named, present the accompanying  
memorandum of appeal from the decree in the above suit and apply to be allowed to  
appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property  
belonging to me with the estimated value thereof.

Dated the \_\_\_\_\_ day \_\_\_\_\_ 19 \_\_\_\_\_

(Signed)

Note.—Where the application is by the plaintiff he should state whether he applied  
and was allowed to sue in the Court of first instance as a pauper.

## No. 11.

## Notice of appeal in forma pauperis. (Or. 44, r. 1.)

(Title.)

WHEREAS the above-named \_\_\_\_\_ has applied to be allowed to appeal as a  
pauper from the decree in the above suit dated the \_\_\_\_\_ day of \_\_\_\_\_



19 and whereas the day of 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

---

### No. 12.

**Notice to show cause why a certificate of appeal to the King in Council should not be granted. (Or. 45, r. 3.)**

*(Title.)*

To

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of S. 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this day of 19 Registrar.

---

### No. 13.

**Notice to respondent of admission of Appeal to the King in Council. (Or. 45, r. 8.)**

*(Title.)*

To

WHEREAS the In the above case, has furnished the security and made the deposit required by Or. XLV, r. 7, of the Code of Civil Procedure, 1908:

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19.

GIVEN under my hand and the seal of the Court, this day 19 Registrar.

---

### No. 14.

**Notice to show Cause why a Review should not be granted. (Or. 47, r. 4.)**

*(Title.)*

To

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case. The day of 19 is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

## APPENDIX H.

### MISCELLANEOUS.

#### No. 1.

Agreement of Parties as to Issues to be tried. (Or. 14, r. 6.)

##### (Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ and filed as Exhibit \_\_\_\_\_ In the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, \_\_\_\_\_ will pay to the said \_\_\_\_\_ the sum of Rupees \_\_\_\_\_ (or such sum as the Court shall hold to be due thereon), and I, the said \_\_\_\_\_, will accept the said sum of Rupees \_\_\_\_\_ (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said \_\_\_\_\_ will do or abstain from doing, etc., etc.]

*Plaintiff.*

*Defendant.*

Witnesses:—

1.

2.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

#### No. 2.

Notice of application for the transfer of a suit to another Court for trial. (S. 24.)

In the Court of the District Judge of \_\_\_\_\_ No. \_\_\_\_\_ of 19\_\_\_\_

WHEREAS an application, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ has been made to this Court by \_\_\_\_\_ the \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19\_\_\_\_ now pending in the Court of the \_\_\_\_\_ at \_\_\_\_\_, in which \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant, for the transfer of the suit for trial to the Court of the \_\_\_\_\_ at \_\_\_\_\_

You are hereby informed that the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_  
*Judge.*

#### No. 3.

Notice of Payment into Court. (Or. 24, r. 2.)

##### (Title.)

TAKE notice that the defendant has paid into Court Rs \_\_\_\_\_ and says that that sum is sufficient to satisfy the plaintiff's claim in full.

*X. Y., Pleader for the defendant.*

*To Z., Pleader for the plaintiff.*

## No. 4.

## Notice to show cause. (General form).

(Title)

To

WHEREAS the above named  
has made application to this Court that

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ at \_\_\_\_\_ o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this  
19\_\_\_\_

day of

Judge.

## No. 5.

List of Documents produced by plaintiff  
defendant. (Or. 13, r. 1).

(Title.)

No.	Description of document.	Date, if any, which the docu- ment bears.	Signature of party or pleader.
1	2	3	4

## No. 6.

Notice to Parties of the Day fixed for Examination of a  
Witness about to leave the Jurisdiction.

(Or. 18, r. 16.)

(Title.)

To

Plaintiff (or defendant.)

WHEREAS in the above suit application has been made to the Court by \_\_\_\_\_ in that the examination of \_\_\_\_\_ a witness required by the said \_\_\_\_\_ in the said suit may be taken immediately; and it has been shown to the Court's satisfac- tion that the said witness is about to leave the Court's jurisdiction (or any other good and sufficient cause to be stated):

TAKE notice that the examination of the said witness will be taken by  
 the Court on the day of 19 .  
 Dated the day of 19 .  
 Judge.

## No. 7.

## Commission to examine absent Witness. (Or. 26, rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of is required by the in the above  
 suit: and whereas ; you are requested to take the evidence on interroga-  
 tories [or *tira roca*] of such witness , and you are hereby appointed  
 Commissioner for that purpose. The evidence will be taken in the presence of the  
 parties or their agents if in attendance who will be at liberty to question the witness on  
 the points specified, and you are further requested to make return of such evidence as  
 soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having  
 jurisdiction on your application.

A sum of Rs , being your fee in the above, is herewith forwarded  
 GIVEN under my hand and the seal of the Court, this day of 19 .  
 Judge.

## No. 8.

## Letter of Request. (Or. 26, r. 5.)

(Title.)

(Heading:—To the President and Judges of, etc., etc., or as the case may be.)

WHEREAS a suit is now pending in the  
 in which A. is plaintiff and C. D is defendant, And in the said suit the plaintiff  
 claims.

(Abstract of claim)

And whereas it has been represented to the said Court that it is necessary for the  
 purposes of justice and for the due determination of the matters in dispute between  
 the parties, that the following persons should be examined as witnesses upon oath  
 touching such matters, that is to say:

E. F., of  
 G. H., of and  
 I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your  
 honourable Court.

Now I , as the of the said Court, have  
 the honour to request, and do hereby request, that for the reasons aforesaid and for the  
 assistance of the said Court, you, as the President and Judges of the said , or  
 some one or more of you, will be pleased to summon the said witness (and such other  
 witnesses as the agents of the said plaintiff and defendant shall humbly request you in  
 writing so to summon) to attend at such time and place as you shall appoint before some  
 one or more of you or such other person as according to the procedure of your Court is  
 competent to take the examination of witnesses, and that you will cause such witnesses  
 to be examined upon the interrogatories which accompany this letter of request  
 (or *tira roca*) touching the said matters in question in the presence of the agents of the  
 plaintiff and defendant, or such of them as shall, on due notice given, attend such  
 examination.

used to cause the  
 s, letters, papers  
 identification, and  
 the seal of your  
 re, and to return  
 examination of other

witnesses to the said Court.

(Note—If the request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the last line of this form.)

### No. 9.

#### Commission for a Local Investigation, or to examine Accounts. (Or. 26, rr, 9, 11.)

(Title.)

To  
WHEREAS it is deemed requisite, for the purposes of this suit, that a commission should be issued; You are hereby appointed Commissioner for the purpose of .

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs ., being your fee in the above, is herewith forwarded

GIVEN under my hand and the seal of the Court, this . day of . 19 .  
Judge.

### No. 10.

#### Commission to make a Partition. (Or. 26, r. 13)

(Title.)

To  
WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 . You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as said property according to the best of your skill and the said decree, and to allot such shares to the several parties to award sums to be paid to any party by any other party the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. ., being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of .

19 .

Judge.

### No. 11.

#### Notice to minor Defendant and Guardian. (Or. 32. r. 3.)

(Title.)

To

Minor Defendant.  
Natural Guardian.

ted on the part of the plaintiff in the above suit to the minor defendant, you, the said . are hereby required to take notice . days from the service upon you of . made to this Court for the appointment of a guardian for the minor, . appoint . suit.

GIVEN under my hand and the seal of the Court, this . day of .  
19 .

Judge.

## No. 12.

**Notice to opposite Party of day fixed for hearing  
evidence of pauperism. (Or. 33, r. 6)**

(Title)

To \_\_\_\_\_  
 WHEREAS \_\_\_\_\_ has applied to this Court for permission to institute a suit against \_\_\_\_\_ *in forma pauperis* under Or. XXXIII of the Code of Civil Procedure, 1908, and whereas the Court sees no reason to reject the application; and whereas the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof:

Notice is hereby given to you under r. 6 of Or. XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.  
 \_\_\_\_\_  
 Judge

## No. 13.

**Notice to Surety of his Liability under a Decree (S. 145)**

(Title)

To \_\_\_\_\_  
 WHEREAS you \_\_\_\_\_ did on \_\_\_\_\_ become liable as surety for the performance of any decree which might be passed against the said \_\_\_\_\_ defendant in the above suit; and whereas a decree was passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ against the said defendant for the payment of \_\_\_\_\_, and whereas application has been made for execution of the said decree against you:

Take notice that you are hereby required on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.  
 \_\_\_\_\_  
 Judge

No. 14.  
Register of Civil Suits (Or, 4, r. 2)

Court of the \_\_\_\_\_ at \_\_\_\_\_  
REGISTER OF CIVIL SUITS IN THE YEAR 19 \_\_\_\_\_

Plaintiff.		Defendant.	Claim.	Appear- ance.	Judgment.	Appeal.	Execution.		Return of Execution.															
Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued	Day for parties to appear	Plaintiff.	Defendant.	Date	For whom	For what, or amount.	Date of decision of appeal	Judgment in appeal	Date of application.	Date of order.	Against whom.	For what and amount if money.	Amount of costs.	Amount paid into Court.	Arrested.	Minute of other Return than payment or Arrest, and date of every return.

NOTE.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only as the case may be, need be entered in the register





# THE SECOND SCHEDULE.

## ARBITRATION.

### ARBITRATION IN SUITS.

1 (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Parties to suits may apply for order of reference

(2) Every such application shall be in writing and shall state the matter sought to be referred. [S. 506, PARA. 1.]

### COMMENTARY.

**Object of this Schedule and Alterations**—Two questions of importance have arisen in connection with this subject: (1) Should any of the sections of the Arbitration Act of 1899, be incorporated in the Code; (2) should the right of appeal as now existing be altered, and if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present. We have determined therefore to leave the arbitration clauses much as they are in the present Code; but we have placed them in a schedule in the hope that at no distant date, they may be transferred into a comprehensive Arbitration Act.—See the Report of the Special Committee.

This para. corresponds to para. 1 of S. 506, C. P. Code of 1882 with some modifications. The words "*where in any suit all the parties interested agree*" have been substituted for the words "*if all the parties to a suit desire*," which occurred in the old section, the words "*in the suit*" which followed the words "*between them*" in the old section and the words "*in person or by their respective pleaders specially authorized in writing in this behalf*," which stood after the words, "*before the judgment is pronounced*" in the old section, have been omitted.

Sub-rule (2) is almost similar to para. 2 of S. 506 of the old Code, with the omission of the adjective "*particular*," which stood before the word "*matter*" in the old section.

\* The reason for the substitution of the words "*all the parties interested*" for the words "*all the parties to a suit*" which occurred in the old section is, that the words in the old section gave rise to much discussion as will appear from the cases reported in *Pitam Mal v. Sadiq Ali*, 24 A 229; *Chairman of the Purnea Municipality v. Siva Sankar*, 33 C 899 and *Lal Mohan v. Surya Kumar*, 11 C. W. N 1152; in those cases it has been held that the expression "*all the parties to a suit*" in S. 506, C. P. Code, 1882, does not include defendants who never appeared and between whom and the plaintiff, there was not any matter of difference. Thus a *pro forma* defendant, who never enters appearance and against whom no relief is asked by the plaintiff, is not a party "*interested*" within the meaning of the present rule, although he is made a defendant as a matter of form. It would thus appear that the word *interested* refers only to parties who are interested and not to the parties who are formal parties and not interested in the result of the suit. This would explain the object of the change.

The reason for the omission of the words "*in person, or by their respective pleaders specially authorized in writing in this behalf*" seems to be, that those words are quite unnecessary, when this rule is read with the r. 1 of Or. III, which provides that

any appearance, application etc. etc., required or authorized by law to be made or done by any party, may be made or done by a pleader duly appointed to act on his behalf.

The other changes introduced in this rule, are not material.

Section 506 and the following sections up to S. 522, C P Code, 1882 (r 16), deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference—*Sheo Dat v. Sheo Shankar*, 27 A. 53.

**Provisions of Sch. II whether mandatory.**—The use of the word "may" in

a matter of jurisdiction, no questions of hardship and no consideration of technicality can be permitted to affect the judgment. The rules as to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the Code.—*Per Mookerjee, J.* in *Loduram v. Nanda Lal*, 47 C 555: 31 C L J. 150: 55 I C. 747.

**Reference to be made by all the parties interested.**—In the case of a reference under this rule the agreement to refer and the application to the Court must have the concurrence of all parties and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to the order of reference by the Court—*Ghulam Jilani v. Muhammad Ahmed*, 29 I A. 51: 6 C.W.N. 226 (P.C.): 29 C. 167: 4 Bom. L R 161: 12 M. L J 77.

An application for reference was signed by some of the defendants personally, and on behalf of others by a pleader; but the *vakalatnama* was not signed by one of the defendants on whose behalf the pleader had signed it. *Held*, that the reference and the subsequent proceedings were invalid.—*Kadhu v. Baijot*, 29 A 423: 4 A L J 347 (24 A. 229 distinguished).

A party may be interested, though no relief is claimed against him.—*Subbarao v. Appadurai*, 48 M.L J. 142: 86 I C 839: A I.R. 1925 Mad 621. See notes under heading "Effect of award made without all parties joining," *post*.

To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. From the mere fact that certain parties are concerned, it does not follow that all the parties to the suit are concerned.—*Sestha v. Sestha*, 2 P. 777.

A defendant who is *ex parte* may be a party "interested" within the meaning of Sch II, Para I, C P Code.—*Patita Pavana v. Narasinga*, 42 M. 632: 36 M. L. J 538: 51 I. C 165

A person who is not a necessary party to a suit is not a party "interested" within the meaning of this para.—*Sabta Prasad v. Dharam*, 35 A 107. 18 I. C 609.—*Ajudhia Prasad v. Badar-ul-Husain*, 39 A. 489: 41 I. C 357: 15 A. L J 427.

The words "all the parties interested" in para. 1 of Sch II of the C. P Code only need be parties to the application of fact in each case as to who are the parties.—*Tapeswari*, 45 I C. 321: *Mahadev*, I C. 943: A I. R 1928 Bom 248

Where in a suit for partnership accounts, the plaintiff made a retired partner a formal party and no relief was asked against him but the defendant did not accept his exoneration from liability and that person having remained *ex parte* the other parties referred the matter to arbitration and an award was passed without notice to the *ex parte* defendant: *held* that it was a case in which the non-joinder did not vitiate the award—*Ibid*

As to the meaning of the "person interested" see also *Vythinatha A Vaitthilinga Mudaliar*, 18 M. L. T. 375 : (1915) M. W. N. 847.

All the parties interested in a suit must join in the reference to arbitration, and only some of the parties agree to refer, the award on such reference is void.—*De Nath v Jogendra Nath*, 64 I.C. 221.

The words "all the parties" . . . . . is 'para )  
to the succeeding . . . . . between th  
the suit,' and not . . . . . appears  
the Court, and bet . . . . . to the submission there was  
fact any matter in issue in the suit.—*Pisam Mal v. Sadiq Ali*, 24 A. 229. So  
*Lal Mohan v. Surja Kumar*, 11 C W N. 1152 and *Chairman of Purnea Municipal*  
*Siva Sankar*, 33 C. 899. *Sorajbala v. Jatendra*, 45 C. L. J. 458 : 103 I.C. 625 : A.  
1927 Cal. 619

Section 506, C. P. Code, 1882 (this para.), contemplates an application to the C in which all the parties join as applicants or parties consenting to the applica There is no provision made for giving an opportunity to an objecting party to be heard. *Tincowry Dey v. Fakir Chand*, 30 C. 218 : 7 C. W. N. 180

In a suit for partnership accounts two out of three defendants petitioned the C to refer the matters in dispute to arbitration. The representatives of the th defendant (who was then deceased) were not parties to the application. Held that reference was illegal and the award was void.—*Indur Subbarami v. Kanda Rajmanner*, 26 M. 47. *Subba Reddy v. Venkatasubba*, 51 M. 755 : 110 I.C. 51 : 55 M. L. J. 72. A. I. R. 1928 Mad. 519. *Ranga Reddy v. Chinnappa*, A. I. R. 1927 M. 1154 : 55 M. L. J. 78

are materia  
later . . . . . be set aside  
—*Da . . . . . Miran Baksh*  
*Sher . . . . .* cannot be a valid reference to arbitration in a su  
unless all the parties to the suit join in asking for the reference.—*Abdul Halim v. Abd*  
*Gafur*, A. I. R. 1928 Cal. 249; *Debendra v. Jogendra*, 64 I. C. 221; *Hassomal*  
*Kodommah*, 22 S. L. R. 135

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the d . . . . . the exception of two of  
that the order of reference was invalid not only against the parties who did not agree to the order of reference but also against those who had agreed and the award must be set aside (9 C. W. N. 873 *fold*, 11 C. W. N. 1152 *dissented from* : 29 C. 167 *refd.* 20); *Dooty Chand v. Mamaji Musaji*, 21 C. W. N. 387 : 25 C. L. J. 339 : 41 I. C. 295 (relied on in *Hara Prasanna v. Arabati*, 71 I. C. 326).

An application for arbitration on behalf of an absent plaintiff is not allowable without special authority.—*Goor Chunder v. Joogul Chunder*, 1 W. N. 80. See also *Bhagwan Dass v. Nund Lal*, 12 C. 173 (178).

One partner has no power, in the absence of special authority, to bind the firm by a submission to arbitration.—*Ram Bharat v. Ballu Mal*, 22 A. 135; *Firm Juran Mal v. Firm Paras Ram*, 118 I. C. 906; *Bhagwan v. Hiraji*, 34 Bom. L. R. 1112; *Gopala Das v. Baijnath*, 48 A. 229 : 51 I. C. 930; A. I. R. 1928 All. 238 : 24 A. L. J. 235; *Diwan Chand v. Punjab National Bank*, 193 I. C. 558; *Rajendra v. Panna Lal*, 36 C. W. N. 8 : A. I. R. 1932 Cal. 343. If some of the partners do not join in submitting a dispute to arbitration the award does not become invalid or ineffectual, as between the persons making the reference, it is binding on them especially when it has been acted upon. Where the arbitrators proceed to decide as well a matter that is not included in the reference and the parties concerned take part in the proceedings and accept the award when it is made and act upon it they must be deemed to have made a second submission in respect of that matter and cannot be allowed to repudiate the award (following 71 I. C. 660).—*Jagannath v. Dina Nath*, 124 I. C. 99.

The plaint in a suit by a firm was signed by the managing partner of the firm. Subsequently that person died and the suit was referred to arbitration, the application for arbitration having been signed by the succeeding managing partner and the pleader for the firm. Held, that the reference to arbitration was valid.—*Tajbhan v. Somnath*,

117 I. C. 783; A. I. R. 1930 Sind 40. An attorney acting for a firm and having the power to conduct a suit has no power to refer a matter to arbitration unless he is authorised specifically for that purpose.—*Rajendra v. Panna Lal*, 36 C. W. N. 8; A. I. R. 1932 Cal. 343.

A manager of a joint Hindu family has the power to bind the family by reference of a dispute with any outsider regarding the family property to arbitration provided such reference be for the benefit of the family. Minors in the family are bound by the reference.—*Balaji v. Nana*, 7 B. 287; *Hardeo Sahai v. Gauri Shankar*, 28 A. 35 (27 C. 229; 12 M. 483 followed); *Annada Krishna v. Jogendra Nath*, 8 C. L. J. 294; *Guran Ditta v. Pokkar Ram*, 8 L. 693; 104 I. C. 202; A. I. R. 1927 Lah. 362; *Ram Bilas v. Birich Singh*, 12 P. L. J. 733.

The Judge intimated that he should refer the suit to arbitration, and allowed a certain time to the parties to object to that course. No objection was made within such time, and thereupon the Judge referred the cause to arbitrators named by him. Held that the reference was not warranted, there having been no express consent by the parties.—*Degumbur v. Ram Preet*, Marsh. 517; 2 Illy. 583 (referred to *Beni Modhub v. Preet Nath*, 23 C. 803; 5 C. W. N. 258).

Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration, the judgment-debtor is a necessary party to the reference.—*Dasdeo v. Saraswati*, 64 I. C. 469.

"Apply."—This para requires that all the parties interested should not only agree to a reference, but that they should all apply to the Court for an order of reference.—*Dooley Chand v. Mamuji Musaji*, 21 C. W. N. 387; 25 C. L. J. 399; 41 I. C. 295. Therefore, if one of the parties interested agrees to a reference, but changes his mind subsequently and does not join in the application, the application for an order of reference should be refused.—*Miran Bakhsh v. Sher Muhammad*, 9 I. C. 195. Where on a compromise petition in a partition suit, the Court passed a preliminary decree in terms of the compromise the first portion of which set out the respective shares of the parties, and the latter parties did not object to the proceedings by which the order of reference was passed, the preliminary decree as to the first portion of the compromise is valid, but as to the latter portion of reference in as much as there was no order.—*Tara Prasanna v. Asoke*, 33 C. W. N. 4, 370. See also *Dwarka v. Atul*, 46 C. L. J. 353.

Where there is a minor who is represented by a referring the matter to arbitration must ascertain course.—*Hanuman v. Ram Lakhan*, 28 A. L. J. 923. Paragraph 1 does not necessarily mean that all the contesting parties must necessarily join in arbitration; where the interest of the defendants can be secured, such as in a suit for money, there is no bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration (approving 2 P. 777).—*Bankey Lal v. Chotey Miyan*, 53 A. 669; 29 A. L. J. 442; 133 I. C. 31; A. I. R. 1931 All. 453.

Application for reference by pleader.—A pleader unless specially authorized cannot apply for reference to arbitration; and if there is nothing to show that the reference was acquiesced in by the subsequent conduct of the parties the reference is invalid.—*Sheo Das v. Birji Nandan*, 7 C. W. N. 343; *Azizdin v. Motiram*, 96 I. C. 277; A. I. R. 1926 Lah. 563. A *Vakalatnama* in general terms is wholly insufficient.—*Ram Jiauan v. Kali Choran*, 29 A. 429; 4 A. L. J. 342. See also *Kadhu v. Baljit*, 29 A. 423; 4 A. L. J. 347.

The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person or their pleaders specially authorized in that behalf.—*Bhriogoo Roy v. Bhagrath*, W. R. (1864), Act X, 41; *Gazze v. Hamid Buksh*, 16 W. R. 150; *Guran Ditta v. Pokkar Ram*, 8 L. 693; 104 I. C. 202; A. I. R. 1927 Lah. 362.

Effect of Acquiescence and Tacit Consent.—Where a party after signing a petition for reference to arbitration does not make any objection to the appointment of the arbitrator on the day when the order of reference is made, he must be taken to have tacitly acquiesced in the course adopted by the Court, and such acquiescence

amounts to a fresh submission.—*Halimbhai v. Shanker Sai*, 10 B. 381 (9 B. H. C. R. 117 and 8 W. R. 171 followed). See also *Dharnidhar v. Sakharam*, 71 I. C. 860.

When a party authorized his agent to conduct a suit, and the agent consented to the case being referred to arbitration, which was carried on with the assent and knowledge of the party, he cannot afterwards apply to set aside the award on the ground that his pleader had no authority in writing to refer the matter to arbitration.—*Unniraman v. Chathan*, 9 M. 451 (followed in *Saturjit v. Dulhin Gulab Kuer*, 24 C. 469, which has been distinguished in *Shoo Das v. Brij Nandan*, 7 C. W. N. 343). See also *Abdul Hamid v. Razuddin*, 30 A. 32 and *Luxmbai v. Hajos Widina*, 23 B. 629, where it has been held that the absence of a written authority did not invalidate the order of reference. These cases have been distinguished in *Beni Madhub v. Preet Nath*, 28 C. 203; 5 C. W. N. 268, where it has been held that a mere silence on the part of a person, not a party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference, cannot make the award binding on him, even though, during the arbitration, he produced through a servant a document before the arbitrators in obedience to a summons, and declined to produce others.

Where three out of the four plaintiffs did not join in the reference to arbitration but all the plaintiffs were represented before the arbitrators by their pleader: held, that the defect in the reference was cured by subsequent conduct of the parties.—*Jai Mal v. Trib Ram*, 122 I. C. 100; 31 P. L. R. 192; A. I. R. 1930 Lab. 523.

In a suit pending before arbitrators, a person who is made a co-plaintiff on application, and makes no objection to the arbitration, is bound by the award.—*Shiva Nath v. Kishan Mohun*, 5 W. R. 130.

**Effect of award made without all parties joining.**—An arbitration award, not being one which has been made upon a reference by all the parties to the suit, is not capable of being converted into a final decree, though it is evidence against any party who agreed to the reference.—*Bafooy Chunder v. Bhyrrib Chunder*, 15 W. R. 427. See also *Basao v. Jagannath*, 131 I. C. 448; A. I. R. 1931 Oudh 127; 8 O. W. N. 71; 14 O. L. J. 184; *Tey Singh v. Ghazi Ram*, 49 A. 812; A. I. R. 1927 All. 503; 102 I. C. 236.

The agreement to refer to arbitration and the application to the Court founded upon it must have the concurrence of all the parties concerned and if all the defendants including those who have not appeared and contested the suit, do not join in the reference to arbitration the award is wholly invalid and not merely against those who joined in it, and is liable to be set aside on the application of any of the parties; *Dooly Chand v. Manuji Musaji*, 21 C. W. N. 387; 25 C. L. J. 839; 41 I. C. 295 (9 C. W. N. 873 followed); 11 C. W. N. 1152 dissected from, 29 C. 167, *refd. to*; *Giriya Nath v. Kanai Lal*, 27 C. L. J. 339; 43 I. C. 169; *Fansindra Nath v. Dwarka Nath*, 25 C. W. N. 832 (29 A. 429, 21 C. W. N. 387, 27 C. L. J. 339 *refd. to*); *Laduram v. Nandalal*, 47 C. 553; 31 C. L. J. 153; 55 I. C. 742; *Potata Pavana v. Narasinga*, 42 M. 632; 36 M. L. J. 538; 51 I. C. 155; *Indur Sultarani v. Kandadai Rajamannar*, 26 M. 47; *Karam Hibi v. Muhammed Alam*, 119 I. C. 235; A. I. R. 1929 Lab. 477; *Muhammad Sharif v. Muhammad Ismail*, 121 I. C. 378; 31 P. L. R. 55; *Venkatasubbayya v. Venkataramanayya*, 126 I. C. 785; A. I. R. 1970 Mad. 646; *Venkataramanaya Charlu v. Vasudeva Charulu*, 96 I. C. 273. But according to the Allahabad High Court, a defendant who does not put in an appearance and does not contest the suit is not a "party" within the meaning of this rule, and the non-joinder of such a party in the application for an order of reference will not invalidate an award.—*Ishordas v. Keshab Das*, 32 A. 657; *Ajudhia Prasad v. Badarut Husain*, 39 A. 489, 493. This view has been modified and it has now been held that a person who has chosen to remain absent and allows *ex parte* proceedings to be taken against him is not necessarily a person not interested in the subject-matter of the suit, an important test is to consider whether he is a necessary party or such that if not originally impleaded the Court would direct him to be joined under Or. I. r. 10.—*Sharafat Ali v. Bhagwati*, A. I. R. 1929 All. 763. Where an award is declared invalid because one of the parties to the proceeding did not join in the reference the award cannot be upheld in part if the decree is a joint one (2 P. 777 distinguished).—*Mahomed Husain v. Nanki*, A. I. R. 1931 All. 242; (1931) A. L. J. 100; 130 I. C. 271. Such an illegal award may be set aside in revision.—*Tey Singh v. Ghazi Ram*, 49 A. 812; 102 I. C. 236; A. I. R. 1927 All. 563.

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of property, such member being deaf and dumb, and not a party to the arbitration award. He afterwards sued for separate possession against the others who in

## Para 1.

their defence denied his title to property. The arbitrators, on account of physical infirmity, of the family, *Gunga Sahas*.

Application for reference shall be in writing. . . . of the second g. is directory of render the 78, C. P. Code, subsequently 1 C. W. N 92

(followed in *Abdul Hamid v. Razuddin*, 30 A. 32; referred to in *Mahabir v. Manohar*, 22 A. L. J. 67) Where the agreement was in writing but was not signed by one of the parties, it was held that para. 1 of this Schedule did not require that the writing should of necessity be signed.—*Umed Singh v. Sobhag Mal*, 43 I. A. 1 43 C. 290 (P. C.): 20 C. W. N. 137; 23 C. L. J. 130; 30 M. L. J. 67; 18 Bom. L. R. 308; 32 I. C. 161; *Sharafat Ali v. Bhagwati*, A I R. 1929 All. 763. The actual signature of a party is not necessary on the application for reference.—*Muhammad Sulaiman v. Mazhar*, been held that the record made b is sufficient.—*Mahabir v. Manohar* 540; 22 A. L. J. 67. But the awa lady was a party and the application was signed by her pleader, who was not authorized to do so by his *Vakalatnam*: *Fanindra v. Dwarka* 25 C. W. N 832

The omission of one of the parties to a case referred to arbitration to sign the petition of reference is not conclusive that he was not a party to the reference and the award will not be invalid merely on that ground.—*Tekat Mal v. Anandamoy*, 38 I. C 226 Where nobody signs on behalf of a party and nobody professes to verify the petitions before the Court on his behalf, he is not a party to the reference to arbitration.—*Mahomed Husain v. Nanhu*, 29 A. L. J. 100; 130 I C 291; A I R. 1931 All. 242.

"And shall state the matter sought to be referred"—An agreement as

application of the parties.—*Ibid*.

"Before judgment"—A suit may be referred to arbitration after a reference is made to the High Court.—*Ramlal v. Deoraj*, 44 A. 91; 64 I C. 601; A. I. R. 1922 All. 173; 19 A. L. J. 876.

Power of appellate Court to make reference.—Under S. 107, an appellate Court has the power with the consent of the parties of reference to settle a dispute in an appeal *Nund Lal* 12 C 173

M. 18; *Kussool Bibee v. amna Das*, 7 N W. P. 21 *Contra*.—*Jugges Sur*

An appellate Court, in remanding a case, has no power to order the first Court to call upon the parties to the suit to agree to arbitration, or, on their refusing to do so, to appoint arbitrators.—*Puna Bibee v. Khoda Buksh*, 22 W R 396

under S. 566, remitted and is to arbitration, v. *Fakir Chand*,

Power of Court to refer matters pending in it.

award, gives no rights as an award or as a compromise.—*Peddapa'ayam Bodachari v.* C P. C.—166

*Peddapalayam Munirachari*, 65 I. C. 92: (1921) M. W. N. 756: 14 L. W. 666. See also *Ram Protap v. Durga Prasad*, 53 I. A. 1: 53 C. 258: 43 C. L. J. 14: 92 I. C. 633: A. I. R. 1925 P. C. 293: 49 M. L. J. 812: 28 Bom. L. R. 217: 24 A. L. J. 13.

"Matter in difference."—The mere failure or disability to pay the amounts due to the plaintiff on the part of the defendant partner does not necessarily constitute a difference unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment, or the time or manner of payment.—*Darwoodbhai v. Abdul Kader*, 33 Bom. L. R. 51: 130 I. C. 588: A. I. R. 1931 Bom. 164.

**Arbitration under Special Acts.**—Under the general law the parties to suits for arrears of rent, may, with the leave of the Court, refer the matters in suits between them to arbitration.—*Khanma Gowala v. Buduloo Khan*, 6 C. 251: 7 C. L. R. 92; *Goshain Girdharji v. Durga Devi*, 2 A. 119: *Gauri Shankar v. Babban Lal*, 14 A. 347. *Contra*,—*Fahimunnissa v. Ajudhia Prasad*, 6 A. 170.

A suit under S. 16 of the Religious Endowments Act (XX of 1863) may be referred to arbitration.—*Perumal Naik v. Saminatha*, 19 M. 498. See also *Protap Chandra v. Brojo Nath*, 19 C. 275; and *Karedla Vijayaraghava v. Vemavarapu*, 26 M. 361.

An executor, against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased.—*Ghallabhai Atmaram v. Nandubai*, 21 B. 335 (reversing in appeal, 20 B. 238); *Gopi Ras v. Baij Nath Rai*, 128 I. C. 817: A. I. R. 1930 All. 840: 28 A. L. J. 1584.

When a complaint has been preferred to a Criminal Court, and the Magistrate has directed that the subject matter of the complaint be referred to arbitration, if the parties consent and proceed to such reference, the award may be enforced under the provisions of the C. P. Code.—*Sheo Nund Ras v. Mahanund Ram*, 1 Agra 45.

**Withdrawal of suit after reference to arbitration.**—After a case has been referred to arbitration on the application of the parties under this para, the Court has no power to allow one of the parties to withdraw from the suit with liberty to bring a fresh suit. An order of Court permitting the withdrawal of the suit and liberty to bring a fresh suit is *ultra vires* and a fresh suit instituted in pursuance of the permission thus given, is barred by S. 21 of the Specific Relief Act (I of 1877), and also by the second clause of S. 373, C. P. Code, 1882 (Or. XXIII, r. 1).—*Sheoambar v. Dcodat*, 9 A. 168. See, however, *Gouri Shankar v. Maida Koor*, 31 C. 516.

**Where a party dies after application but before order of reference.**—In such a case, the death of the party does not operate as a revocation of the authority of the proposed arbitration. If, therefore, the right to sue survives, it is competent to the Court to make an order of reference after substitution of the representative of the deceased party.—*Dutta v. Khedu*, 33 A. 615; *Binayakdas v. Sasi*, 26 C. W. N. 804: 70 I. C. 459: A. I. R. 1922 Cal. 226.

**Execution Proceedings.**—This Schedule does not apply to execution proceedings and a reference to arbitration by an execution Court is without jurisdiction.—*T. Wang v. Sonawangdi*, 52 C. 559: 79 C. W. N. 886: 42 C. L. J. 26: 87 I. C. 633: A. I. R. 1925 Cal. 812.

**Form.**—For Form of application for an order of reference, see the Appendix to this Schedule, Form No. 1.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.  
[S. 507, PARA. 1.]

## COMMENTARY.

**Alteration.**—This para. corresponds to para. 1 of S. 507 of the C. P. Code, 1882 with this modification that the word "appointed" has been substituted for the word "nominated," which occurred in the old section. The other changes are not material.

The second para. of S. 507 has been omitted from this para. and inserted in para. 5 with some amendments.

**Appointment of Arbitrator.**—Before a Judge refers a case for arbitration he should ascertain whether the persons nominated are willing to accept the office, and till he has

done so, any nomination of an arbitrator by him, without the application or consent of the parties, is illegal—*Troylucko Nath v. The Collector of Beasbroom*, W. R. (1864) 339.

Where a party has selected an arbitrator, he cannot ask the Court to appoint another arbitrator.—*Shiam Sundar v. Bhairon Singh*, (1906) A. W. N. 51 : 3 A. L. J. 185.

The Code gives no power to a Court to force arbitrators on an unwilling suitor. The award of arbitrators so appointed will not be enforced.—*Shao Nath alias Burray Kaka v. Ram Nath alias Chotay Kaka*, 5 W. R. 21 (P. C.) : 10 M. I. A. 413 ; *Jagannath v. Chhedi*, 51 A. 501 : 27 A. L. J. 182 : 115 I. C. 611 : A. I. R. 1929 All. 144.

A pleader of one of the parties to the suit should not be appointed as arbitrator—*Kali Prasanna v. Raiani Kant*, 25 C. 141 (referred to in *Mahomed Wahiduddin v. Hakimani*, 29 C. 278 : 6 C. W. N. 235).

3. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit. [S. 503.]

## COMMENTARY.

**Alterations.**—Suh-rule (1) corresponds to S 508 of the C. P. Code, 1882, with this modification that the words "for the making" have been substituted for the words "for the delivery," which occurred in the old section.

Suh rule (2) corresponds to para 2 of S 506, C. P. Code, 1882, with change of language only, there being no change in the meaning.

**Scope**—The order under this Rule, suit, though entered, cannot be said to be a reference.

**Direction of Court to refer to arbitration for reference to arbitration by the parties.**—The Court may refer to arbitration and apply to the parties to refuse to do so, even after the hearing of the case by the Court.—*Shao Nath v. Harbins*, 33

A. 626 : 8 A. L. J. 652 : *Subbayya v. Papayya*, A. I. R. 1929 Mad. 789

**Matters in difference between the parties.**—Where all matters in difference between the parties in the suit were referred to arbitration under an order of Court. *Held*, that the arbitrators had power to award interest after the date of the submission, and to deal with the costs of reference and award.—*Mohan Lal v. Nathu Ram*, 1 B. L. R. O. C. 144

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration, made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. *Held*, that as it was clear that the reference to arbitration gave the arbitrators full powers, not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed by the award.—*Jawahar Singh v. Mul Raj*, 8 A. 449.

The parties cannot have a piece-meal arbitration.—*Wadero Ali v. Khushaldas*, A. I. R. 1932 Sind 77.

Where the whole case is referred to the arbitrator and he is called on to decide all questions that were in dispute between the parties, the fact that the Court failed to frame issues noting the points in dispute between the parties and refer them specifically



does not matter.—*Muhammad Aijaz v. Basant Bai*, 54 A. 297; A. I. R. 1932 All. 665. The Court has power to refer a question of jurisdiction, namely, whether the cause of action arose in one place or another, to the arbitrator.—*Ibid*.

A decision of arbitrators in a matter not in difference between the parties nor referred to them, is null and void for want of jurisdiction.—*Moshahel Singh v. Konumty Bawa*, 15 W. R. 172.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, precludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.—*Bhagoti v. Chandan*, 11 C. 386 (P. C.); 12 I. A. 67.

**Power of Arbitrators to deal with the question of costs.**—*See notes under para. 13*

**Courts shall fix time for delivery of award.**—Paragraph 3 provides that the Court shall fix such time as it thinks reasonable for the making of the award and shall specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award. Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph, requiring the Court to fix a reasonable time for the making of the award, is not merely directory but is mandatory and imperative. Hence the provisions of this para should be strictly followed. It has, however, been held that, if no time is fixed for the delivery of the award in the order of reference, but the Court subsequently makes an order under para 8 for enlarging the time and fixes in that order the time within which the award is to be made, the omission to fix the time in original the order of reference is not fatal to the award—*Har Narain v. Bhagwant Kuar*, 13 A. 300 (P. C.); 18 I. A. 55 (reversing 10 A. 137). In *Robindra Deb v. J-gendra Deb*, 27 C. W. N. 420; 80 I. C. 459; A. I. R. 1923 Cal 410, it was held by Rankin, J., recalling the order of reference, that the provision in para 3 of Sch II, viz., "the Court shall fix such time as it thinks reasonable for the making of the award," is mandatory; accordingly, a reference which gave the arbitrators leave to extend for such further time as they may allow themselves was bad and of no effect. *See also Gauri Shankar v. Babban Lal*, 14 A. 347; *Luchman Das v. Abporkash*, 30 A. 169.

The Madras High Court in *Muthukutti Nayakan v. Acha Nayakan*, 18 M. 22 (referring to *Har Narain v. Bhagwant Kuar*, 10 A. 137), held that an award is not invalid merely because no time has been fixed for the making of the award, S. 508, C. P. Code, 1882, being directory and not mandatory. This view of the Madras High Court is opposed to the Privy Council case reported in 13 A. 300. In *Umarsey Premji v. Shamji Kanyt*, 13 B 119, the Bombay High Court has held that an award made but not filed within the time specified by order of the Court is not invalid. *See also Mahan Lal v. Baz Khan*, 46 I C, 324, *Radhakant v. Jaladhar*, 37 I. C. 844.

In the case of an arbitration made under the order of a Court it is sufficient if the award is made, completed and signed by the arbitrators within the period limited under S. 508, C. P Code (this rule). It is not necessary for the validity of such award that it should actually reach the hands of the Court within such period.—*Asadullah v. Mohammad Nur*, 27 A. 459 (22 M 22, 13 B 119, and 13 A. 300 followed; 8 A 543 dissented from). *See also Debendra Nath v. Sarbamangola*, 8 C. W. N. 916.

The time fixed by the Court for the delivery of an award was the 16th of April, 1900. The award was made and signed by the arbitrators and handed over to a peon of the Court on the 16th of April, 1900, but it did not in fact reach the Court within time.—*Sitaram v. Sitaram*, 22 M. 22 referred to).

The Court, in directing the arbitrators for sending in the date for delivery of the award, the award is B. L. R. S. N. 13; 10 W. R. 206. *See also Lachman Das v. Abporkash*, 30 A. 169 (to A. 548 followed).

Where no time was originally fixed within which the award was to be made, it is open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made, and an umpire appointed, within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their

submission by reason of the notice—*Pestonjee v. Manockjee & Co.*, 10 W. R. 51 (P. C.); 12 M. I. A. 112. See also *Ablakhee Koor v. Oodun Singh*, 15 W. R. 331.

Power of Courts to extend time for making award.—See notes under rule 8.

Clause (2)—“The Court shall not deal with such matter in the same suit.”—When once a matter is referred to arbitration, it is not competent to the Court, under the second paragraph of this para. to “deal with” the matter in difference between the parties except as provided in this schedule. There is no rule of that Schedule which authorizes the Court to revoke the authority conferred on an arbitrator and to appoint a new one except in cases strictly within the purview of S 510, C. P. Code, 1892 (r. 10).

After a reference to arbitration the Courts' power to deal with the case is of a very limited nature, as for example if there is no occasion to remit the award under para. 14 and if the party's application to set aside the award under para. 15 is dismissed, the Court can act, if at all under para. 12 only.—*Kaikabad v. Khambatta*, 124 I. C. 339; A. I. R. 1930 Lah. 26; 31 P. L. R. 668.

When, on account of the arbitration clause in a partnership agreement or lease or

might be referred and the Court might defer the consideration of the question of appointment of a Receiver in the view that the parties by agreement between themselves have disentitled themselves to the auxiliary relief which otherwise they could have from the Court.—*Surendra v. Sushil*, 55 C. 249; 109 I. C. 759; A. I. R. 1928 Cal. 256.

9 A. 168; *Debi Churn v. Bipra Prosad*, 1 C. W. N. 186

It is not open to the Court to hear the suit on the merits unless the arbitration has been superseded under paras. 5, 8 or 15—*Jamna v. Nasib*, 24 A 312 Similarly, the Court has no power to confirm an order passed by arbitrators making payments of their fees a condition precedent to the hearing of the reference, there being no paragraph in this Schedule empowering the Court to make an order in that behalf.—*Steel v. Roberts*, 6 C. 809

The parties to a suit applied for an adjournment on the ground that they had agreed to refer the matters in difference between them to arbitration. The Court accordingly referred the matters in difference to arbitration and an award was made. Held, that under the circumstances, the further hearing of the suit was barred.—*Sahg Ram v. Jhunna Kuor*, 4 A 546

Where the proceeding has assumed the character of a reference to arbitration it is governed by the second schedule and the party cannot institute a separate suit. It cannot be said that there cannot be arbitration proceedings until a valid reference has been made.—*Raoji v. Ratansi*, 54 B 696; 32 Bom. L. R. 389; 126 I. C. 305; A. I. R. 1930 Bom. 431.

Where the costs incurred prior to the reference to arbitration were also referred to arbitration, the Court cannot award costs. *Held*, once the reference is made, the costs incurred prior to the reference are also referred to arbitration. *Gaya*,

over the arbitration during the course of the arbitration may have been made in the suit 832.

A suit was referred to three arbitrators who were to make an award within six months. An agreement was come to by the parties to withdraw the matters from arbitration and to appear to have been afterwards made an application by the plaintiff to have the suit restored to the file of the Court.—*Held*, that the suit was still pending, the

arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.—*Gopi Nath v. Shib Chandra*, 6 B. L. R. App. 74.

... was subsequently of the arbitration again referred the matter to the arbitrators after the heirs of the deceased plaintiffs were brought upon the record. The arbitrators made a fresh award, and the Court passed a decree accordingly. *Held*, that the Court had no power to deal with the matter.—*Pachkouri Ram v. Nand Rai*, 30 A. 505.

**Revocation of, or withdrawal from, Arbitration.**—It is almost an universal rule that a submission to arbitration is irrevocable.—*Surubjeet Narain v. Gouree Pershad*, 7 W. R. 269.

When persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted.—*Pestoryjee v. Manockjee & Co.*, 10 W. R. 51 (P. C.); 12 M. I. A. 112 (confirming the judgment reported in 3 M. H. C. R. 183). Followed in *Nainsukh Rai v. Umarai*, 7 A. 273, and also in *Sultan Muhammad v. Sheo Prasad*, 20 A. 145. See also *Ram Coomar v. Kala Chand*, 21 W. R. 395; *Ablakhee Koor v. Oodun Singh*, 15 W. R. 339 and *Dansidhar v. Sital Prasad*, 29 A. 13, where it has been held that if it be proved that the arbitrator is in fraudulent collusion with one of the opposite side, that may be a good ground for revocation. A reference to arbitration made under an order of Court cannot be revoked at the instance of a party.—*Nirmones v. Mohima Chunder*, 17 W. R. 516.

An agreement to refer an existing dispute to arbitration enforcement as any other lawful contract; and a submission once made is not, without just and sufficient cause. *Perumalla*, 27 M. 112. See also *Nagasawmy Naik v. (3 M H C R 82 overruled)*; 3 M. H. C. R. 183 and *Sheo Narain v. Bala Rao*, 137 I. C. 198; 30 A. L. J. 331; A. I. R. 1932 All. 348 (which also held that the fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding against a party is no ground for its revocation).

An agreement by parties to a suit to have a case decided in accordance with the statement made on oath by a third party, is in the nature of a reference to arbitration under the C. P. Code, and the revocation of such a reference is not prohibited by the law.—*Lekhraj Singh v. Dullima Kuar*, 4 A. 302.

If, after a reference to arbitration, it transpires that the arbitrator has been acting as a muktear of one of the parties, the other party is entitled to withdraw from the arbitration, and the reference is liable to be set aside. *See* *of revocation of arbitration by the parties*.—*Ma*

A submission to arbitration can only be revoked on good grounds. Long and unreasonable delay in the conduct of the proceedings is a good ground for revocation of the agreement for submission. When an agreement to refer has been duly revoked the Court is incompetent to order it to be filed under S. 523, C. P. Code, 1882.—*Coley v. Da Costa*, 17 C. 200.

In the course of arbitration proceedings in Calcutta, the parties telegraphed to the arbitrators to stay further proceedings. *Held*, that the telegrams sent to arbitrators did not amount to a revocation of their authority.—*Kelhe v. Fraser*, 2 C. 445.

**Form.**—For Form of order of reference, see Form No. 2, to the Appendix to this Schedule.

4. (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more, order to provide for difference of opinion.

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or

- (c) by empowering the arbitrators to appoint an umpire; or  
(d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act. [S 509.]

## COMMENTARY.

**Alterations**—This para. corresponds to S. 509, C. P. Code, 1882, with some alterations in the language of clauses (b) and (d). The changes are of a verbal character; no change seems to have been made in the meaning.

**Provision as to difference of opinion among Arbitrators**—Where a case has been referred to arbitration, but no provision has been made in the order of reference for any difference of opinion among them. *Held*, that the Court should have ordered that the arbitrators should appoint an umpire; or should have declared that the decision of the majority should prevail; or should have appointed an umpire; or should have made such arrangements as the parties would have consented to; or if they could not agree such arrangement should be made as it thought fit. Where this was not done, case with instructions to submit the case  
*aradhan v. Radha Nath*, 2 B L. R. S. N.  
" " *Ram Jeewan*, 14 W R 150

*v. Krishna Banary*, 8 C. L. J. 475) where an order of reference to arbitration does not provide for difference of opinion among the arbitrators, and for authorizing a majority to decide the case, the award will, on objection being taken, be set aside—*Futteh Singh v. Gangi*, 4 W. R. 4 (*distinguished* in 8 C. L. J. 475)

Where the parties agreed to refer a suit to arbitration, but no provision was made that the decision by the majority of arbitrators should be binding, and two out of five arbitrators withdrew, *held*, that the decision by the remaining three who constituted the majority was invalid—*Gurupathappa v. Narasingappa*, 7 M 174

In an agreement to refer certain matters to arbitration, no provision was made for difference of opinion between the arbitrators by appointing an umpire or otherwise. The arbitrators being unable to agree, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire, and one arbitrator and a decree followed. *Held*, that the award was not legal, inasmuch as the agreement to refer gave the Court no power to appoint an umpire and required that the award should be made by the arbitrators named by the parties—*Muhammad Abid v. Muhammad Ashgar*, 8 A 64

An arbitrator cannot be an arbitrator as well as an umpire.—*Kafurchand v. Jeuraj*, 36 C. W. N 332.

**Effect of award made contrary to Order of Reference.**—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting, when the final act of arbitration is done, is essential to the validity of the award—*Nand Ram v. Fakir Chand*, 7 A. 523 See, however, *Nadwar Chand v. Gobinda Chander*, 2 C L J 61

A case was referred to the arbitration of four persons, the award being made by any two of the arbitrators being ab the other three. Two of the arbitrators were consent of the parties, ceased to act as a other arbitrators. *Held*, that the award made award—*Debendra v. Aubhay*, 9 C 905: 12 C L. R. 525.

**Umpire appointed contrary to the terms of the agreement**—Decision by majority of arbitrators. *Held*, that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to

appoint an umpire under this section was controlled and limited by that stipulation; and that the umpire not being one of the seven persons named in the submission, there was no valid award.—*Barrocho v. A. D. Souza*, 7 M. H. C. R. 72.

**Delegation of duty by Arbitrator.**—An arbitrator cannot delegate his duties to a third person.—*Jamna v. Nasib*, 24 A. 312. But he may delegate, to a third person, the performance of acts of a ministerial character.—*Buta v. Municipal Committee of Lahore*, 29 C. 854 (P. C.); 29 I. A. 168; 7 C. W. N. 82; 4 Bom. L. R. 673; 87 P. R. 1902.

**Arbitrators cannot delegate their power of appointment of an umpire.**—Where by a contract the matters in dispute between the parties were referred to the arbitration of two persons, with a provision that, if they disagree, they should appoint an umpire, held, that the arbitrators could not delegate the power of appointment of umpire conferred on them by the contract to a third person.—*Smith v. Ludha Ghella*, 17 B 129.

**Extension of period for submission by umpire.**—As in the case of an arbitrator, so in the case of an umpire, a Court has power to extend the period within which the award is to be submitted. The Court can extend the time allowed to an umpire under this section.—*Kupu Rau v. Venkataromayyar*, 4 M. 311.

**Power of Court to appoint arbitrator in certain cases.**

5. (1) In any of the following cases, namely:—

(a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or  
[S. 507 (?) and S. 510.]

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting,  
or [S. 510.]

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire [S. 511.]

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit. [S. 510.]

## COMMENTARY.

**Alterations.**—This para. embodies in a concise and amended form the provisions contained in Ss. 507 (2), 510 and 511 of the C. P. Code of 1882. The provisions of the old sections have been recast and summarized in this rule by change of language and phraseology, as will appear on a comparison of the provisions of the old sections with this para.

**Date of Court under this paragraph.**—The Court cannot, on the happening of any event, annul or supersede the award made by the arbitrator or arbitrators. Where, therefore, one of the three arbitrators dies, the arbitrator nor made an award by the other two was valid. *Bapiraju*, 12 M. 113;

*Thakardas v. Narain*, 2 L. L. J. 637; 56 I. C. 644.

**Death, negligence, refusal or incapacity of arbitrators to act.**—Where a case was referred to the arbitration of three persons, and the parties agreed to be bound by the award of the majority, the award of two is valid. *Bapiraju*, 12 M. 113.

*Bapiraju*, 12 M. 113.

When a person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting as umpire; *Gadadhar v. Ganga Prasad*, 4 B. L. R. O. C. 89.

The Court has no power to revoke the authority conferred on an arbitrator and to appoint a new one, except in cases falling strictly within the purview of this para. where "the scope and the object of the reference cannot be executed." It is only in those cases, apparently, that the authority conferred on arbitrators can be revoked "for good cause," the cause being such as is contemplated in that section, as where "an arbitrator refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return to India at an early date."—*Halimkhan v. Shankar Sai*, 10 B. 381.

Matters in dispute were referred to the arbitration of five persons of whom four made their award. Subsequently the same arbitrators granted an application for re-hearing. Before the matter was re-heard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. *Held*, that the award was not valid and final.—*Hoan Jad Mathoor v. Nathoo Shahoo*, 3 C. 375; 1 C. L. R. 455.

**Appointment of new arbitrator or umpire.**—It was held under the corresponding S. 507 of the old Code, that the Court had no power, on the happening of either of the events referred to in Cl. (a) of this paragraph, to appoint a new arbitrator without the consent of all the parties to the reference.—*Fugardin v. Moidinso*, 6 M. 414; *Bopin v. Annoda*, 18 C. 324. But under this paragraph, the Court has power to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in Cl. (a). In cases covered by Cl. (b), it is open to the Court to appoint only one new arbitrator in place of several old arbitrators.—*Rampersad v. Juggernath*, 6 C. L. R. 1. But the Court has no power to appoint an arbitrator or umpire under sub-para. (2) unless notice as required in sub-para. (1) is given and the party served with the notice has been given an opportunity of being heard.—*Abdul Ghani v. Din Daul*, 41 A. 578; 50 I. C. 655; 17 A. L. J. 643; *Thakar Das v. Ram Das*, 7 L. L. J. 163; 88 I. C. 975; A. I. R. 1925 Lah. 574; *Ram Lagan v. Phatanoam*, 111 I. C. 559; A. I. R. 1928 All. 674; 27 A. L. J. 31; *Peran Lal v. Rup Chand*, 29 A. L. J. 612; A. I. R. 1931 All. 761. An irregularity of procedure in the appointment of a new arbitrator is cured by consent of parties.—*Mahmud Sheikh v. Messrs Kankinagrah Co.*, 28 C. W. N. 634; A. I. R. 1924 Cal. 665. An arbitrator who is legally appointed and objects to the award cannot be stopped from questioning the award. *17 I. C. 344*; A. I. R. 1929 All.

the failure of one of the parties to appoint a new arbitrator after formal notice to do so.—*Vishwas v. Bhalchandra*, 33 Bom. L. R. 1022; 134 I. C. 733; A. I. R. 1931 Bom. 529.

Where the arbitrator refused to act and the Court acting *suo motu* superseded the reference to arbitration, *held*, that order superseding the arbitration was contrary to law and should be set aside.—*Budh Sen v. Nanak Chand*, 129 I. C. 162 : 7 O. W. N. 1043.

**Appointment of Umpire.**—The appointment of an umpire under S. 511, C. P. Code, 1882, is required where there are two or more arbitrators to provide for any difference of opinion amongst them; but not where, with the consent of the Court, only one arbitrator has been appointed.—*Mahabeer v. Juggar Nath*, 25 W. R. 11.

Provision should be made in the order of reference for the appointment of an umpire in case of difference of opinion among the arbitrators.—*Hareedhan v. Radha Nath*, 2 B. L. R. S. N. 14—15 : 10 W. R. 398.

Award by umpire and one arbitrator without provision for the appointment of an umpire—agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by the Court *Held*, that there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.—*Muhammed Abid v. Muhammad Asghar*, 8 A. 64.

Where the terms of a submission to arbitration were that an umpire should be selected by seven persons named, and the umpire first selected declined to act, and the Court of its own motion appointed an umpire who was not one of the seven persons named in the submission. *Held*, that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire was controlled and limited by that stipulation; and that the umpire not being one of the seven persons named, there was no valid award.—*Barracho v. A. D. Souza*, 7 M. II. C. R. 72.

**Where arbitrator refuses to act.**—It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are Judges chosen by the parties themselves, and that such Judges are willing to settle the disputes referred to them. Thus, where an arbitrator refused to act, and the Court, instead of accepting his refusal, directed him to proceed and make an award, it was held that the award was invalid.—*Shib Charan v. Retiram*, 7 A. 20; *Lal Khan v. Kashmiri Lal*, 124 I. C. 676 : 31 P. L. R. 386 : A. I. R. 1930 Lah. 125 (relying on 7 A. 20). But where the Court requested the arbitrators to proceed in the following terms: "The arbitrators are requested to finish the work. The protest does not matter. It is unjustified. The Court has confidence in the arbitrators. They should not retire, for that would mean that plaintiff succeeds in his tactics": *Held*, that the Judge's order was not one which forced or compelled the arbitrators to resume the arbitration against their own wish, but was in the nature of a request made to the arbitrators to reconsider their decisions and was consequently valid in law.—*Keshavlal v. Bai Laxmi*, 52 B. 568 : 112 I. C. 284 : 30 Bom. L. R. 950 : A. I. R. 1929 Bom. 50. Where one of the arbitrators, before duly signing the award, tendered his resignation in a letter to the Judge, but was induced to withdraw it, and afterwards signed the award, *held*, that the award was valid.—*Joy Mangul v. Mohun Ram*, 23 W. R. 429 (P. C.) (affirming 15 W. R. 38).

**Order superseding arbitration.**—If a Court refers a dispute to arbitration, it cannot proceed with the suit until it supersedes the arbitration. If it does proceed without supersession, it acts without jurisdiction.—*Ganesh Prasad v. Damodar Das*, 10 A. L. J. 23 : *Jamna v. Nasib*, 24 A. 312.

**Form.**—For Form of appointment of new arbitrator, see Appendix to this Schedule, Form No. 3.

**Powers of arbitrator or umpire** paragraph 4 or paragraph 5 shall have the like powers appointed under as if his name had been inserted in the order of paragraph 4 or 5. reference. [S. 512.]

## COMMENTARY.

**Alterations**—This para. corresponds to S. 512, C. P. Code, 1882, with some verbal changes only.

7. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

Summoning witnesses and default.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court. [S. 513.]

### COMMENTARY.

No alteration.—This para. exactly corresponds to S. 513, C. P. Code, 1882.

"Refusing to give their evidence"—The words refusing to give their evidence in Sch II, para. 7 (2) are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him. A person therefore who elects not to produce any evidence cannot be said to refuse to give evidence within the meaning of the enactment.—*Jonan v. Norain Das*, 8 A. L. J. 929; 11 I. C. 259.

Arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration—*Krishna Kanta v. Bidya Sundari*, 2 B. L. R. App. 25

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration and in such case shall proceed with the suit. [S. 514.]

Extension of time for making award.

### COMMENTARY.

Alterations in the rule.—This para. corresponds to S. 514, C. P. Code, 1882, with some alterations and omissions

The words "where the arbitrators or the umpire cannot complete the award" have been substituted for the words "if from the want of the necessary evidence or information, or from any other cause the arbitrators," which occurred in the old section. By the above change, the scope of the present rule has been enlarged, as it includes any cause for non completion of the award within the time fixed, but under the old section certain causes were specifically mentioned.

The words "either before or after the expiration of the period fixed," have been added after the words "from time to time." The other changes are merely verbal.

Extension of time for making an award.—The application to extend the time must be made before the award is made. The time for making the award is 300 (P.C.); view of the effect that no award has been made after 31 M. 103 (F.B. 69. Section 148



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arbitrator extended the period to another date and the award was filed on that date but i  
hore a date a day previous to the date originally fixed and it was contended that the exten  
sion of time was illegal and so the award was invalid: *held*, that the award is not final till i  
has been promulgated either by its being filed in Court or by its being announced to the  
parties and hence the award was valid.—*Harbhajan v. Mewa*, 110 I. C. 748: A. I. R. 1922  
Lah. 753 (following 49 I. C. 522 and 89 P. R. 1907).

Application for the extension of the period for the submission of an award and order  
thereon should be made in writing and recorded.—*Monji Premji v. Malyakel Koj*  
*Assan*, 3 M. 59. But see *Sakri Chand v. Ambarim*, 26 Bom. L. R. 280; 80 I. C. 260  
A. I. R. 1924 Bom. 380, which has held that an application for extension of time need not  
necessarily be in writing.

As in the case of an arbitrator, so in the case of an umpire, a Court has power to  
exteod the period within which the award is to be submitted. The Court can extend the  
time allowed to an umpire under S. 509, C. P. Code, 1882.—*Kupu Rau v. Venkata*  
*ramayyar*, 4 M. 311.

A Court has power, to act under this para. at any time before the award is actually  
made whether the time previously limited for making the award has expired or not.—*Ram*  
*Manohar v. Lal Behari*, 14 A. 343 (13 A. 300 referred to).

Where the arbitrator returned the papers to Court stating his inconvenience to  
proceed with the matter on the due date but he never declined 'to arbitrate: *held* that the  
Court had jurisdiction to send the papers back to arbitrator and extend the time.—*Muhammad*  
*Aijaz v. Basant Bai*, 54 A. 297; A. I. R. 1932 All. 665.

An order extending time for the presentation of an award upon application presented  
within time is not bad in law by reason of its having been made after the expiry of the  
term which it purports to extend.—*Suppu v. Govinda Charyar*, 11 M. 85.

**Award made out of time**—An award made after the expiration of the period  
allowed by the Court may be set aside under r. 15, Cl. (c). See notes under r. 15, *post*.

Where a Judge dismissed a suit for faili  
for filing of the award even though the  
dismissal is improper and would be set aside  
the arbitrator, the parties need not be perse.  
*Bhagat*, 3 P. L. T. 346; 65 I. C. 144.

If the arbitrators fail to submit their award within the time prescribed, Sch. II of  
para 8 of C. P. Code applies and it is within the discretion of the Court after hearing  
both the parties to the suit to make an order under that article superseding the arbitration  
and proceeding with the suit.—*Hrishikesh Das v. Lal Mohan*, 57 I. C. 890.

The time fixed by the Court for the delivery of an award was the 16th April, 1900.  
The award was actually completed and signed and made over to a peon of the Court on  
the same day, but, as it was received by the peon after Court hours, it did not in fact reach  
the hands of the Court, until the next day. *Held*, that the award was within time.—*Sita*  
*Rani v. Bhawan Din*, 26 A. 105 (8 A. 543 and 548, 13 A. 300, 13 B. 119, and 21 M. 22  
referred to).

An award made, that is completed and signed but not submitted to the Court within  
the time limited for delivering the same in Court is valid in law.—*Asadullah v.*  
*Muhammad Nur*, 27 A. 459 (22 M. 22, 13 B. 119, 13 A. 300 followed; 8 A. 543 dissented  
from). See also *Debendra Nath v. Sarbasinghola*, 8 C. W. N. 916 Where by an order  
of reference an arbitrator is given power to extend the time for making the award, he can  
only extend the time before the time originally fixed for making the award has expired.—*Co-operative Hindusthan Bank Ltd. v. Bholu Noth*, 19 C. W. N. 165.

**Estoppel by conduct**.—The parties to a reference may be estopped by their conduct  
from impeaching the validity of an award on the ground that it was made after time.—*Patto*  
*Kumari v. Upendranath*, 4 P. L. J. 265, 270; *Kishen Lal v. Jai Lal*, 52 I. C. 352.

**Order superseding the arbitration**—Before the Court can proceed to hear the  
suit it is necessary that it should itself make, either under this para. or para. 5, an order  
superseding the reference to arbitration.—*Jamna Kunwar v. Nasir Ali*, 24 A. 312.

There is no rule of law except S. 151 of the Code which can authorise a Court to revise its own order superseding a reference to arbitration—*Salle Singh v. Mullo Singh*, 138 I. C. 524; A. I. R. 1932 All. 656.

**Appeal.**—Under S. 104 (1) (a) an appeal lies from an order superseding arbitration where the award has not been completed within the period fixed by the Court. See notes under that section of the Code.

Where umpire may arbitrate in lieu of arbitrators 9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree. [S. 515.]

### COMMENTARY.

**Alterations**—This para. corresponds to S. 515, C. P. Code, 1882. The word "where" has been substituted for the word "when" in the beginning. No other change has been made.

**Decision by umpire.**—Where the parties prayed to the Court to appoint two arbitrators and an umpire, and to refer the case to them for decision, and undertook to abide by such decision as might be passed by them unanimously or by the majority of them. *Held*, that an award by the umpire alone, the arbitrators being unable to decide, was valid.—*Kun Rau v. Venkटरामायर*, 4 M. 311.

In a reference to arbitration one of the arbitrators absented himself. After expiry of the time for the award the umpire approached the Court for direction. The Court directed him to proceed under Cl (a) *Held*, that it was a fair inference that the arbitrators had allowed the time to expire without making an award and that under the circumstances the umpire by himself was entitled to make an award.—*Ram Logan v. Phataugan*, 111 I. C. 559; A. I. R. 1928 All. 674; 27 A. L. J. 31. Where an umpire is appointed, r. 9 gives him power to enter on the reference without the arbitrators.—*Ibid*

10. Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties. [S. 516.]

### COMMENTARY.

**Alterations**—This para. corresponds to S. 516, C. P. Code, 1882, with the substitution of the word "where" for "when"

**Signatures.**—Para. 10 applies only to awards which are made when the suit is dismissed by the Court. An award made on a reference need not be in writing or signed by the Court. P. L. J. 733.

**Persons making the award shall sign it**—It is necessary, that all the arbitrators agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of each other.—*Muthukutti v. Acha Nayakan*, 18 M. 22. See also *Bhabasundari v. Makhmal*, 8 B. L. R. 178. But see *per* Narman, J., in *Jai Mangal v. Mohan Ram*, 8 B. L. R. 130-note and 319-note; 12 W. R. 397.

An award must be signed by all the arbitrators before it is filed. *Ayyasami v. Appandai*, 38 M. L. J. 145; 54 I. C. 912; but not necessarily at the same time and place.—*Abdul Rahman v. Shahabuddin*, 1 L. 461; 55 I. C. 893. An award which was signed by an arbitrator after it was filed in Court is invalid.—*Ramesh Chandra v. Karunamoyi*, 33 C. 498; *Kanakku v. Nagalinga*, 32 M. 510.

Under para. 10 of Sch. II of the C. P. Code, it is incumbent upon all the arbitrators to sign the award before it is filed in Court and a Court has no power to allow any of them to sign it after it is duly submitted. A decree passed in accordance with an award which was signed by some of the arbitrators after its submission to Court is illegal and invalid—*Khudiram v. Chand Charan*, 1 P. L. J. 306; 2 P. L. W. 377.

For the meaning of the word "made" see *Umersey Premji v. Shamji Kumbhi*, 13 B. 119, in which it has been held that the word "made" in Ss. 514 and 521, C. P. Code, 1882, does not include the filing of the award.

Even if the writing out of the award be a ministerial act, it does not become an award until it is signed by the arbitrators—*Rundas v. Jodgi*, 107 I. C. 532; A. I. R. 1928 Pat. 231.

Where the agreement was that the decision of the majority of the arbitrators shall prevail, the signatures of the three out of five arbitrators who decided one way rendered the award valid—*Bhoj Nath v. Sriva Nandan*, 7 O. W. N. 541; 127 I. C. 254; A. I. R. 1930 Oudh 389.

Draft of award was signed by all the five arbitrators, but the fair copy was signed by only four of the arbitrators. Held, that the award was complete at the date of rough draft, and that its validity was not affected by the subsequent occurrences.—*Kula Nugabushanani v. Kula Seshachalam*, 1 M. H. C. R. 178.

**Cause it to be filed.**—A Court is not competent to act on an award unless it is not only signed by all the arbitrators but is also properly placed before the Court by the arbitrators and by no other persons. Where award was sent to Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court, the award was not properly placed before the Court, and, as such, could not be acted upon by the Court (A. I. R. 1928 Pat. 231, rel.; 1 P. L. J. 90; 6 B. 663, expl.; 6 W. R. 95, rel.)—*Ram Narain v. Lalji*, 118 I. C. 606; A. I. R. 1929 Pat. 178.

**Arbitrator's presence at meetings essential to the validity of the award.**—The presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award.—*Nand Ram v. Fakir Chand*, 7 A. 523. The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding.—*Benode v. Pran Chandra*, 14 C. L. J. 143; 11 I. C. 898, *Duttar Chand v. Dharamdhar*, A. I. R. 1929 Cal. 831.

**"Together with any depositions and documents."**—Although the arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions and exhibits—*Jagat Sunder v. Sonatan Bysak*, 5 B. L. R. 357.

When a Court has referred a suit to arbitration, it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration and to return the original records of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators—*Nursing Chunder v. Nuffer Chunder*, 17 C. 832. The omission of the arbitrators to file with their award the depositions and documents may lead to the inference that they are guilty of legal misconduct.—*Yusuf v. Riyasat*, 1 Luck. 139; 93 I. C. 445; A. I. R. 1926 Oudh 307.

Para. 10 undoubtedly contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators but does not oblige them to keep such a record—*Sanghi v. Kisan*, 119 I. C. 694; A. I. R. 1929 Nag. 254. It is not essential that in every case the ordinary rules of judicial procedure should be followed by an arbitrator inquiring into a matter—*Gudipoodi v. Kotipalli*, 105 I. C. 105; A. I. R. 1928 Mad. 48.

**Notice of filing to be given to parties.**—When a Court passed a decree in the terms of an award without giving notice of the filing of the award under this rule, it was held that the Court had acted with material irregularity and the judgment was liable to be set aside in revision.—*Ranjit v. Bissay Ram*, 94 I. C. 115; A. I. R. 1926 Cal. 1018; *Ringasami v. Muttusami*, 11 M. 144 (followed in *Chatarbuj v. Ganesh*, 20 A. 474). See also *Ram Kumar v. Khushal Chand*, 107 I. C. 665; A. I. R. 1928 Nag. 166. Where the Judge refuses to grant the prayer asking for an opportunity to give evidence in support of objections to the award and passes a decree the decree is invalidated.—*Ibid.* The fact that the parties might have received knowledge of the award having been filed in Court *affondo* does not amount to such a notice.—*Punoo Ram v. Nebhi Raj*, 119 I. C. 331; A. I. R. 1930 Lah. 228. The mere signature by a party to an award does not necessarily

in all cases estop him from afterwards disputing its correctness; nor does the mere signature necessarily remove all objection. *Rahman*, 7 R. 136; 117 I. C. 574; A. I. R. 1925 Bom. 22. If the order of the Court were shown the order of the Court re order-sheet as an acknowledgment, it *Bata Krishna*, 7 P. L. T. 739; *Siroj* 458; 103 I. C. 625.

When the arbitrator himself brings in the award, the Court is bound to give notice to the parties that the award has been filed, and the Court cannot pass a decree unless such notice has been given. If the parties or their pleaders bring in the award and ask that it should be filed, and the Court informs them that they should file objections within the time then no notice is necessary.—*Valchand v. Gulba*, 28 Bom. L. R. 511; 95 I. C. 547; A. I. R. 1926 Bom. 312.

But if the award is brought in by the arbitrator, the Court is bound to give notice to the parties that the award has been filed, and the Court cannot pass a decree unless such notice has been given. If the parties or their pleaders bring in the award and ask that it should be filed, and the Court informs them that they should file objections within the time then no notice is necessary.—*Valchand v. Gulba*, 28 Bom. L. R. 511; 95 I. C. 547; A. I. R. 1926 Bom. 312.

Form.—For Form of award see Form No. 5 in the Appendix to this schedule.

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award. [S. 517.]

## COMMENTARY.

**Alterations.**—This para. corresponds to S. 517 of the C. P. Code, with some alterations. The words "with the leave" have been substituted for the words "with the consent"; and the words "shall order such opinion to be added to" have been substituted for the words "such opinion shall be added to," which occurred in the old section.

**Special case.**—The scope of the special case contemplated by this para. is limited to questions of law.—*Laxman v. Ram Chandra*, 48 B. 663; 26 Bom. L. R. 836; 84 I. C. 378; A. I. R. 1925 Bom. 22.

1080: A. I. R. 1931 P. C. 289; 61 M. L. J. 623.

**Appeal.**—Under S. 104 (1) (b) an appeal lies from an order on an award stated in the form of a special case. See notes under that section of the Code.

**Form.**—For Form of special cases, see Form No. 4, given in the Appendix to this schedule.

Power to modify or correct award. 12. The Court may, by order, modify or correct an award—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission. [S. 518.]

### COMMENTARY.

**Alterations**—This rule corresponds to S. 518 of the C. P. Code, 1882, with some alterations and additions. The word "and" has been substituted for the word "provided," which occurred in Cl. (a) of the old section; and Cl. (c) has been newly added.

"The Court may, by order, modify or correct an award."—The Court has no power to modify or correct an award except in the three cases mentioned in this rule. Where a Court modifies an award because it takes a view different from that held by the arbitrator it acts without jurisdiction.—*Forma Dit v. Dujju* (1916) Punj. Rec. No. 78, p. 243; 35 I. C. 847; *Gopal Dinkar v. Ganesh Narayan*, 45 B. 512; 59 I. C. 785; *Aftab Begam v. Haji Abdul*, 22 A. L. J. 816; 81 I. C. 525; A. I. R. 1924 All. 800; *Anant Ram v. Gurditta*, 7 L. 327; 98 I. C. 336; A. I. R. 1926 Lah. 519.

When, under para. 12 of the second schedule, the Court proceeds to correct an award in a case where a severable matter not referred has been dealt with, it does so by cancelling that part of the award and the part so cancelled is set aside for all purposes. Neither para. 12 nor para. 14 is directed to such a confusion of jurisdiction as the present case discloses.—*Rimpratap Chauria v. Durgoprasad Chauria*, 28 C. W. N. 424.

An award in a suit for cancellation of a deed of gift and for recovery of Rs. 680 to the effect that the deed of gift was cancelled and Rs. 680 to the defendant for which the plaintiff should be the possessor's mortgage in favour of the defendant, was not set aside under para. 12 or 14 and it could not be set aside on any of the grounds mentioned in para. 15.—*Ganesh v. Bhikham*, 3 Luck. 1 (F. D.); 107 I. C. 545; A. I. R. 1928 Oudh. 1.

"When a part of the award is upon a matter not referred to arbitration"—The addition, in a judgment according to an award, of a trifling direction upon a matter not referred to the arbitrators, which was quite separable from the other parts of the award, and did not affect the decision of the matter referred, was held not to affect the finality of the judgment.—*Huro Soonduree v. Sreedhur*, 17 W. R. 352.

The arbitrators to whom the matters in difference in two suits were referred for arbitration, made an award for payment of certain sums of money to plaintiff by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments and the first Court modified it to that extent. The appellate Court which allowing the power of the arbitrators to direct payment by instalments reduced the number of instalments. Held, that the reference gave the arbitrators full powers to direct payment by instalments and that the lower appellate Court was wrong in reducing the number of the instalments.—*Jawahar Singh v. Mul Raj* 8 A. 449. Even if the order fixing the instalments is erroneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of form which could be amended without affecting the decision.—*Karkabad v. Khambatta*, 11 L. 342; 124 I. C. 339; 31 P. L. R. 668; A. I. R. 1930 Lah. 26.

The decision of arbitrators in a matter not in difference between the parties, not referred to them, is null and void for want of jurisdiction.—*Moshahel Singh v. Konomutti* 15 W. R. 172. See also *Mumtaz Ali v. Sakhat Ali*, 28 I. A. 190; 23 A. 394 (P. C.); *Bula v. Municipal Committee of Lahore*, 29 I. A. 168; 29 C. 854 (P. C.); 87 P. R. 1902; 7 C. W. N. 82; 4 Bom. L. R. 673. If the arbitrators went beyond the scope of their authority and determined a matter not referred to arbitration, it is the duty of the Court to take action under para. 12 or 14 (a) of Sch. II.—*Hanu Ram v. Dhanna*, 110 I. C. 401; A. I. R. 1928 Lah. 915.

"And such part can be separated from the others."—See notes under para. 14.

**Where the award is imperfect in form**—Para. 12 applies only if the "imperfect in form" exists in the award at the time when it is filed in Court by the arbitrator.

## Paras. 12-14.

and not if it comes into existence at a subsequent stage on the happening of an unanticipated event.—*Karkabad v. Khambhatta*, 124 I. C. 339; 31 P. L. R. 668; A. I. R. 1930 Lab. 26; 11 L. 342.

"Where the award contains a clerical mistake," etc.—Under para. 12 (b) and (c) of Sch. II to the C. P. Code, the only power the Court has is either to amend without affecting the decision or to rectify a clerical mistake or an error arising from an accidental slip or omission. It has no power to correct an error of calculation or arithmetic and award a sum different from that awarded by the arbitrator.—*Gopal Dinkar v. Ginesh Narayan*, 45 B. 512; 22 Bom. L. R. 1416; 59 I. C. 785; *Shiam Lal v. Parshotam Das*, 41 A. 277; 58 I. C. 585.

An award was made upon the basis of figures contained in certain documents assessed according to the award without subsequently found that there was a mistake and the party who was affected by the mistake applied for correction of the error. *Held*, that the application was not to correct an error patent and apparent on the face of the record but to go much deeper into the matter and to reopen the accounts and the figures at which the arbitrators had arrived and the remedy lay either by review or by appeal. *Maham Lakshmi v. Maham Batchayya*, 53 M. L. J. 38; A. I. R. 1927 Mad 720; 103 I. C. 829. See also *Ramanathan v. Muthiah Chetty*, 43 M. 429.

"Or contains any obvious error"—In a suit for dissolution of partnership and for accounts plaintiff claimed interest which the defendant denied. The matter in dispute was referred to arbitration, one of the points referred being whether the defendant was liable for any money and, if so, the amount due. *Held*, that it was not an error on the part of the arbitrator to include in his award the sum payable by the defendant as interest both on sums advanced to the firm and on those advanced to defendant for the personal use and also for the period before and after the suit and up to the date of the award—*Jaharmal v. Birinchi*, 56 I. C. 941.

Appeal—Under S. 104 (1) (c), an appeal lies from an order modifying or correcting an award. See notes under that section of the Code.

13. The Court may also make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them. [S. 519.]

## COMMENTARY.

Alteration.—This para corresponds to S. 519, C. P. Code, 1882, with this modification that the word "where" has been substituted for the word "if" after the word "arbitration."

Power of arbitrators to deal with costs.—The parties to a suit being referred to the the to be pay with the question of costs and directed the award to stand good, except so far as it awarded costs.—*Dagdusa Tslakchand v. Bhukan Govind*, 9 B. 82; *Amolak v. Charan Das*, 52 P. R. 1913; 16 P. W. R. 1913, 17 I. C. 684.

In the absence of any provision in the award in the matter of costs it is open to the Court seized of the proceedings to make an order as to costs under para. 13.—*Ramcharan v. Jasoda*, 5 Luck. 678; 126 I. C. 508; 7 O. W. N. 97; A. I. R. 1930 Oudh 89.

Where an award or matter referred to arbitration may be remitted 14 The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit—

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines

any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of execution;

(c) where an objection to the legality of the award is apparent upon the face of it. [S. 520.]

### COMMENTARY.

#### Alterations

The words "unless of the matters"

have been made adopting the law as laid down in the Privy Council case of *Buta v. Municipal Committee of Lahore*, 29 C. 854 (P. C.); 7 C. W. N. 82; 4 Bom. L. R. 673 noted below.

**Award going beyond matters in dispute in suit and adjudging rights of a stranger to suit, if valid**—Where the arbitrators made an award which dealt with matters not included within the scope of the suit and was in excess of their authority in respect of matters included within its scope, *held*, that the award was invalid and could not be enforced either under the C. P. Code, Sch. II, or the Indian Arbitration Act, and at any rate, it was not a case in which the Court should exercise its discretionary powers under para. 12 or para. 14 of Sch. II of the C. P. Code.—*Ram Prataf Chamria v. Durga Prasad Chamria*, 28 C. W. N. 424.

**Clause (a)**—"Where the award has left undetermined any of the matters referred to or determined any matter not referred to arbitration."—The ground for holding an award to be invalid on account of its not disposing of all the matters referred, appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators.—*Makund Ram v. Salig Ram*, 21 I. A. 47; 21 C. 590 (P. C.); *Bhagwan Das v. Shiv Dial*, (1913) P. R. 332; 22 I. C. 811; *Jnanendra Sureschandra*, 6 P. 556; 109 I. C. 821; A. I. R. 1928 Pat. 7. Where there was no distinct and separate finding on each of the issues, but there was a decision on the whole matter any of the matters referred for consideration—reconsideration—was not necessary. when the whole matter in issue between the parties is decided by the arbitrators.—*Ghulam Jilani v. Muhammad Hussain*, 29 I. A. 51; 29 C. 167 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 12 M. L. J. 77; 25 P. R. 1902.

In a suit for partition and for settlement of accounts, the arbitrator to whom the case was referred for determination made an award only with reference to partition, but omitted to settle accounts. *Held*, that the Court had acted erroneously in confirming the award before the accounts had been settled, inasmuch as the award had left undetermined a very important matter, *viz.*, the settlement of accounts; and that the Court should, under this rule, have remitted the award for the reconsideration of the arbitrator.—*Sadik Ali v. Imdad Ali*, 3 A. 286. Where several issues in a suit are referred to arbitration, but the arbitrator makes his award deciding only some of the issues, the award must be remitted for the determination of the other matters raised in the case.—*Jonardon v. Sambhu Nath*, 16 C. 806.

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of the matter left undetermined under para. 14 of Sch. II; but in the case of an arbitration without the intervention of the Court, para. 21 of the schedule confers no such power on the Court.—*Kunj Lal v. Banwari Lal*, 4 P. L. J. 394; 48 I. C. 711.

Where the arbitrator determines matters not referred to arbitration it is open to the Court to remit the award to the arbitrator once again.—*Abdullah v. Ali Marahna*, 12 L. L. J. 314; 131 I. C. 303; A. I. R. 1931 Lah. 215.

Para. 14.

**Where reference to arbitration proves abortive.**—When the arbitration agreed to by the parties proves abortive, the Court has no jurisdiction to send the case to another arbitrator of its own motion without the consent of all the parties. The Court can supersede the award or remit it to the original arbitrator but it cannot make a fresh reference to arbitration.—*Satish Chandra v. Patiram*, (1921) Pat. 170 ; 2 P. L. T. 277.

**"Unless such matter can be separated"**—Where one portion of the award

An award that goes beyond the terms of reference to the arbitrators is to that extent *ultra vires*—*Raja's Mohammed Muntax Ali v. Sakhawat Ali*, 28 I. A. 190 ; 23 A. 394 (P. C.) : 5 C. W. N. 881.

**Clause (b)**—"Where the award is so indefinite as to be incapable of execution."—Under Cl. (b) of this para. the award is to be remitted when it is so indefinite as to be incapable of execution. But the fact that a particular expression used in an award is capable of more than one interpretation does not show that it is indefinite, much less that it is so indefinite as to be incapable of execution. The expression in such a case has to be interpreted in execution proceedings consequent on the decree following the award.—*Raghuraj Bhikdur v. Rajeshwar*, 35 I. C. 761 ; 3 O. L. J. 258.

Where an award was remitted back to the arbitrator on the ground that it was

The mere fact that the amount is not actually ascertained or calculated by the arbitrator is not sufficient justification for holding the award to be uncertain, for the principle will apply that that is sufficiently certain which can be made certain.—*Nathu v. Abdul Ghani*, 119 I. C. 726. An award is not incapable of execution simply because the executing Court will have to make an enquiry into the various circumstances before determining what each party is entitled to get.—*Ibid*.

**Clause (c)**—"Where an objection to the legality of the award is apparent on the face of it"—An award defective and illegal on the face of it, should be at once remitted to the arbitrators.—*Luchmee Narain v. Pyle*, 2 N. W. P. 150, *Ram Kurn v. Zahira*, 101 P. R. 1868, *Narain v. Kanhe*, 3 P. R. 1872. But where there is no illegality apparent on the face of an award, a Court cannot remit it for re-consideration.—*Nanak Chand v. Ram Narayan*, 2 A. 181 (F. B.)

An error in law on the face of an award, such as will justify the Court in setting it aside, must be an error in some legal proposition, to which the arbitrators have tied themselves, the same being found in the award or a document actually incorporated therein, and forming the basis of the award.—*Chamsey Bhara & Co v. The Jivroy Balloo Spinning Co*, 50 I. A. 324 ; 47 B. 578 (P. C.). A. I. R. 1923 P. C. 66 ; 73 I. C. 436 ; 44 M. L. J. 706 ; 38 C. L. J. 130, *Salch Mahomed v. Nathoomji*, 54 I. A. 427 ; 55 C. 126 (P. C.) : A. I. R. 1927 P. C. 164 ; 104 I. C. 476 ; 29 Bom. L. R. 1150 ; 53 M. L. J. 18, *Ram Devi v. Ganesh Lal*, 48 A. 475 ; 95 I. C. 416 ; A. I. R. 1926 All. 501. See also *Sreelal v. Madan*, 52 C. 100 ; 88 I. C. 49 ; A. I. R. 1925 Cal. 599. An error of law exists only when in an award there is stated some proposition which is opposed to law and when the erroneous proposition is made the basis of the award. But the mere use of the

the law of limitation does  
for setting it aside (56 M.  
to)—*Alagappa Chettiar*



A. I. R. 1931 Mad. 619. Where the arbitrator nowhere stated that he was following the Imamia Law of Succession but he was simply following his own views as to what was right and proper in the circumstances of the family, it was held there was no error of law so as to vitiate the award.—*Mahommed Yousuf v. Wilayat Husain*, 113 I. C. 785: A. I. R. 1929 Oudh 1: 5 O. W. N. 1001.

This section authorizes a Court to remand a case, to arbitrators for reconsideration when their award contains mistakes, omissions, or defects, and the award, on the refusal of the arbitrators to reconsider it, becomes null and void, without proof of corruption or misconduct.—*Mohun Kishen v. Bhobun Shyam*, 7 W. R. 406.

A case involving questions of Hindu law having been referred to arbitration, the arbitrator decided the case against the plaintiff. The plaintiff obtaining the opinions of certain pundits in his favour, applied to the Court to remit the award. The Court accordingly remitted the award with the opinions of the pundits, requesting the arbitrator to reconsider them. The arbitrator having refused to act further, the Court proceeded to determine the suit and gave the plaintiff a decree. *Held*, that there being no illegality apparent on the face of the award the Court was not justified in remitting the award, or setting the award aside, and proceeding to determine the suit itself.—*Nanak Chand v. Ram Narayan*, 2 A. 181 (F. B.) (referred to in *George v. Vastian Soury*, 22 M. 202).

Where six arbitrators were appointed but they did not all take part in the proceedings, it was held that the award so passed by the arbitrators was invalid on the face of it under para. 14 (c) of Sch. II of the C. P. Code.—*Raj Charan v. Gupta Nath*, 16 A. L. J. 307: 45 I. C. 31.

A reference to arbitration provided that the arbitrator should determine the case after hearing the evidence and that if one of the parties failed to appear before him, he should have power to proceed to hear the evidence *ex parte*. *Held*, that, on the plaintiff's failure to appear before the arbitrator on the day fixed for trial, the arbitrator could not make an award without taking evidence but should have proceeded to hear the evidence of the other side. *Held*, also that the award so made without taking any evidence could not be set aside by the Court on the plaintiff's application under Or. IX, r. 9, C. P. Code, but should be remitted under para. 14 of Sch. II of the C. P. Code to the arbitrator for reconsideration if a proper case was made out by the plaintiff to excuse his absence before the arbitrator.—*Gopal Chandra v. Khetra Mohan*, 22 C. W. N. 933: 46 I. C. 193.

Where a suit was referred to arbitration for the determination of the only question whether a Hindu was born blind and therefore not entitled to inherit and the arbitrator made an award whereby the blind man was declared to be entitled to a certain portion of the property, it was held on an objection to this award that the award was not so vitiated as to require remission.—*Madefa*, 45 I. C. 644.

Part of the award cannot be remitted.—There is no provision in the Civil Procedure Code by which a portion of an award may be remitted.—*Tursi Ram v. Bredoe*, 24 A. L. J. 705: 96 I. C. 531. A. I. R. 1926 All. 567.

Pleader.—Whether can be Arbitrator.—A gentleman of the legal profession does not become incompetent to act as an arbitrator merely because on some occasions he was engaged by one of the parties as their pleader, *Rajendra Nath v. Abdul Hakim Khan*, 39 I. C. 767.

Appeal.—No appeal lies from an order under this para. remitting an award to the reconsideration of the arbitrators. Where an award is remitted to the reconsideration of the arbitrator, and a decree is passed in accordance with the revised award, no appeal lies from the decree on the ground that the order of remittal was wrong.—*Subbiah v. Subramanian*, 21 M. 479. *Palani d. Bakhshi v. Ram Chandra*, 6 L. L. J. 500: 84 I. C. 693.

15. (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely:—

(a) corruption or misconduct of the arbitrator or umpire;

(b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire ;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under Cl. (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit. [S. 521.]

## COMMENTARY.

**Alterations in the para.**—This para. corresponds to S. 521, C. P. Code, 1882, with several alterations and additions.

The words "*on failure*" have been substituted for the words "*on the refusal*," after the words "*becomes void* "

The words "*and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid*" have been added to Cl. (c), and the last para. of S. 521, which ran as follows: "*and no award shall be valid unless made within the period allowed by the Court*" has been omitted. The object of the addition of the words "*or being otherwise invalid*" will appear from the following report of the Special Committee.

The words "*or being otherwise invalid*" were reported in 25 C. 141 (which followed the present Code. If, therefore, he can apply to have it set aside.—See the Report of the Special Committee.

Sub-sec (2) is new.

"*But no award shall be set aside* "—There is a clear distinction between setting

of Sch. II and a Court has no authority to go into the question of the reasonableness of the award.—*Nathu v. Abdul Ghani*, 119 I C 726; A I R 1930 Lah. 22.

'**Corruption or misconduct.**'—The word "*misconduct*" does not necessarily imply

*Riyasat Ali*, 1 Luck. 139. 3 O W N 279; 93 I C 446; A I R. 1926 Oudh 307. The word '*misconduct*' does not necessarily or at all imply anything in the nature of fraud. It certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator as he is occupying a *quasi* judicial position.—*Bhogilal v. Chimanlal*, 52 B 116. 30 Bom L.R. 92. 107 I C 707; A I R. 1928 Bom. 49. The word '*misconduct*' simply means legal misconduct.—*Ayyammal v. Naranaappa*, (1927) M. W. N. 917.

The term '*misconduct*' in S. 521, C. P. Code, 1882 (r. 15), does not necessarily imply "*corruption*."—*Kali Charan v. Sarat Chunder*, 30 C. 397; 7 C. W. N. 545.

Perversity is misconduct within the meaning of S. 15 of the Second Schedule of the C. P. Code, and a Court would be justified in setting aside an award on that ground.—*Nga Tek v. Nga Kasini*, 5 Bur. L. T. 55; 14 I. C. 978.

Where one of the questions referred to arbitrators was whether certain moulds used for stamping marks on cotton goods belonged to partners *L* and *K* or to *K* alone and the award stated that both parties should have the right to use the moulds; *held*, that the award was bad because of the technical misconduct on behalf of the arbitrators that they did not attempt to decide the real question at issue between the parties and that the point could not be separated from the other point.—*Khiaram v. Lal Chand*, 125 I. C. 824. A. I. R. 1930 Sind 103.

"Acts amounting to misconduct."—*The following acts have been held to amount to "misconduct" within the meaning of this para, affording grounds for setting aside an award:—*

Proceeding with the arbitration in the absence of one of the arbitrators.—*Thammiraju v. Bapiraju*, 12 M. 113; *Nand Ram v. Fakir Chand*, 7 A. 523; *Benode v. Pran Chandra*, 14 C. L. J. 143.

*Bay Nath*, 29 C. 36.

Irregularities in procedure which amount to no proper hearing of the matters in dispute amount to misconduct on the part of the arbitrator.—*Amir Begam v. Badruddin*, 36 A. 336 (P. C.); 23 I. C. 625; 18 C. W. N. 755; 19 C. L. J. 484; 16 Bom. L. R. 413; 27 M. L. J. 181. Where an arbitrator was asked to decide certain issues and he decided them on an inspection of the locality without taking any steps to call on the parties to produce evidence, *held*, that it was a case where evidence had to be taken and consequently the award was vitiated.—*Ayyammal v. Narayappa*, (1927) M. W. N. 917. Where the nature of the dispute is such that it could not be settled without evidence; the arbitrator is guilty of misconduct when he examines no witnesses.—*Ramchand v. Buta Ram*, A. I. R. 1931 Lah. 65; 130 I. C. 833.

Hearing and receiving evidence from one side in the absence of the other side, without giving the other side the opportunity of meeting and answering it, is also "misconduct" within the meaning of this para.—*Cuscutji v. Crouter*, 18 B. 299; *Mohammed Afzal v. Abdul Hamid*, 7 I. L. J. 463; 88 I. C. 161; A. I. R. 1925 Lah. 570; *Venkatasubbayya v. Venkataramanayya*, 126 I. C. 735; A. I. R. 1930 Mad. 646.

Refusal of arbitrator to hear witnesses produced by the parties amounts to judicial misconduct within the meaning of this para.—*Rugheebur v. Malina Koor*, 12 C. L. R. 564. Receiving documents from one party and basing the award upon those documents, without giving the other party an opportunity of seeing those documents and of meeting the inferences deducible therefrom, is misconduct within the meaning of this para.—*Delhi Cloth & General Mills Co. v. Kidari Pershad*, 64 I. C. 363.

any one of the parties or the subject matter of the reference.—*Kaliprovanu v. Rajani*, 25 C. 141; *Mahomed v. Hakimian*, 29 C. 278; *Yusuf v. Riyasat*, 1 Luck. 139; 93 I. C. 446; A. I. R. 1926 Oudh 307; or improperly adding another to their number amounts to misconduct within this para.—*Phiran v. Daroran*, 7 N. W. P. 367; or ignoring the evidence and deciding on his own special knowledge.—*Gopalau v. Surayanarayana*, 50 M. L. J. 514; 95 I. C. 740; A. I. R. 1926 Mad. 752.

Taking third party's opinion on a suspicious entry in an account book without calling upon the parties to explain the suspicious entry, amounts to judicial misconduct on the part of the arbitrator.—*Ramchand v. Buta Ram*, A. I. R. 1931 Lah. 65; 130 I. C. 833.

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Making an award after a delay of 5 years; the mere fact that no time was specified during which he should make the award was immaterial, for in such a case the arbitrator should pass the award within a reasonable time.—*Bhogital v. Chhimantal*, 52 B. 116; 30 Bom. L. R. 92; 107 I. C. 707; A. I. R. 1928 Bom. 49.

It is not a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. — *Suppu v. Gobindacharyar*, 11 M. 85; *Maung Shwe v. U Min Ngun*, 3 R. 387; 91 I. C. 659; A. I. R. 1925 Rang 363. Perusal of a letter marked 'without prejudice' and which was consequently inadmissible in evidence and which was subsequently rejected by the arbitrator, was no misconduct so as to vitiate the award simply because the reading of the letter might possibly have prejudiced the mind of the arbitrator. — *Das & Co. v. Broach Electric Supply*, 30 Bom. L. R. 90; 108 I. C. 18; A. I. R. 1928 Bom. 55. The extent to which an arbitrator may seek outside advice upon matters of law is difficult to prescribe in general terms. Where the language of the award indicated no more than that the arbitrators were not satisfied with the evidence, it was held that arbitrators are not bound to call for further evidence, but it is for them to decide. — *Dayaram v. Naraindas*, 119 I. C. 529; A. I. R. 1929 Sind 200.

There is no misconduct of an arbitrator in having made private enquiries or examined evidence in the absence of a party to the arbitration proceeding where that party by his own conduct waives the objection he had to such a procedure. — *Dayaram v. Naraindas*, 119 I. C. 529; A. I. R. 1929 Sind 200.

Where the parties knew that arbitrators might be examined as witnesses and two of them were so examined subsequently, each on one side; held, that the award and decree were not vitiated. — *Brojendra v. Purnachandra*, 58 C. 269; 34 C. W. N. 689; 129 I. C. 428; A. I. R. 1931 Cal. 53.

**Acts not amounting to misconduct** — It is not a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. — *Suppu v. Gobindacharyar*, 11 M. 85; *Maung Shwe v. U Min Ngun*, 3 R. 387; 91 I. C. 659; A. I. R. 1925 Rang 363. Perusal of a letter marked 'without prejudice' and which was consequently inadmissible in evidence and which was subsequently rejected by the arbitrator, was no misconduct so as to vitiate the award simply because the reading of the letter might possibly have prejudiced the mind of the arbitrator. — *Das & Co. v. Broach Electric Supply*, 30 Bom. L. R. 90; 108 I. C. 18; A. I. R. 1928 Bom. 55. The extent to which an arbitrator may seek outside advice upon matters of law is difficult to prescribe in general terms. Where the language of the award indicated no more than that the arbitrators were not satisfied with the evidence, it was held that arbitrators are not bound to call for further evidence, but it is for them to decide. — *Dayaram v. Naraindas*, 119 I. C. 529; A. I. R. 1929 Sind 200.

(1931) A. L. J. 1116; 61 M. L. J. 623; 34 L. W. 67; 8 O. W. N. 1066; 134 I. C. 1090; A. I. R. 1931 P. C. 289. It is not misconduct on the part of an arbitrator to delegate, to a third person, the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred. — *Buta v. Municipal Committee of Lahore*, 29 I. A. 168; 29 C. 854 (P. C.); 7 C. W. N. 82; 4 Bom. L. R. 673. Misconduct cannot be presumed from the fact that the arbitrator is the relative of one of the parties. — *Nainsukh v. Umadas*, 7 A. 273. From the mere fact that the arbitrators failed to satisfy the Court that their delay was due to the negligence of the parties or other proper causes, it cannot be presumed that they acted fraudulently. — *Savilappa v. Dev Chand*, 26 B. 132. An award cannot be set aside on the mere surmise that the arbitrator has been partial. — *Nainsukh v. Umadas*, 7 A. 273. An award is not vitiated by material irregularity by reason of the fact that one of the arbitrators used knowledge obtained by him privately, provided he communicated that knowledge to the other arbitrators in the presence of the parties. — *Sheik Mohidin v. Ramaswami*, 41 M. L. J. 276.

The absence of an arbitrator cannot be deemed to amount to misconduct where it is clear that no business of a disputed character was gone into during the absence of the arbitrator and where the decision is that of all the arbitrators (relying on 2 C. L. J. 61). — *Brojendra v. Purnachandra*, 58 C. 269; 34 C. W. N. 689; 129 I. C. 428; A. I. R. 1931 Cal. 53.

The mere fact that the arbitrators questioned the parties as to their respective cases, would not amount to misconduct so as to vitiate an award, unless the parties were denied the opportunity of meeting the representations made by the other side. — *Ramaswami v. Subbar*, 24 L. W. 482; 97 I. C. 478; A. I. R. 1926 Mad. 1158.

Absence of notice by arbitrators that they were prepared to receive evidence, when the reference itself implied that no further evidence was to be produced, does not render the award invalid. — *Yerra Venkata Reddi v. Krishna*, 106 I. C. 331; A. I. R. 1927 Mad. 1010.

An award based entirely or almost entirely on evidence, the arbitrators only using their own personal knowledge in understanding and appreciating the evidence, is not bad. — *Ienka Poltillai v. Ammannu*, 114 I. C. 367; A. I. R. 1929 Mad. 144 (*distinguishing* A. I. R. 1926 Mad. 752).

An award is not illegal by reason of the acceptance, by the arbitrators, of the offer of a fee for their services, such an acceptance not involving any misconduct on their part.—*Subraya v. Manjunath*, 29 M. 44.

Where a particular arbitrator has been selected only because of his personal knowledge of the matter in dispute it would not be a misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to adduce evidence sufficient to vary his views.—*Danlatsing v. Ratna Anandsing*, 97 I. C. 673 : 28 Bom. L. R. 86 : A. I. R. 1926 Bom. 527.

**Clause (b)—Fraudulent concealment.**—Where the arbitrator is directly interested in the subject-matter of the litigation in that he would get a share out of the money which may be decreed to the plaintiff on the strength of the award, and the plaintiff does not disclose this matter in Court when the case is going to be referred to his arbitration, he, the plaintiff, can be considered to be guilty of fraudulent misconduct, and the case comes within Cl (b) of this para.—*Yusuf Khan v. Riyasat Ali*, 1 Luck. 139 : 3 O. L. J. 224 : 93 I. C. 446 : A. I. R. 1926 Oudh 307.

A Court is justified in holding that an award is not valid and binding upon the defendant when the arbitrator was the retained pleader of the plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it.—*Kali Prasanna v. Rajani Kant*, 25 C. 141; *Mahomed Wahiduddin v. Hakimani*, 29 C. 278 : 6 C. W. N. 235.

**Award made after the expiration of the period allowed by the Court.**—The words "or after the expiration of the period allowed by the Court" have been added to sub cl (e), and the words "and no award shall be valid unless made within the period allowed by the Court" which occurred in the original draft of this alteration is that the only remedy now open is that it was made after the expiration of under this para. to set aside the award. If no application is made to set aside the award under this paragraph, or if the application is made but refused, the award becomes final, and no appeal will lie from a decree based upon the award.—*Shib Krishto Daw & Co v. Satis Chandra*, 39 C. 822 (followed in *Kahan Singh v. Mohan Lal*, 34 I. C. 177 : 56 P. L. R. 1917).

Paragraph 15 of Sch. II of the C. P. Code does not render an award made out of time *per se* a nullity. The award is merely voidable and if not sought to be set aside within 10 days from the time when it was filed, it is binding upon the parties.—*Bibi Patti Kumari v. Upendra Nath*, 4 P. L. J. 265 : 50 I. C. 52.

Under S. 521 of the C. P. Code, an award made out of time was a nullity.—*Behari Das v. Ka* .. .. . 12 C. 173 : *Simson v. Venkatagopalani*, .. .. . 18 I. A. 55 : 13 A. 300 (P. C.) .. .. . 1 A. 548, and reversing 10 A. 137, it was .. .. . in the period fixed by the Court's order, but was made after the date given in the last order extending the time for its delivery, the award was invalid. The above Privy Council case was followed in *Ram Monohur v. Lal Behari*, 14 A. 343. But under the present para it is merely voidable, and if not set aside within the period provided by S. 158, Limitation Act, is binding upon the parties.

**Objection to invalidity of award when to be taken**—An objection to an award on the ground that it is invalid must be made at the time when it is filed. If no objection is then taken, or if it is made and disallowed, the party objecting cannot reargue the matter by way of appeal from the decree.—*Mahomed Valli Asmal v. Valli Asmal*, 26 Bom. L. R. 171 (26 M. 47 : 31 A. 450 *distd* ; 36 B. 105 *reld. on*).

**"Or being otherwise invalid."**—These words at the end of sub cl (c) are new. The object of adding them will appear from the following report of the Special Committee :—"To meet the difficulty expressed in the case reported in 25 C. 141 (*Kali Prasanna* .. .. . High Court, we have of S. 521 of the .. .. . any ground he .. .. . ant to give effect .. .. . lical Committee, .. .. . : 6 C. W. N. 225

## Para. 15.

4 Bom. L. R. 161 11 M. L. J. 77, and followed in *Chairman of the Purnea Municipality v. Siva Sankar*, 33 C. 692 (1921)

The words "or being otherwise invalid" in Cl. (c) should not be read as *ejusdem generis* with the other cases mentioned in that clause and are not restricted to cases where an award is bad on grounds like want of jurisdiction. On the other hand, they are meant to include all cases of invalidity, on grounds other than those mentioned. It is open to a minor by a suit instituted either through a guardian or when he attains majority, to impeach an award if he can prove that his guardian was grossly negligent or acted fraudulently in conducting the proceedings before the arbitrator—*Lakshminarayana v. Rani Chandra*, 34 M. L. J. 71; 23 M. L. T. 89. But see *Durga v. Gangadhar*, 34 C. W. N. 813; 130 I. C. 137; A. I. R. 1931 Cal. 109 and *Golenur Bibi v. Akhbar Samad*, 58 C. 628; 35 C. W. N. 238; 52 C. L. J. 298; 130 I. C. 209; A. I. R. 1931 Cal. 211, where it has been held that the said words refer to the invalidity of the kind referred to in the preceding sentences of the said clause as for instance the award having been made after an issue of an order by the Court superseding the arbitration and proceeding with the suit or after expiration of the period allowed by the Court; S. 15 assumes a valid reference to arbitration and only contemplates cases where the propriety of the award on the basis of such a reference is in question.

The meaning of the words "or being otherwise invalid" in Sch. II, para. 15, C. P. Code, and the doctrine of finality of decision either upholding or rejecting objections to an award explained with reference to the ruling in the Full Bench case of *Intaram v. Lachhya*, 12 A. L. J. 57; *Kanhaya Lal v. Jagannath Prasad*, 43 A. 305; 19 A. L. J. 33.

Where an arbitrator, in a reference pending a suit, treats a person, who is not a party to the suit, as a party to the arbitration and decides disputes between parties to the suit or any of them and such person, however just and equitable the award may be, "it is otherwise invalid" within the meaning of para. 15, sub-cl. (c).—*Intaram v. Balchand*, A. I. R. 1927 Sind 193; 101 I. C. 802.

An award is invalid if the arbitrators go beyond the scope of the suit and decide matters which are not in suit and which concern persons who are not parties to the suit.—*Ram Pratap v. Durga Prasad*, 28 C. W. N. 424; 83 I. C. 300; A. I. R. 1924 Cal.

*Manindra*, 44 C. L. J. 224; 98 I. C. 803; A. I. R. 1927 Cal. 52

Where the parties agree to be bound by the unanimous opinion of the arbitrators or by the opinion of the majority in case of difference, the Court has no power to force upon the parties the award of the umpire alone.—*Ajaz Ali v. Zohra*, 134 I. C. 39; 29 A. L. J. 906; A. I. R. 1932 All. 76.

Where the agreement to refer to arbitration was vague and indefinite and did not clearly lay down the power of the arbitrators in dealing with the subject-matter in dispute, and it was not possible to make out what powers were intended to be conferred upon the arbitrators. Held, that the objection to the validity of the award was well-founded.—*Bindessuri Pershad v. Jankee Pershad*, 16 C. 482.

When the arbitrator has stated that he was awarding the shares in the Law but he was simply in the circumstances of the case the award—*Mohammad* 929 Oudh 1.

The words "or being otherwise invalid" should not be taken as including the question whether there was a valid reference to arbitration—*Mahadeo v. Badri*, 50 A. 955; 110 I. C. 881; 26 A. L. J. 1009; A. I. R. 1928 All. 740; *Durga v. Gangadhar*, 34 C. W. N. 813; 130 I. C. 137; A. I. R. 1931 Cal. 109.

There is nothing wrong in parties agreeing to abide by the award of a majority of the arbitrators even when one of the parties is a minor represented by a guardian (distinguishing A. I. R. 1923 Mad. 301 and 38 M. L. J. 145)—*Lenka Potipillai v. Annamma*, 114 I. C. 367; A. I. R. 1929 Mad. 144.

The arbitrators have power to decide the question of jurisdiction. They may err in law for they are judges of fact as well as of law and such error will not vitiate the

award Where the arbitrators proceeded on a view that there was no pre-existing wakf and that a wakf which was to come into existence could be separately managed and no objection was made to the decree at any later stage; held, that the decree is binding on the parties and that it could not be said to be a nullity merely because the arbitrators wrongly decided a mixed question of law and fact (referring to 29 C. 167 (P. C)).—*Madan Mohan v. Narain*, 27 A. L. J. 540: 117 I. C. 361: A. I. R. 1929 All. 521.

The Court has jurisdiction to entertain objections to the validity of the award and a separate suit for that purpose will not lie. The remedy lies under para. 15 (1) (c) of the second schedule.—*Raoji v. Ratansi*, 54 B. 696: 32 Bom. L.R. 387: A.I.R. 1930 Bom. 431: 126 I. C. 305

The Limitation Act is certainly applicable to arbitration proceedings but it does not necessarily follow that awards w<sup>h</sup> Limitation Act are on that account  
I C 522: 34 L. W. 507: (1931) M. W.

**Sub-Clause (2)**—When the Court supersedes an award, it should give the parties time and opportunity to present themselves in Court and to produce evidence.—*Krishna Kishore v. Banwar Lal*, 27 A. L. J. 100: 113 I. C. 749: A. I. R. 1929 All. 259.

**Appeal**—Except in the case provided by S. 104, Cl. (a), no appeal lies from an order under the paragraph setting aside or refusing to set aside an award.—*Zakur Ahmad v. Taslimun Nissa*, 89 I. C. 404: 23 A. L. J. 891: A. I. R. 1926 All. 55. If the objecting party does not appear in support of the objection, the Court has no option but to pronounce judgment in accordance with the award.—*Raghunath v. Bridhi Chau*, 3 P. 839: 83 I. C. 26: A. I. R. 1924 Pat. 603; and the decree made thereon cannot be set aside under Or. IX, r. 13, because it is not an *ex parte* decree.—*Raghunath v. Bridhi Chau*, 3 P. 839: 83 I. C. 26. A. I. R. 1924 Pat. 603. It has been held by the High Courts of Calcutta, Madras, Bombay and the Chief Court of the Punjab that though no appeal lies from an order setting aside an award, the legality of the order may be challenged on appeal from the decree that may ultimately be passed in the suit.—*Achuthayya v. Thimmayya*, 31 M. 345; *Damodar v. Raghunath*, 26 B. 551. *Juma v. Mubarak*, 97 P. R. 1912: 133 P. L. R. 1912 106 P. W. R. 1912: 15 I. C. 62. *Ambica v. Nadyar*, 11 C. 172. The Allahabad High Court took a contrary view in *Ganga Prasad v. Kura*, 28 A. 408.

**Revision**—An order sett<sup>g</sup> revision.—*Kalicharan v. Sarat* 731 C 464: A. I. R. 1923 Bom. 502: A. I. R. 25 All. 458. But an order superseding arbitration may be attacked under S. 105 in appeal from the decree in the suit.—*Rudra Prasad v. Mathura Prasad*, 47 A. 916: 89 I. C. 173: A. I. R. 1925 All. 566. An order under this para. setting aside an award on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the power conferred on it under S. 115.—*Chattar Singh v. Lekhray*, 5 A. 293. *Damodar Trimbak v. Raghunath Hari*, 26 B. 551: *Nasrwanji v. Jamshetty*, 34 Bom. L. R. 376: A. I. R. 1932 Bom. 232: 138 I. C. 215

Where an award was superseded on the ground that the umpire was related to the plaintiff but this was not proved: held that the order was invalid in law and must be set aside in revision. the Court has inherent power to pass such an order but it should be exercised only in extreme cases.—*Bhola Nath v. Raghunath* 51 A. 1010: 27 A. L. J. 918: A. I. R. 1929 All. 743.

An order setting aside the award on the ground of technical misconduct by the arbitrator and resuming cognizance of the suit, is not a decision of a case and is consequently not revisable.—*Ganga Prasad v. Ranu Narain*, 6 O. W. N. 813: A. I. R. 1929 Oudh 493

**16. (1)** Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

Judgment to be according to award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award [S. 522.]

### COMMENTARY.

**Alterations in the para.**—Sub-rule (1) corresponds to paras 1 and 2 of S. 522, C. P. Code, with this modification that the word "pronounced" has been substituted for the word "give."

The third para. of S. 522, which ran as follows, "or if the award has been submitted to it in the form of a special case, according to its own opinion on such case" has been omitted.

Sub para. (2)—"No appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with, the award."—Sub-para. (2) corresponds to the last para. of the old section, with some alterations and omissions; the old para. is reproduced here for the purpose of comparison: "Upon the judgment so given, a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award."

This paragraph gives effect to the "principle of finality" of awards, by declaring that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with, the award—*Ghulam Jilani v. Muhammad Hussain*, 29 I. A. 51; 29 C. 167 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 12 M. L. J. 77; *Hansraj v. Sundar Lal*, 35 C. 648 (P. C.); 35 I. A. 83; 12 C. W. N. 585; 7 C. L. J. 520; 10 Bom. L. R. 581; 18 M. L. J. 266.

"After the time for making an application to set aside an award has expired."—The period of limitation for an application to set aside an award is ten days from its submission to the Court under Art. 158 of the Limitation Act (IX of 1908). The date of submission of the award to the Court is the date on which the award is received by the Registrar of the Court.—*Nobin Kally v. Ambica*, 5 C. W. N. 813. In *Sova Chaud v. Hurry Bux*, 46 C. 721; 50 C. W. N. 260; 53 I. C. 46, it was held that it means the date of filing the award.

Any point of objection against an award must be taken in the lower Court. A point which could have been taken but was not taken in the lower Court, cannot, for the first time, be allowed to be taken in revision—*Dustfar Chaud v. Dharanidhar*, A. I. R. 1929 Cal. 831.

Paragraph 16 (1) does not prevent the Court from passing a decree on an award if the parties so desire without giving them 10 days' time to file their objections, if any, to the award—*Pandurang v. Amrit Rao*, 27 N. L. R. 240; 134 I. C. 282; A. I. R. 1931 Nag. 112.

"An appeal lies from a decree based upon a judgment pronounced in . . . (though the decree may be in excess of, or not in accordance with the award, passed on an award before the time expired an appeal will lie from the decree, though the decree may be in accordance with the award, —*Najimuddin v. Albert Puch*, 29 A. 584; *Bagnath v. Narain Prasad*, 50 A. 51; 102 I. C. 608; A. I. R. 1927 All. 614. This is perfectly clear from the language used in Cl. (1) of para. 16, viz. "upon the judgment so pronounced." It would be one contemplated by Cl. (1) of para. 16—*19 A. 178*; A. I. R. 1927 All. 120; *Tulsi v. Basu*, 19 A. L. J. 705. See also *1930 Rang 307*. The Bombay, Lahore and Madras High Courts in such cases the High Court can interfere in *45 B. 812*; 59 I. C. 811; *Bhikha Lal v. 25 Bom. 344*; *Rukhlal v. Narayanraju*, (1912) M. W. N. 1232; 12 M. L. J. 608; *Bhagat Durbani v. Bhika*, 3 L. J. 487.



1927 All. 614; *Ramaswami v. Venkatarama*, 49 M. L. J. 523; 91 I. C 745; A. I. R, 1926 Mad. 201.

"The Court shall proceed to pronounce judgment according to the award."—The Court can only give judgment in accordance with the award, and cannot add an order for interest to it, if interest has not been given.—*Mohun Lal v. Joy Naran*, 23 W R 105. Where an award is modified under para 12, the only award according to the award; no second appeal therefore in excess of the award.—*Mazhar* 1930 Lab. 219.

*Held, per Mahmood, J.*—The word "award" used in the last sentence of S. 522, C. P. Code, 1882 (r. 16), must be understood to mean an award as given by the arbitrators and as amended by the Court under S. 518, C. P. Code, 1882 (r. 12). The words "in excess of, or not in accordance with, the award" used in S. 522, C. P. Code, 1882 (r. 16) were intended to enable the Court of appeal to check the improper use of the power conferred by S. 518, C. P. Code, 1882.—*Jawahar Singh v. Mut Rafi*, 8 A. 449.

power to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground.—*Chumimony v. Nistarinee*. 3 C. L. R. 357.

An arbitrator is fully justified in rejecting in part the case set up by either party and ascertaining the real facts according to his own view of the evidence. A counsel is not entitled to attack the findings of fact given by the arbitrator on the evidence led by the parties. Whether his conclusions are for consideration by the trial Court or *Rhambattia*, 120 I C 494. A I R 1930 L the technical provisions of the Evidence Act and his decision cannot be challenged on the ground that he relied upon a document not admissible under the Act. —*Ibid.*

Apart from the provisions contained in sub-para. (1) of para 16, there is no other provision under which judgement may be pronounced on a modified award and so from such a judgment no appeal lies under Sub-para (2) — *Nilmoni Pal v. Dakhinswar*, 138 I C, 818; 36 C W N, 1069; A I R 1932 Cal 713

Finality of decree in accordance with the award.—No appeal lies from a decree based on an award except in so far as the decree is in excess of or not in accordance with the award.—*Ghulam Islami v. Muhammad Hussain*, 29 I. A. 51; 29 C. 167 (P. C.); 6 C. W. N. 226; 14 Bom. L. R. 161; 12 M. L. J. 77, *Chairman of the Purnea Municipality v. Siva Sankar*, 33 C. 899, *Bihari Lal v. Chhuni Lal*, 29 A. 457 (F. B.); *Hansraj v. Sundar Lal*, 35 C. 648 (P. C.); 7 C. L. J. 520; 35 I. A. 89; 12 C. W. N. 585; 10 B. L. R. 581; 14 Bom. L. R. 146; 18 M. L. J. 206, *Abdul Ali v. Anwar Ali*, 11 C. W. N. 230; *Deendra Nath v. Sarbamanigola Debi*, 8 C. W. N. 916; *Haranund Naskar v. Dnyan Chand*, 2 C. L. J. 142, *Wali Mathuradas v. Ebyi Umersey*, 29 B. 285; *Shiva Prasad v. Lachman Prasad*, 46 I. C. 785, *Batecha Sahib v. Abdul Gunny*, 38 M. 256; 25 M. L. J. 507; *Hari Shankar v. Ram Piari*, 45 A. 441; 21 A. L. J. 326; 74 I. C. 834; A. I. R. 1923 All. 502; *Devat Ram v. Lachmi Mai*, 31 P. L. R. 81; 127 I. C. 365; A. I. R. 1930 Lah. 477, *Uttari v. Kakoo*, 12 L. L. J. 89. The only cases in which the Code allows an appeal from a decree based on an award are: (1) where the decree is in excess of the award, or (2) where the decree is not in accordance with the award. No appeal lies from a decree in accordance with the award even on the ground that the submission was invalid owing to want of concurrence of all the parties. (A. I. R. 1927 Lah. 362, 36 A. 69, A. I. R. 1923 All. 502, 25 I. C. 593, A. I. R. 1924 Bom. 324 foll., 28 P. R. 1916 held obiter; 25 C. W. N. 832 not foll.)—*Balkishan v. Sohan Singh*, 116 I. C. 559; A. I. R. 1929 Lah. 476; *Waran Wali v. Hira Nand*, 12 L. 408; 131 I. C. 348; 32 P. L. R. 44; A. I. R. 1931 Lah. 126; *Baldeo v. Abdur*, 137 I. C. 151; 9 O. W. N. 191; A. I. R. 1932 Oudh. 156; *Raja Ram v. Bansi Lal*, 13 L. 528; 136 I. C. 11; 33 P. L. R. 163; A. I. R. 1932 Lah. 239. But a revision lies—*Tey Singh v. Ghasi Ram*, 49 A. 812; A. I. R. 1927 All. 563; 102 I. C. 236. The Calcutta High Court has held that para. 16 contemplates an award made in a case where there has been a valid submission to arbitration; where the reference itself is impugned for want of consent of the parties interested an appeal will lie against the decree passed on the basis of the invalid award (relying on 25 C. W. N. 832)—*Durga v. Gangadhar*,

34 C. W. N. 813; 130 I. C. 137; A. I. R. 1931 Cal. 109. See, however, *Golemar Biba v. Abdur Samad*, 58 C. 628; 35 C. W. N. 228; 52 C. L. J. 299; 130 I. C. 209; A. I. R. 1931 Cal. 211.

No appeal lies from a decree passed in terms of the award even though the award itself was one liable to be set aside as one made beyond the date allowed—*Shib Kristo v. Satish Chandra*, 39 C. 822.

Where parties were added in a suit at the time of considering the objections to the award and they joined in the objections: *Held*, that they are bound by the decision of the Court and no appeal lies at their instance—*Guran v. Akhtar* 8 L. 693; 9 L. L. J. 569; 29 P. L. R. 247; 104 I. C. 202; A. I. R. 1927 Lah. 362.

Where the chosen arbitrators submit the services of a Court and the Court acts on it, the award is final—*See* *Chandrasekhar v. Subbarao*, 134 I. C. 30; 29 A. L. J. 466; A. I. R. 1932 All. 76, 1 C. 212; A. I. R. 1929 Rang. 225.

The principle of finality applies even to cases where the award is impeached on account of alleged errors of law—*Emnabas v. Fakir Mahomed*, 65 I. C. 50; 15 S. L. R. 165. Where the ground of attack on an award has failed and the Court has refused to set aside the award under para. 16(1), a decree must be passed in accordance with it and a finality attaches to such a decree and the matter can be allowed to be challenged in revision—*Ajay Ali v. Zehra*, 134 I. C. 30; 29 A. L. J. 466; A. I. R. 1932 All. 76.

**Finality of decree on fresh award**—Where the Court remits an award under r. 14 and the arbitrators submit a fresh award and the Court passes a decree in accordance with such revised award under this para. no appeal lies against such decree on the ground that the order of the remittal was wrong and that the original award ought to have been accepted and acted upon—*Subbiah Iyer v. Subramania*, 31 M. 479; 18 M. L. J. 485.

**Invalid award**—It was held under the old Code in a number of cases that though

*Ghulam Jilani v. Muhammad Hussain*, 29 I. A. 51; 29 C. 167 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 12 M. L. J. 77. The words "except in so far as the decree is in excess of, or not in accordance with, the award," in Cl. (2) of para. 16, now make it clear that no appeal lies from a decree passed in accordance with the award on the ground that the award was invalid—*Chairman of the Purnea Municipality v. Siva Sankar*, 33 C. 899; *Kanakku v. Nagalinga*, 32 M. 510. In such a case the party aggrieved may apply under para. 15(1)(c) to have the award set aside—*Guran Ditta v. Pokhar Ram*, 8 L. 693; 101 I. C. 202; A. I. R. 1917 Lah. 362; *Hari Shankar v. Ram Piar*, 45 A. 441; A. I. R. 1923 All. 502; 74 I. C. 834; 21 A. L. J. 326. If he does not avail himself of that remedy, the award becomes final and no appeal lies from the decree based upon the award—*Valli v. Valli*, 79 I. C. 723; 26 Bom. L. R. 171; A. I. R. 1924 Bom. 324. But see *Durga v. Gangadhar*, 34 C. W. N. 813, noted under heading "Finality of decree in accordance with the award," ante.

The rule prohibiting an appeal against a decree based on and in accordance with an award does not apply to a case where the objection is as to the inherent jurisdiction of the Court to entertain the suit—*Ladha Ram v. Ralla Ram*, 10 L. L. J. 242; 112 I. C. 262; A. I. R. 1928 Lah. 730.

**Second Appeal.**—Where the Court of first instance sets aside the award and passes a decree on the merits, and the first appellate Court reversing that decree passes judgment in accordance with the award, *held*, that the decision of the appellate Court is not final under S. 522, C. P. Code, 1882 (r. 16), and a second appeal lay. The mere fact that the decree of the first appellate Court is in accordance with the award is no ground for refusing the appeal.—*Shyama Charan v. Pralhad*, 8 C. W. N. 390; *Ganga Prasad v. Kura*, 28 A. 469; *Ganesh v. Bhikham*, 3 Luck. 1 (F. B.); 107 I. C. 545; A. I. R. 1928 Oudh 1. But see *Mazhar v. Fatch Din*, 31 P. L. R. 337; 120 I. C. 673; A. I. R. 1930 Lah. 219.

A second appeal will also lie to the High Court where the decree of the Court of first instance is in accordance with the award, and such decree is set aside by the first appellate Court.—*Krishnan v Muthu*, 22 M 172

**Power of Arbitrators to review their decision.**—After an award has been made and handed to the parties, the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.—*Dutto Singh v. Dosad Bahadur*, 9 C 575.

**High Court's power of revision.**—An order under S 52t, C P. Code, 1892 (r 15), setting aside an award, made on a reference to arbitration in the course of a suit, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court under S 622, C P. Code, 1892 (S 115).—*Chattar Singh v. Lekhraj Singh*, 5 A 293.

Where an order is made refusing to file an award no appeal lies from it, but the High Court can interfere under S 622, C. P. Code, 1892 (S 115).—*Mana Vikrama v. Mallichery*, 3 M, 68

Where a decree was passed in the terms of an arbitration award without giving notice of its filing to the parties as required by S. 516, C. P. Code, 1892 (r. 18). Held, that it was a good ground for a revision of the decree based upon the award under S 622, C. P. Code, 1892 (S 115).—*Chatarbuj Das v. Ganesh Ram*, 20 A 474. See also *Rangasami v. Muttusami*, 1 M 144.

Where a Court passes a decree in terms of an award without giving the parties time to file an appeal, the High Court has power to set aside the decree.—*Dahyat*, 115, C P Code.—*Ravjibhai v.*

Where a Court passes a decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence, there is a revision, but not an appeal, against the decree.—*Bhagat Darbari Ram v. Bhikha Ram*, 3 L. L J 487: 20 P. L R, 1922.

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The question whether a party is interested within the meaning of para. 16 (2) must be decided on the facts of each case and a finding of the trial Court that a person is not a party interested cannot be interfered with in revision (52 B 408 relied on).—*Wiran Wali Hira Nand*, 12 L 408: 32 P L R 44: 131 I C 348: A I. R 1931 Lah 126.

**Binding effect of an arbitration award**—An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, precludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.—*Bhagoti v. Chandan*, 11 C. 355 (P. C.). See also *Ghellaibhai v. Nandubai*, 25 B 238.

A judgment and decree passed in terms of an award under S 522, C P Code, 1892 (r. 16), constitute *res judicata*.—*Vyankatesh v. Sakhararam*, 21 B. 465. See also *Wazeer Mahlon v. Chuni Singh*, 7 C 727.

An award on a private reference made by some of the plaintiffs and the defendants is binding on the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it.—*Jadu Nath v. Kailas*, 10 C. L J 41. See *Lal Mohan v. Surya Kumar*, 11 C. W. N. 1152.

A person who is a stranger to the submission to arbitration and who is not a party to the award, is not under an obligation to abide by the award.—*Hira Singh v. Ganga Sahai*, 6 A 322 (P C) (affirming 2 A 809 (F B)).

A decree on an arbitration award, one of the parties to the submission having been a Hindu widow or daughter, is not binding on the reversioners.—*Gobind Krishna v. Khunnu Lal*, 29 A. 487.

**"Suit upon award."**—Where a decree is passed in terms of an award, the only mode of enforcing the award is by way of executing the decree, and no separate suit will lie to enforce the award.—*Sasi Sekharswar v. Lalit Mohan*, 52 C. 314: 52 I. A 79.

**Distinction between valuer and arbitrator.**—In a partition suit it was arranged between the parties that the defendant, who was the owner of two thirds share, should buy the plaintiff's one-third share at a price to be settled by certain persons named in the petition of compromise. The referees accordingly made their award and the Court gave judgment upon the award. *Held*, on appeal, that the persons to whom it was referred to settle the price were rather valuers than arbitrators, and the order of reference cannot accordingly be regarded as one under S. 506, C. P. Code, 1882 (r. 1) and no decree on the award of the valuer can be made under S. 522, C. P. Code, 1882 (r. 16).—*Chooney Menay v. Rani Kinkur*, 28 C. 155: 5 C. W. N. 242 (followed in *Macnaghten v. Rameshwar*, 30 C. 831).

**When the Court acts as arbitrator**—In the course of a suit, both the plaintiff and the defendant jointly presented a petition requesting the Court to inspect the site and peruse the documents filed in the suit and agreeing to abide by the decision which the Court might be pleased to pass as the final decision. *Held*, that the Court acted as an arbitrator by consent of the parties and no appeal lay from its decision.—*Nidamarthi v. Thammana*, 26 M. 76; *Sayed Zain v. Kalabhas*, 23 B. 757. A decree passed in accordance with such a decision must be regarded as a consent decree, and it comes within the purview of Or. XXIII, r. 3.—*Chinna v. Venkatasami*, 42 M. 625, 628. See also *Bankanta v. Sita Nath*, 38 C. 421.

## ORDER OF REFERENCE ON AGREEMENTS TO REFER.

17. (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

Application to  
file in Court agree-  
ment to refer to  
arbitration

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

[S. 523.]

## COMMENTARY.

**Alterations**—This para. corresponds to S. 523, C. P. Code, 1882, with several alterations and additions.

Sub-rule (1), with some additions and alterations, corresponds to para. 1 of the old section, which ran as follows: "When any persons agree in writing that any difference, between them shall be referred to the arbitration of any person named in the agreement

or to be appointed by any Court having jurisdiction relates, the parties thereto, or any in Court."

as joined

Sub-rule (2) exactly corresponds to para. 2, and sub-rule (3) exactly corresponds to para. 3 of the old section.

Sub-rule (4) has been substituted for para. 4 of the old section, which ran as follows: "If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination."

The changes introduced by the present rule will clearly appear on a comparison of the provisions of the new rule with that of the old section.

**Application of the Para. to Cases governed by the Indian Arbitration Act.**—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies.—See S. 3 of the Indian Arbitration Act (IX of 1899); as for instance an agreement made with a company to refer to arbitration under certain contingencies, to which S. 152 of the Companies Act applies.—*Attock Oil Co Ltd. v. Abdul Majid*, 118 I C 533: A I R 1929 Lah. 246.

**Meaning and scope of this para.**—Paragraph 17 and the subsequent paragraphs refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration. Where an agreement relates to the division by metes and bounds of revenue-paying land wherein there is also a dispute between the parties as to title, the lands concerned can be validly made the subject-matter of an award and a decree under this para.—*Asa Nand v. Ganesha*, 11 L. 470: 31 P. L. R. 769: 122 I C 724: 12 L. L. J. 297: A I R. 1930 Lah. 836

The scope of para. 17 is no more than this that where an agreement of reference to arbitration has been entered into by the parties but the arbitrators have not so far functioned the Court has power to enforce the agreement against the parties where the arbitrators are ready and willing to act in terms of the reference. Para. 17 far from implying an ouster of jurisdiction predicates that the arbitrators have the jurisdiction to act on the reference and that the Court should step in and ask them to exercise their powers as arbitrators if they are agreeable to do so.—*Sheo Narain v. Bala Rao*, 137 I C. 198: 30 A. L. J. 331: A I R 1932 All 348

Where after an application to file the agreement and before its disposal, the arbitrator enters upon the arbitration and actually delivers his award, para. 17 ceases to have any application to the case, and the proper course for the parties to follow in such a case is to take steps under para. 20 to have the award made a rule of the Court. This may be done either by amendment of the previous application or by withdrawing it and filing a fresh application under para. 20.—*Parbati v. Durga*, 107 I. C. 186: A. I R. 1928 Lah. 170.

**Agreement to refer future difference to Arbitration.**—A general agreement to refer future differences to arbitration comes within this para. and may be filed. The para. is not confined to cases in which a dispute actually existing at the date of agreement is agreed to be referred to arbitration. But the agreement must name the arbitrator or arbitrators and an agreement which provides for the future appointment or election of arbitrators does not fall within the section. The effect of the last clause of S. 523 C P Code 1882 (r. 17) is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee.—*Fazulbhoy v. Bombay and Persia Steam Navigation Company Ltd.*, 30 B. 232 (F. B.)

**Agreement to refer to arbitration matters in dispute in a pending suit.**—An agreement between the parties to refer matters in difference in a pending suit to arbitration without the leave of the Court under paras. 1 to 3, is illegal as an invasion of the jurisdiction of the Court, and an award made on such an agreement is a nullity and cannot be treated as an adjustment, because Or XXIII, r. 3 is subject to S. 89.—*Amar Chand v. Bhatwari*, 49 B. 608: 69 I C 808: A I R 1922 Cal 404; *Ram Parth v. Durga Prasad*, 28 C. W. N. 424: 83 I C. 300: A I R. 1924 Cal 567; *Dinkarrai v. Yeshwantrao*, 51 B. 197: 31 Bom. L. R. 1403: 124 I C 119: A I R. 1930 Bom. 98. Under the old Code it was held by the Calcutta and Punjab Courts that the corresponding S. 523 did not

apply to an agreement to refer to arbitration matters in difference in a pending suit.—*Tincoury v Fakir Chand*, 20 C. 218; 7 C. W. N. 180; *Dhan Singh v. Rahu Singh*, 115 P. R. 1912. But a contrary view was taken by the Bombay and Allahabad High Courts in *Harivalab v. Utamchand*, 4 B 1; *Sheo Dat v. Sheo Shankar*, 27 A. 53. Where a pending suit was, by an agreement between the parties, withdrawn, and after such withdrawal the matter in dispute was referred to arbitration under this para, and an award was made and filed under paras. 20 and 21, it was held that the Court having surrendered its jurisdiction by allowing the suit to be withdrawn, the procedure was quite correct.—*Rukul Singh v. Ramasray*, 3 P. 443; A 1 R. 1924 Pat. 468; *Lal Chand v. Sri Ram*, 12 L. L. J. 24. 31 P. L. R. 443; A. 1 R. 1930 Lah. 1006; 122 I. C. 237

**Revocation of agreement to refer to Arbitration.**—See notes under para. 3.

Where a party has been induced by misrepresentation to refer to arbitration he is at liberty to revoke the reference and the agreement to refer cannot be filed in Court—*Ganesh Das v. Keshu Das*, 50 I. C. 637.

"Any Court having jurisdiction in the matter."—There is no authority for holding that Ss. 16 to 20 of C. P. Code are not to be considered in determining which Court had jurisdiction in the matter in which the agreement relates for the purposes of para. 17 of Sch. II.—*Nihal Chand v. Jas Ram*, 32 P. L. R. 464; 132 I. C. 218; A. 1 R. 1931 Lah. 673.

**Power of Court to remit or set aside award made under this para**—In a suit for partition and to take account, where the arbitrators to whom the case was referred under this section omitted to carry out the terms of reference and left undetermined a very important matter, viz., the settlement of the accounts, *held*, that the Court, instead of confirming the award, should have remitted it under S. 523, C. P. Code, 1882 (r. 17), for the consideration of the arbitrators—*Sadix Ali v. Imdad Ali*, 3 A. 286

In an agreement to submit to arbitration, which was filed in Court under the provisions of S. 523, C. P. Code, 1882 (r. 17), it was stipulated that the decision of the arbitrator should be accepted as final, and that an appeal therefrom should be made by either party. *Held*, that this stipulation did not prevent the Court from setting aside the award on the ground of misconduct on the part of the arbitrator—*Ranga v. Sithaya*, 6 M. 363

"The agreement shall be in writing."—The paragraph does not apply unless the agreement to refer is in writing.—*Tincoury v. Fakir Chand*, 30 C. 218.

"It shall be a suit."—When an application is presented as a suit, but that does not mean that it is a suit, but that it is commenced by application.—*Rajmal v. Maruti*, 1 I. C. 266. 33 P. L. R. 508; A. 1 R. 1932 Lah. 374, which held that it is not a suit within the meaning of S. 80 of the Code. It has been held by the Calcutta High Court that a proceeding under para. 21 is a suit—*Guru Charan v. Uma Charan*, 26 C. W. N. 910; 70 I. C. 985. And the Bombay High Court has held that after the registration of the application as a suit, it becomes a suit for the purposes of Or. XXXVIII and the Court has jurisdiction to direct attachment before judgment—*Govind v. Venkatesh*, 29 Bom. L. R. 342; 101 I. C. 480; A. 1 R. 1927 Bom. 259.

**Pleader's fee.**—According to r. 289 (6) of the Oudh Civil Rules only one-fourth of the fee payable to pleaders in case of suits decided on merits on contest can be taxed—*Ram Charan v. Jasoda*, 5 Luck. 678; 7 O. W. N. 97; 126 I. C. 508; A. 1 R. 1930 Oudh 89

"Arbitration which was filed in an order of reference was appointment of an umpire, and an umpire. An award was made by the umpire."

"Sufficient cause" against the filing of the agreement.—Where the parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the others had consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in the Court.—*Brouke v. Surdya*, 12 B. L. R. App. 13.

Under Ss. 523 and 525, C. P. Code, 1882 (rr 17, 20) parties to a suit as well as persons not parties to a suit may agree to refer matters in dispute between them to arbitration. The Court may order the agreement to be filed in the Court. O. L. J. 131: 401 C. 20.

The Court should not make an order of reference under this para, where the agreement is to refer to several persons specifically named as arbitrators and one of them dies before the application under this para. is made.—*Mohantai v. Damodar Das*, (1918) Punj. Rec. No. 71, p. 238, *Ma Ba U v. Maung Pe Lan*, 11 Bnr. L. T. 160; 42 I. C. 911; *Narayanappa v. Ramchandrappa*, 54 M. 469; 129 I. C. 638; A. I. R. 1931 Mad. 28. But the Court is competent to make an order of reference if the agreement expressly provides that in case of death of any arbitrator, another arbitrator may be appointed in his place.—*Sri Ram v. Sorabji*, (1919) Punj. Rec. No. 155, p. 114.

If one party to a submission has been guilty of such laches, (a delay of 3 years in filing the agreement without any sufficient reason) as to entitle the other party to repudiate the submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation (following 52 B 116 and 17 C. 200)—*Vishwas v. Bhalchandra*, 33 Bom. L. R. 1022; 134 I. C. 733; A. I. R. 1931 Bom. 529.

On a reference to arbitration without the intervention of the Court, one of the parties declined to act after the proceedings were begun. Held, that it was competent to the Court to make an order of reference under para. 17, Sch. II, C. P. Code on the application of one of the parties and to appoint a new arbitrator under para. 5 even in the absence of a provision to that effect in the deed of agreement.—*Fasal Ilahi v. Prag Narain*, 44 A. 523; 20 A. L. J. 327.

During the pendency of the arbitration proceedings on a private reference one of the parties died and the arbitrator thinking that he had no power to bring the representatives of the deceased on the record refused to go on with the arbitration. On an application for filing the agreement referring the matters to arbitration, held, that the Court could not order the arbitrator to carry on the arbitration proceedings.—*Ahmad Nur Khan v. Abdur Rahman Khan*, 42 A. 191; 18 A. L. J. 76; 51 I. C. 866.

Under the Mahomedan Law, a mother who has not been appointed guardian of the properties of her minor children by the Court is not competent to bind the minors between the minors and other persons parties. Such an agreement is not for the purpose of the Code, and does not amount to an acceptance on their part. It is void. It is not filed in Court under Sch. II, para. 17 of the C. P. Code.—*Mohsinddin Agha v. K. Ahmed*, 47 C. 713; 57 I. C. 945.

An agreement to refer to arbitration does not become void by reason of the resignation of one of the arbitrators and this is not a sufficient reason for refusing to file the agreement in Court, in as much as there was a distinct provision in the agreement that in case of disability, resignation or death of any arbitrator, the party which had elected such arbitrator would be competent to appoint another in such arbitrator's place.—*Sriram v. Sorabji*, 8 L. L. J. 276.

"Arbitrator appointed in accordance with the provisions of the agreement."—The provision is mandatory. Thus where an agreement provides for a reference to a European merchant, the Court has no power to appoint an Indian merchant: *Dreyfus & Co. v. Gurditta*, 35 P. R. 1911; 9 I. C. 635.

Two persons were named as arbitrators, and the agreement provided that in the event of difference of opinion, the final decision was to be given by K. As one of the named arbitrators refused to act, the Court appointed the umpire K, the sole arbitrator.

*held*, that the appointment of K as the sole arbitrator was in accordance with para 17 (4) (44 A 523 Dist., 8 A. 61 and 12 A 191 Ref. to).—*Vishwas v. Bhalchandra*, 134 I. C. 733; 33 Bom. L. R. 1022; A. I. R. 1911 Bom 522. If the agreement was to refer the matter in dispute to three arbitrators, the Court could not add a clause that in case of difference the opinion of the majority should prevail—*Ramappa v. Bhatrya*, 51 M. L. J. 440; 97 I. C. 824; A. I. R. 1926 Mad. 1183.

Appeal from orders filing or refusing to file an agreement to refer to arbitration.—Under S 101 (1) (d), an appeal lies from an order under this para. filing or refusing to file an agreement to refer to arbitration. It was appealable as a decree under the old Code—*Ghulam Khan v. Muhammad Hassan*, 29 C. 167. See notes under that section of the Code.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit. [NEW.]

### COMMENTARY.

Scope and object of the para.—This para. is new and it corresponds to S. 19 of the Indian Arbitration Act (IX of 1997). It gives a party who is willing to abide by the agreement, the right to apply for a stay of the suit filed by the other party and has been inserted to meet the cases noted below. Under this para the suit will not be barred, but its proceedings may be stayed by an application at the earliest opportunity.

This para applies to suits pending before the Court of Small Causes. Bombay : 1

applicability of the para. A suit was referred to arbitration but subsequently technical difficulties arose so as to prevent the arbitrator and the Court can therewith. *Held*, that para. 18 applies to the present case.—*Rani Sashi* 879.

Where the reference to arbitration was made by the parties after the suit was disposed of by the trial Court and before the appeal was filed, *held* that the award was immune from the objection that unless proceedings before the arbitrators are stayed under para 18, there might be a clash between the decision of the Court and of the arbitrators. The award is enforceable if the appeal is subsequently withdrawn—*Shiva Kumar v. Prasad*, 7 O. W. N. 815; 128 I. C. 748; A. I. R. 1930 Oudh 432.

"No sufficient reason"—It is for the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not for the defendant to show that no such reason exists—*Dinabandhu v. Durgaprasad*, 46 C. 1041. *Ganesh Das Ishar Das v. Durga*, 3 L. L. J. 61; 60 I. C. 776. *Volkart v. Fateh Muhammad*, 61 I. C. 322.

Where pending arbitration proceedings one of the three specified arbitrators died and the agreement contained no provision for filling up the vacancy and one of the



parties thereupon filed a suit; *held*, that the Court had no power to stay the suit. The provisions of paras. 4 and 5 cannot be invoked; these provisions can only be applied if they are consistent with the agreement (following 24 M. L. J. 15; 51 M. L. J. 440; 45 B. 1181; *distinguishing* 12 M. I. A. 112, 33 A 743 (P. C.) and 27 M. 112; *referring to* 17 M. 458, 42 I. C. 911, 12 B. L. R. App. 13, 51 I. C. 636, and 42 A. 192; and *not following* 19 A. L. J. 823 and 44 A. 523).—*Narayanappa v Ramchandrappa*, 34 M. 469; (1930) M. W. N. 1028; 60 M. L. J. 676; 129 I. C. 698; A. I. R. 1931 Mad. 28.

Where parties have deliberately made contracts with an arbitration clause and chosen to select their own forum, there is a *prima facie* duty upon the Court to respect the agreement. But if there is a likelihood of difficult questions of law arising which would inevitably entail a special case being prepared and referred to Court or which are clearly outside the purview of the arbitration clause or if there be questions which, though within it are so intimately connected with the prime question, a more convenient course would be to try the whole action in Court and a stay may be refused.—*Singaran Coal Syndicate v. Balmukund*, 58 C. 1107; 35 C. W. N. 514; 53 C. L. J. 321; 134 I. C. 529; A. I. R. 1931 Cal 772. The fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceeding where the main object of the action is within the clause—*Ibid*.

"Institutes any suit"—This para. applies only to suits instituted after the agreement to refer to arbitration has been made. The Court has no power to stay the suit under this para where a suit is first filed and then the parties agree to refer the matters to arbitration.—*Ranjidas v. House*, 85 C. 199; *Poruri v. Gullapudi*, 34 B. 372.

The institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration dealing with the same subject matter; but if after the institution of the suit, neither party applies for a stay of the hearing of the suit under Sch II, para. 18, C. P. Code, either at the time of settlement of issues or before, the effect of such a failure is to supersede the arbitration for good and any decision which might be arrived at in that suit would be binding on the parties as if no such reference to arbitration had been made prior to the suit.—*Zainab v. Budhna*, 23 O. C. 63; 68 I. C. 235; *Sarat Chandra v. Rajkumar*, 69 I. C. 563.

Agreement to refer to arbitration, whether bars a suit.—Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of S 523, C. P. Code, 1882 (r. 17) or not.—*Shoo Dat v. Shoo Shankar*, 27 A. 58 (4 A. 546 and 9 A. 168 followed). But the Court should proceed with the suit after removing the stay where the arbitrators having been found unwilling to act, the plaintiff applied for removal of the stay.—*Laxman v. Manjunath*, 45 B. 1181; 23 Bom. L. R. 511.

To bar a suit under S. 21 of the Specific Relief Act (I of 1877), it must be shown that the plaintiff has refused to perform the agreement to refer to arbitration before the action is brought; the filing of the plaint is not such a refusal.—*Koomud Chunder v. Chunder Kant*, 5 O. 498; 5 C. L. R. 284; *Crisp v. Adlard*, 23 C. 956; and *Tahal v. Bisheshwar*, 8 A. 57. On this point, see also *Salig Ram v. Jhunna Kuar*, 4 A. 546; *Sheoambar v. Deodat*, 9 A. 168; and *Adhibar v. Cursandas Nathu*, 11 B. 159.

A suit will not lie to enforce an agreement to refer to arbitration even in the case referred to in the first exception to S. 28 of the Contract Act, IX of 1877. But that section does not forbid an action for damages for the breach of such an agreement.—*Koegler v. The Coringa Oil Company*, 1 C. 42 (on appeal 1 C. 456).

See also the cases noted under para. 22.

Power of Court when agreement to refer dispute to arbitration is set up by one party and denied by the other.—A Court can only take action under para. 18, Sch. II, C. P. Code, when there is a subsisting agreement to refer a dispute to arbitration. It is not necessary that both parties should admit that there is an agreement to refer. It is for the Court to decide whether or not such an agreement had as a matter of fact been made.—*Firm Shoo Parshad Radha Keshan v. Indore Malwa United Mills*, 62 P. R. 1917; 65 P. W. R. 1917; 89 I. C. 508.

"Apply to the Court to stay the suit."—Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit, he must be deemed to have waived his right to arbitration.—*Chimman Lal Posti Mal v. Phul Chand Fateh Chand*, 44 A. 292; 20 A. L. J. 123; 65 I. C. 795; *Ram Nath v. Ramranjan*, A. I. R. 1922 Cal. 181.

**Appeal.**—Under S. 104 (1) (c), an appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration. See notes under that section of the Code.

Provisions applicable to proceedings under paragraph 17, 19. The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon. [S. 524.]

### COMMENTARY.

**Alterations.**—This para. corresponds to S. 524, C. P. Code, 1882, with some alterations of a verbal character.

"So far as they are consistent with any agreement filed under para. 17—The words "so far as they are consistent with any agreement so filed" in this para. do not

new arbitrator may be appointed in such a case by the Court, the Court may also make an order superseding the arbitration if the new arbitrator refuses to act.—*Zahur Ahmed v. Taslimunnissa*, A. I. R. 1926 All. 55; 89 I. C. 401.

Under S. 523, C. P. Code, 1882, it would be accepted *Held*, that this ground of mis-

### ARBITRATION WITHOUT THE INTERVENTION OF A COURT.

20. (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed. [S. 525.]

### COMMENTARY.

**Alterations.**—This para. corresponds to S. 525, C. P. Code, 1882. No other alteration has been made except that the words "any Court having jurisdiction over the subject-matter of the award" have been substituted for the words "Court of the lowest grade having jurisdiction over the matter to which it relates."

The provisions of the Code, relating to arbitration are not compulsory, but enabling and they provide certain courses of procedure to be followed if the parties desire to adopt those provisions, but it does not enact that no other course shall be pursued. So, where an award is made otherwise than in a suit, the parties need not apply under this rule but may file a suit to enforce it. See the cases noted under r. 21 under the heading "*Suit to enforce a private award.*"

**Scope of the Paragraph**—This para. and para. 21 refer to cases where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award.—*Ghulam Khan v. Muhammad Hassan*, 29 C. 167 : 59 I. A. 51.

Paragraph 20, unlike paras. 1 and 17, does not require that the reference should be in writing, the language of that para. does not require that there should be a written reference. All that is necessary is that the Court must be satisfied that the matter had been referred to arbitration, that an award had been made thereon and that there was no ground or proof which would vitiate the award.—*Ram Chandra v. Manohar*, 133 I. C. 531 : A. I. R. 1931 All 751. If no writing is required by the term of submission a parole or oral award is valid and binding (26 B. 132 foll.).—*Ram Bilash v. Birich Singh*, 12 P. L. J. 733.

Where the agreement was under S. 152 of the Companies Act (such as the Assisted Siding Agreement between a Railway Co. and a Coal Co.) the provisions of para. 20 were excluded by S. 3 of the Arbitration Act and under S. 4 of the latter Act, the Court of a Sub-Judge was not "the Court" and it had no jurisdiction to entertain an application (following 118 I. C. 533 and dissenting from 132 I. C. 399).—*Ruplal v. Dhansar Coal Co.*, 136 I. C. 445 : 13 P. L. T. 169.

This para. does not apply to matters referred to arbitration at the parties to the reference.—*Mansaf Motilal v. Gokal Das*, 45 B. 245 : 22 Bom. L. R. 1048 ; *Chandasappa v. Basingappa*, 29 Bom. L. R. 1254 (F.B.) : A. I. R. 1927 Bom 565 ; *Kondé v. Chumtal*, A. I. R. 1929 Bom. 1. But see *Gurdev v. Gufar Mai*, 131 I. C. 126 : A. I. R. 1931 Lah. 594 (applying 3 L. 296). See notes under Or. XXIII, r. 3.

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R. 1928 Mad. 371  
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(following 41 M 116, A. I. R. 1923 Cal 135 and A. I. R. 1922 Lah. 369).

Where an agreement to refer to arbitration was made after a suit for pre-emption had terminated and before an appeal has been filed ; held, that the suit was not pending during that period and that leave of the Court was not necessary to effect a compromise in pursuance of the agreement.—*Shiva Kumar v. Thakur Prasad*, 7 O. W. N. 815 : 129 I. C. 748 : A. I. R. 1930 Oudh 432.

There is nothing illegal in two or more persons agreeing to refer future disputes to arbitration in a pending suit.—*Ganga Ram v. Ram Kishen*, 137 I. C. 807 : A. I. R. 1932 Lah. 459.

This paragraph is no bar to a regular suit to enforce an award.—Under the corresponding S. 525 of the old Code, it was held that a party interested in an award may, at his option, either avail himself of the summary remedy to enforce the award as provided by that section or he may bring a regular suit to enforce the award.—*Subbaraya v. Sadasiva*, 20 M. 490 ; *Bhagahari v. Behary Lal*, 33 C. 881. A suit can be brought upon an award independently of the summary procedure authorized by this paragraph at any period which the law of limitation of suits permits.—*Wazir Ali v. Mulkar*, 5 I. C. 597 : 34 P. R. 1910 : 11 P. W. R. 1910.

Where the suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award and the question of the acceptance of his award is not in issue, it cannot be said that a party is estopped because of his signature to the award. If both parties to the award signed it after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures.—*Gunn v. Rahman*, 7 R. 136 : 117 I. C. 574 : A. I. R. 1929 Rang. 166.

## Para. 20.

There is a distinction between an application to file an award and a suit to enforce an award; in the latter case a second appeal is maintainable—*Ibid*.

**A valid award bars a suit on original demand**—A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and the award furnish the only basis by which the rights of the parties can be determined and constitutes a bar to any action on the original demand.—*Krishna v. Balaram*, 19 M. 220; *Bhajahari v. Bchary Lal*, 33 C. 681.

**"Any person interested in the award"**—A person who is a stranger to the submission to reference and under no obligation to abide by the award could not be said to be a person interested in the award within the meaning of Sch 11, para. 20 of the C. P. Code.—*Pandit Sankata Prasad v. Jagannath*, 9 O. L. J. 410: A. I. R. 1922 Oudh 276

**"Where any matter has been referred to arbitration."**—A Civil Court has jurisdiction to file an award and pass a decree thereon under this para. and para. 21 though the matter referred to arbitration is one to which a Civil Court has no jurisdiction to entertain a suit under S 9 of the C. P. Code; as for instance a matter (*manjari*) relating to a compliment or dignity.—*Raghavendra v. Gururao*, 37 B. 442: 15 Bom. L. R. 361. See also *Muhammad Ibrahim v. Ahmad*, 32 A. 503, in which it was held that the right to succeed to the trusteeship of a public charitable trust is not a right which can be settled by arbitration without the intervention of a Court. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph

These matters are referred to arbitration by the parties before the arbitrators to the postponement of such matters.—*Jnaniendra v. Suresh*, 109 I. C 821: A. I. R. 1928 Pat 7. An executor can refer the construction of a will to an arbitrator.—*Ibid* (referring to 19 C. W N 948).

All that paras. 20 and 21 require is that the Court should be satisfied that a matter was actually referred to arbitration and an award made thereon. It is not necessary that there should be a dispute between the parties.—*Ganga Ram v. Ram Kishan*, 137 I. C. 807: A. I. R. 1932 Lah 459.

**Court to which application should be made under this paragraph.**—The words "subject matter of the award" have been substituted in the paragraph for the

no jurisdiction to file an award and to pronounce judgment in accordance with the provisions thereof where person or property within the jurisdiction of the 51 C. 361 (P. C.) 51 I A 72: 83 I C 531: A. I. R. Ram, 10 L. L. J. 500: 113 I C. 899: A. I. R. 1929 Lah. 24; *Dakumal v. Khayumal*, 131 I. C 182: 25 S. L. R. 204: A. I. R. 1931 Sind 47.

The Court is not to be satisfied that the property situated in India is within the jurisdiction of the Court even if a want of jurisdiction vitiates the decree as regards both the property over which the Court had jurisdiction and that over which the Court had no jurisdiction, or only as regards the latter depends on whether the nature of the case permits of a separation of the part concerning the one from that concerning the other without affecting its basis. Where such separation is not possible the whole decree is vitiated.—*Ibid* (42 M. 813 (P. C.) and 131 I. R. 1931 Rang. 252 34: 35 M. L. W. 565).

**Persons competent to apply under this para.**—The word "parties," as used in S. 525, C. P. Code, 1882 (r. 20), should not be confined to persons who are actually before arbitrators, but include those who are likely to be affected by the award. If parties, by an agreement, have undertaken between themselves that, in the event of certain things happening, a particular procedure shall be followed, which, under one set of circumstances, may be adopted *in invitum*, then, for the purposes of this paragraph, they should be regarded as parties to the arbitration.—*Jones v. Ledgard*, 8 A. 340.

Where a matter has been referred to arbitration, without the intervention of the Court, by parties, one of whom is an agriculturist, and an award has been made thereon, any person interested in the award may, without obtaining the conciliator's certificate, apply for the filing of the award under S. 525, C. P. Code, 1882 (r. 20), the provisions of which are not superseded by S. 47 of the Dekkan Agriculturist's Relief Act, 1879.—*Gangadhar v. Mahadu Santaji*, 8 B. 20.

A natural guardian of a minor has power to submit to a private arbitration, provided the submission and the award are for the benefit of the minor.—*Roman Kissen v. Hurroji*, 19 C. 334. But see *Lakshmana v. Chinnathambi*, 24 M. 326, where it has been held that submission and award by a minor's guardian without the sanction of the Court under S. 462, C. P. Code, 1882 (Or. XXII, r. 7), are invalid.

Proceedings taken to file and enforce a private award are of the nature of a suit, and a minor must be represented in such proceedings by a person holding a certificate of administration.—*Vasudev Vishnu v. Narayan Jagannath*, 9 B. H. C. R. 289.

The power given by Sch. II, para. 20 to any person interested to apply to a Court to have an award filed in Court does not override the general power under Or. XXIII, r. 3 to adjust disputes by a lawful compromise at any time after the institution of a suit.—*Chitalapalli v. Venkanna*, 76 I. C. 502.

Where the document containing the agreement to refer and the award is not signed by the person claiming under the award or by any other person on his behalf as his guardian he cannot base any claim on the award.—*Prem Sagar v. Ram Gopal*, A. I. R. 1929 Lah. 814.

**Small Cause Court.**—When a matter has been referred to arbitration without the intervention of any Court, a Small Cause Court in which the award is made, may, by such Court, file the award.—*Sagatullah, 1 B. L. W. A. C. 121*, 5 M. H. C. R. C. R. 54; and *Gangappa v. Kapinappa*, 5 M. H. C. R. 128. See also *Simson v. McMaster*, 13 M. 344.

A Sub-judge invested with powers of Small Cause Court, does not on that account become a Judge of Small Cause Court, and is not competent to try a civil suit for pecuniary relief.—*Balkrishna v. Lakshman*, 3 B. 219.

The jurisdiction of a Court to file an award depends on the reliefs granted by the award. It is not open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under para. 20 of Sch. II where the other reliefs granted are beyond the competence of the Court.—*Rethamati v. Ramasani*, 10 L. W. 57; 51 I. C. 53.

The High Court can interfere in revision with the order of the Small Cause Court, staying the hearing of a petition under Sch. II, para. 20, on the ground of there having been a prior instituted suit and that both the suits related to the same dispute, the order being one which is passed without jurisdiction (114 P. R. 1919 and 60 L. J. 96 Rel. on)—*Gurbaksh v. Sant Ram*, 30 P. L. R. 395; 117 I. C. 94; A. I. R. 1929 Lah. 533.

**Rejection of Application out of Court.**—See *Ramdhari v. Ram Charitter*, 38 C. 143.

**Effect of refusal of an application to file an award.**—The refusal of an application under para. 20 of Sch. II of the C. P. Code to file an award does not operate as a res judicata in respect of a subsequent suit brought to enforce the award.—*Harakh Ram Jani v. Lakshmi Ram Jani*, 43 A. 109; 60 I. C. 626. The mere refusal to file an award

legal effect.—*Muhammad Nizaz*  
1, 32 A. 491. It is not necessary for  
—*Suzain v. Lachmi*, A. I. R. 1927

All. 733.

**Filing and Enforcement of private award.**—Where there is no matter in differ-  
valuation made by three  
meaning of S. 525, C. P.  
*enaghten v. Rameshwar*

In the case of a private award where the arbitrators granted a new trial and even-  
tually disposed of the case in the absence of the defendant, and the award was signed by  
the arbitrators at different times. *Held*, that such an irregular award should not be  
enforced under this section.—*Nader Ali v. Majoo*, 21 W. R. 377.

A Court to which an application is made under this section, to file a private award,  
has no power to amend the award or remit it for reconsideration, but only possesses the  
power to file and enforce it or to reject the application.—*Mustafa Khan v. Phulja Bibi*,  
27 A. 526; *Sidik Mahomed v. Nihalchand*, 23 S. L. R. 349; 116 I. C. 102; A. I. R. 1929  
Sind 107.

Matters in dispute were referred to seven arbitrators without the intervention of a  
Court. The arbitrators held several sittings extending over some six months and at their  
last sitting they unanimously came to a decision and informed the parties of it. Subse-  
quently the award was drawn up and signed by four out of the seven arbitrators. *Held*,  
that the actual award was an oral award made by all the arbitrators at their  
last sitting, and the fact that the minority of the arbitrators did not sign the award was  
not fatal to the award.—*Dandekar v. Dandekars*, 6 B. 663.

An award made under S. 525, C. P. Code, 1892 (r. 20), which is partly within, and  
partly exceeds, the terms of the submission to arbitration, cannot be enforced by summary  
procedure under S. 526 as to such portion as does not exceed those matters.—*Mana*  
*Vikrama v. Mattichery*, 3 M. G. 68 (followed in *Mustafa Khan v. Phulja Bibi*, 27 A. 526).

On an application to have the award filed in Court under S. 525 C. P. Code, 1892  
(r. 20), the defendant amongst others objected that the agreement of submission was vague  
and indefinite. The Sub-Judge, overruling the objection, directed the award to be filed  
and passed a decree upon it. *Held*, that the objection was well founded inasmuch as the  
agreement to refer was vague and indefinite, and the award should not be allowed to be  
enforced under S. 525, C. P. Code 1892 (r. 20).—*Bindessuri Pershad v. Jauke Pershad*,  
16 C. 482.

Under para 20 (1) of Sch. II of the C. P. Code, the Court cannot refuse to file the

19 M. L. T. 228; (1916) 1 M. W. N. 203.

When a private award between parties is filed in a Court, the prescribed course is for  
the Court to give judgment upon it and pass a decree, not to order execution thereof before  
such decree has been passed.—*Sahab Ram v. Rashee Nath*, 41 W. R. 295. See also  
*Ishwardas v. Dasibai*, 7 B. 316, where it has been held that it is the duty of the Court to  
proceed to pass judgment according to the award as soon it is ordered to be filed, without  
waiting for an application that that should be done.

Where the award determined rights of parties not joining in the reference and a  
decree was passed thereon: *held* that the decree was null and void and an executing Court  
can refuse to execute it.—*Samson v. Gnanamanikam*, 129 I. C. 519; 8 R. 544; A. I. R.  
1930 Rang. 337.

*Chaturbaj v. Anthoni*, 1932, C. 524. A. I. R. 1931 All. 251.



The date of the award means not the date the award bears, but the date on which it was given to the parties, i.e., the date of publication—*Kunji Lal v. Banwari Lal*, 43 I. C. 711; 4 P. L. J. 394.

It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under this section from the time when he is in a position to enforce it, that is, from the time when the award is delivered to the parties, and not from the date when the award is signed by the arbitrators—*Dutto Singh v. Dosad Bahadur*. 9 C. 575.

not amount to a fresh application so as to create bar of limitation—*Mangal v Prag Das*, 29 A. L. J 863; 133 I. C. 410; A. I. R. 1931 All. 725.

21. (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. [S. 526.]

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. [N&W.]

## COMMENTARY

**Alterations**—Sub-rule (1), with some modification, corresponds to S 526 of the C. P. Code of 1892, which ran as follows: "If no ground such as is mentioned or referred to in S 520, or S 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

"Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon"—These words are new

of the old section with sub-  
to set at rest the conflict-  
as to the proper course for  
mentioned in rr. 14 and 15.

In some of the cases it was held that where an objection to the factum or validity of the submission and award is raised, the Court had no jurisdiction to deal with it and must refer the parties to a regular suit. But in some other cases it was held that where objections are raised to the award

been noted below to understand clearly the object of the amendment.

Sub-rule (2) is new. It has been framed adopting the view of the Judicial Committee as expressed in *Ghulam Khan's case* (29 C. 167, 6 C. W. N. 226 (P. C.)).

The provisions of Ss. 523 to 526, C. P. Code, 1882, shall not apply to any submission to arbitration to which the provisions of the Indian Arbitration Act for the time being apply.—Sec 3 of the Indian Arbitration Act (IX of 1899)

**Grounds of objection under paras 14 and 15** — If an award in a matter referred to arbitration without the intervention of the Court determines any matter not referred to arbitration the only course open to the Court under the present rule is to refuse to file



the award, even where the portion of the award open to exception can be separated from the rest.—*Dinabandhu v. Chintamani*, 19 C. W. N. 476; *Kunj Lall v. Bonwari Lall*, 4 P. L. J. 394, 401-402; *Dhanpat Ras v. Kahan Divi*, (1914) Punj. Rec. No. 30, p. 108; *Allarakhia v. Jehangir*, 10 B. H. C. R. 391; *Mustafa Khan v. Phulja Bibi*, 27 A. 526; *Dandekar v. Dandekars*, 6 B. 663; *Thiruvengadathiengar v. Vaidinatha*, 29 M. 303. But in *Sayed Khan v. Abdul Gaffoor*, 115 I. C. 687; 10 P. L. T. 53 it has been held that such an award is not invalid if the portion of the award dealing with the matter referred is valid and can be enforced and it is separable from the rest of the award. It has also been held that the binding nature of the award on the parties is not affected by the fact that the arbitrators professed to deal with the interest of persons who were not parties to the reference (following 7 P. L. T. 644). See also *Dayaram v. Naraindas*, 119 I. C. 59; A. I. R. 1929 Sind 200.

Paragraph 21 does not contemplate an application to set aside the award like paras 16 and 19 within ten days of getting notice of filing the award.—*Peria Goundan v. Thangammal*, 111 I. C. 555; A. I. R. 1928 Mad 371.

Where the agreement was to refer the dispute to an Association and the Secretary arrogating all the powers and functions of the whole body made the award, an application to file the award cannot be granted as the award was not made by the Association.—*Narsingh v. Siva Ram*, 11 L. L. J. 356; A. I. R. 1909 Lah. 826.

An award of three arbitrators made without final discussion with the fourth arbitrator and in his absence and to which he does not agree is not an award by a majority of four arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all, and the award is consequently vitiated.—*Ma Sin v. Ma Pu*, 7 R. 715; 121 I. C. 801; A. I. R. 1930 Rang 196. But where five arbitrators were appointed under a registered agreement and one being absent, the parties orally agreed to abide by the decision of the remaining four arbitrators; held, that though the subsequent oral agreement between the parties was hit at by S. 92 of the Evidence Act, the defendant himself having agreed to the procedure, it was not a proper case for interference in revision.—*Bhim Sen v. Tarachand*, 135 I. C. 230; 29 A. L. J. 1087; A. I. R. 1932 All 154. A matter clearly outside the power of the arbitrator would render his award invalid, unless that portion of his award was separable from the rest (*Ibid*); referring to *Amir Begau v. Badriddin Husain*, 36 A. 336 (P. C.); 18 C. W. N. 755; 19 C. L. J. 494; 16 Bom. L. R. 413; 27 M. L. J. 181; 23 I. C. 625).

An error in calculation, unless so palpable and gross as to afford strong evidence of misconduct, is no ground for interference by Court, the Court has no power either to correct such errors or to reject an award which contains them (42 A. 277 Ref.).—*Alagappa Chettiar v. Chudambaram*, 133 I. C. 522; 34 L. W. 507; (1931) M. W. N. 451; A. I. R. 1931 Mad 619. Examination of a party or a witness in the absence of the other party is an irregularity amounting to misconduct and justifies setting aside of the award. It is not necessary to prove prejudice; but such an irregularity can be cured by waiver.—*Ibid*.

Where parties have consented to an award they cannot be allowed to object that the award is partial or incomplete.—*Gita Ram v. Kesho Ram*, 32 P. L. R. 754 (12 L. 65 foll.).

An arbitrator has very wide powers and even an error of law made by an arbitrator does not invalidate the award (5 O. W. N. 1001 foll.; 23 A. 383 dist.)—*Sartaj Fatima v. Muhomed Jawad*, 129 I. C. 322; 7 O. W. N. 1095; A. I. R. 1931 Oudh 6.

Objections to the filing of awards upon any of the grounds mentioned in paras 14 and 15 and the jurisdiction of the Court.—When an application is made to a C. P. Code, 1882 (r. 20), and objection is made to it mentioned in Ss. 520 and 521, C. P. Code, 1882 (rr. Court to pursue is to dismiss the application and to suit to enforce the award in which all the objections and determined.—*Hurronath v. Nistaranji*, 10 C. 74; *Bhupat v. Monohur Bhugut*, 10 C. 11; 13 C. L. R. 15; C. 157; *Sree Ram v. Denodunilho*, 7 C. 450; 9 C. 157; *Jankee Pershad*, 16 C. 482; and *Hussaini Bibi v. J.* A. 120, but see

*Dandekar v. Dandekars*, 6 B 663; *Dhanyibhai v. Mathurbhai*, 28 B 287; *Dutto Singh v. Dosad Bahadur*, 9 C. 375; *Jagan Nath v. Mannu Lal*, 16 A 231; and *Jones v. Leboart*, 8 A 340. In these latter cases it has been held (dissenting from the former cases) that in Ss 525 and 526, C. P. Code, 1882 (rr. 20, 21), the terms "to show cause" does not mean argument, but both to view is supported by which it has been held verified written state. 1882 (r. 15) the Court the duty of the Court to determine whether ted by the recent Full 3.); 2 C. W. N. 529, in 21, has been followed; ssented from; and this 1 C 741 13 C L R 14, 10 C 11; 13 C. L. R. 171, 9 C 557, 7 C 490; 8 C. L. R. 147. See also *Ganesh Singh v. Kashi Singh*, 28 A 621, and *Manilal v. Vanamtilas*, 29 B 621, in which the principle laid down in 25 C 737 (T. II) has been followed.

**A Private Award is valid and binding though Proceedings under Para. 20 have not been taken to enforce it**—An award made by private submission may be valid and binding though no proceedings under S 525, C. P. Code, 1882 (r. 20) have been taken to enforce it—*Surubhet Narain v. Geuree Pershad*, W. R. 269. See also *Ramyad Sahoo v. Deolar Sahoo*, 9 W. R. 441 and *Nursunah v. Putto*, 20 W. R. 50.

An arbitration award may be valid without being enforced by the Courts, as for instance, where possession under the award is shown: *Mohesh Chunder v. Bulorani*, 6 W. R. 94.

22 A 224

**"A decree shall follow"**—Schedule II of the C. P. Code is not complete in itself, A decree passed under para 21 (2) of Sch. II is a decree in a suit and Or IX, r. 13 applies to such a decree—*Mahabir Prasad v. Balkishun Das*, 62 I C. 927.

**Suit to enforce private award—Limitation**—The provisions of the Code on arbitration are not compulsory, but enabling, and prescribe certain courses of procedure to be followed if the parties desire to adopt its provisions but this chapter does not enact that no other course shall be pursued. So where an award is made otherwise than in a suit, the parties need not apply under S 525, C. P. Code, 1882 (r. 20), but may file a suit to enforce it—*Pragdas v. Girhardas*, 26 B 76.

A suit lies to enforce an award made without the intervention of a Court of justice. The procedure provided by S 525, C. P. Code, 1882 (r. 20), is not imperative upon a plaintiff who seeks to enforce an award so made—*Palanappa Chetti v. Rayappa Chetti*, 4 M H C. R. 119, and *Kota Seetamma v. Kothiparla*, 8 M. H. C. R. 81 (followed in *Subbaraya Chetti v. Sada Siva Chetti*, 20 M 490 (15 M. 99 followed)).

Where an award cannot be filed and a decree obtained upon it under S. 525, C. P. Code, 1882 (r. 20), a party is not precluded from suing upon it—*Gopi Reddi v. Mahanandi*, 15 M. 99. See also *Narasayya v. Ramabadra*, 15 M 474, and *Jafri Begum v. Syed Ali Raza*, 5 C. W. N. 585 (P. C.).

A suit is maintainable to enforce specific performance of a private award, where it is not possible to assess compensation in money for breach of the particular condition in the award—*Brij Mohan v. Shyam Singh*, 24 A. 164.

A suit to enforce an award cannot be treated as a suit for specific performance of contract within the meaning of Art. 113 of the Limitation Act 1877, the article applicable being Art 144 of the Act.—*Sornavalli Ammal v. Muthayya Sastri*, 23 M 503 (S. A. 263, and 16 A. 3 referred to). Distinguished in *Sheo Narain v. Beni Madho*, 13 A 285. See also *Bhajahari v. Behary Lal*, 33 C. 631; 4 C. L. J 162.

Whether matters heard and determined in proceedings under this para. are *Res Judicata* and cannot be re-opened in subsequent suit.—Matters heard and determined in proceedings under para. 21 of Sch II of the C. P. Code are *res judicata* and cannot be re-opened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith. A proceeding under para. 21 of Sch II is a suit within the meaning of S. 11 of the C. P. Code.—*Guru Charan v. Uma Charan*, 26 C. W. N. 940. The Allahabad and Bombay High Courts have held that the refusal of a Court to file a private award on the ground of misconduct of the arbitrators does not operate as *res judicata* in respect of a suit subsequently brought to enforce the award.—*Kunjt Lal v. Durga Prasad*, 32 A. 491; *Harakh Ram v. Lakshmi Ram*, 43 A. 109; 10 I. C. 446; *Rajmal v. Maruti*, 45 B. 329; 59 I. C. 755; *Abdul Aziz v. Chandu*, 27 Bom. L. R. 652; 60 I. C. 69. A. I. R. 1925 Bom. 418.

Appeal.—An appeal lies from an order under this rule filing or refusing to file an award.—See S. 104 Sub-sec. (1), Cl. (f) *Shankar Das v. Amir Chand*, 7 L. L. J 91; 83 I. C. 531; A. I. R. 1925 Lah. 321. *Jagat Pande v. Sarwan Pande*, 47 A. 743; 89 I. C. 76. A. I. R. 1925 All. 404. But no appeal lies from the order passed in appeal.—*Ahmed Dun v. Atlas Trading Co.* (1919) P. R. No. 66, p. 287. It must be noted however that though an appeal lies from an order made under this rule, no appeal lies from a decree passed on an award except in so far as the decree is, in excess of or not in accordance with the award.—*Bhahadur Singh v. Negi Puran Singh*, 30 A. 151; *Kulsum v. Ali Akbar*, 39 A. 401 (411); *Munung Tun v. Munung Po*, 1 R. 265; A. I. R. 1923 Rang. 197. In such appeal the appellant is not entitled to reopen the whole case and argue all other questions which were raised before the lower Court.—*Bansit Lal v. Gopal Lal*, 110 I. C. 298. A. I. R. 1929 Lah. 819.

Where an award is filed in Court, the Court should first pass an order that the award be filed under para. 21. He should then have proceeded to pronounce judgment according to the award and a decree should follow the judgment so pronounced. But even though there is no separate order as contemplated by para. 21 that would not prejudice the party affected from filing an appeal against the order which should be deemed to have been passed by the Court.—*Krishna Aiyar v. Subbarama*, (1932) M. W. N. 234; 35 L. W. 565; A. I. R. 1912 Mad. 462; 62 M. L. J. 550; 139 I. C. 877.

When an order is made directing an award to be filed, and decree is passed on such award before an appeal is preferred from the order directing the award to be filed, it has been held that the right of appeal from the order is not lost and if the appellate Court set aside the order, the previous decree based on such order is vacated.—*Khetra Nath v. Ushabala*, 18 C. W. N. 381; *Sondamini v. Gopal*, 19 C. W. N. 948; *Hari v. Lakshmi*, 38 A. 380, 397; *Nihal Singh v. Khushhal Singh*, 38 A. 297; *Lakshmi Narain v. Sheonath*, 42 A. 183; 54 I. C. 443; *Badri Nath v. Ram Padarath*, 134 I. C. 474; 8 O. W. N. 789; A. I. R. 1931 Oudh 315.

An appeal lies in a case where the reference itself is impugned for want of consent of the parties interested.—*Fanindra Nath v. Dwarla Nath*, 25 C. W. N. 832. See further notes under S. 104 (i) (f) of the Code.

22. The last thirty-seven words of S. 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, which the provisions of this schedule apply. [New.]

## COMMENTARY.

Addition.—This para is new.

"Shall not apply."—The proviso to S. 21 of the Specific Relief Act (I of 1877), of which the last 37 words shall not apply to any agreement to refer to arbitration, is

Paras. 22, 23.

refer, the existence of such contract shall bar the suit."

The object of exclusion of the last 37 words of S. 21 of the Specific Relief Act is to and where such a suit is instituted any party may apply to stay the suit under para 18 but adopting the procedure laid down in para 17. In this connection the exceptions 1 and 2 to S. 28 of the Indian Contract Act (IX of 1872) and the case of *Bhajahari Saha v. Behary Lal*, 33 C. 831; 4 C. L. J. 162, may be consulted. See also *Nathu Mai v. Muhammad Shaif*, 12 P. R. 1917; 39 I. C. 349.

In the case of *Bhajahari Saha v. Behary Lal*, 33 C. 831; 4 C. L. J. 162, it has been held that a suit for recovery of possession of land on declaration of plaintiff's right one to 2 years specific relief has -As an in the y basis action within award, id that such a suit cannot be regarded as a suit for specific performance of a contract within the meaning of S. 21 of the Specific Relief Act (I of 1877)

The following rulings under S. 21 of the Specific Relief Act and under S. 28 of the Indian Contract Act will explain the meaning and object of this rule

**Contract to refer to arbitration, if bars** -The proviso to S. 21 of the Specific Relief Act (I of 1877) is intended to prevent into contracts to refer matters in controversy and capriciously The Courts of Equity will contract to refer a controversy to arbitration But before this para. can be relied on as

Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Courts to proceed with the suit, whether it is filed in Court under the provisions of S. 523, C. P. Code, 1882 (r. 17) or not -*Sheodat v. Sheo Shankar*, 27 A. 53 (9 A. 163 and 4 A. 546 followed.)

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purpose therein mentioned.

[NEW.]

## APPENDIX TO SCHEDULE II.

### No. 1.

#### Application for an order of reference.

(Title of suit)

1. This suit is instituted for (*state nature of claim.*)
2. The matter in difference between the parties is (*state matter of difference.*)
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference

A. B.  
C. D.

Dated the                      day of                      19 .

NOTE —If the parties are agreed as to the arbitrators it should be so stated.

### No. 2.

#### Order of reference.

(Title of suit)

UPON reading the application presented on the                      day of                      19 .  
it is ordered the following matter in difference arising in this suit, namely:—

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the                      day of                      19 .  
and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within                      months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this

day of                      19 .

Judge.

### No. 3.

#### Order for appointment of new arbitrator.

(Title of suit)

WHEREAS by an order, dated the                      day of                      19 (*state order of reference and death, refusal, etc., of arbitrator.*) it is by consent ordered that Z be appointed in the place of X deceased (or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the                      day of                      19 .

GIVEN under my hand and the seal of the Court, this  
day of                      19 .

Judge.

## No 4.

## Special Case.

(Title of suit)

In the matter of an arbitration between A. B. of \_\_\_\_\_ and C. D. of \_\_\_\_\_  
 the following special case is stated for the opinion of the Court :—

[Here state the facts concisely in numbered paragraphs]

The questions of law for the opinion of the Court are :—

First, whether \_\_\_\_\_  
 \_\_\_\_\_

Secondly, whether \_\_\_\_\_  
 \_\_\_\_\_

X.

Y.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 .

## No. 5.

## Award.

(Title of suit.)

In the matter of an arbitration between A. B. of \_\_\_\_\_ and \_\_\_\_\_  
 C. D. of \_\_\_\_\_ :—

WHEREAS in pursuance of an order of reference made by the Court of \_\_\_\_\_  
 and dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 the  
 following matter in difference between A. B. and C. D., namely,  
 \_\_\_\_\_

has been referred to us for determination;

Now we, having duly considered the matter referred to us, do hereby make our award  
 as follows :—

We award—

(1) that \_\_\_\_\_

(2) that \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 . X.  
 Y.

## APPENDIX TO SCHEDULE II.

### No. 1.

#### Application for an order of reference.

(Title of suit)

1. This suit is instituted for (*state nature of claim*.)
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference

A B.  
C D

Dated the                      day of                      19 .

NOTE —If the parties are agreed as to the arbitrators it should be so stated.

### No. 2.

#### Order of reference.

(Title of suit)

UPON reading the application presented on the                      day of                      19 .  
it is ordered the following matter in difference arising in this suit, namely:—

\_\_\_\_\_

\_\_\_\_\_

be referred for determination to X and Y, or in case of their not agreeing then to the  
— such arbitrators are to  
19 .  
Empire is to make  
me during which it is  
used.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this

day of                      19 .

Judge.

### No. 3.

#### Order for appointment of new arbitrator.

(Title of suit)

WHEREAS by an order, dated the                      day of                      19 (*state  
order of reference and death, refusal, etc., of arbitrator*), it is by consent ordered that  
Z be appointed in the place of X deceased (or as the case may be) to act as arbitrator  
with Y, the surviving arbitrator, under the said order; and it is ordered that the award  
of the said arbitrators be made on or before the                      day of                      19 .

GIVEN under my hand and the seal of the Court, this  
day of                      19 .

Judge.

## No. 4.

## Special Case.

(Title of suit)

In the matter of an arbitration between A. B. of \_\_\_\_\_ and C. D. of \_\_\_\_\_  
the following special case is stated for the opinion of the Court :—

(Here state the facts concisely in numbered paragraphs)

The questions of law for the opinion of the Court are :—

First, whether \_\_\_\_\_

Secondly, whether \_\_\_\_\_

X.

Y

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

## No. 5.

## Award.

(Title of suit.)

In the matter of an arbitration between A. B. of \_\_\_\_\_ and  
C. D. of \_\_\_\_\_

WHEREAS in pursuance of an order of reference made by the Court of \_\_\_\_\_  
and dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
following matter in difference between A. B. and C. D., namely,

has been referred to us for determination;

Now we, having duly considered the matter referred to us, do hereby make our award  
as follows :—

We award—

(1) that \_\_\_\_\_

(2) that \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_



# THE THIRD SCHEDULE.

## EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector.

1. Where the execution of a decree has been transferred to the Collector under S. 68, he may—

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree, or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary. [S. 321.]

## COMMENTARY.

This para corresponds to S. 321, C. P. Code, 1882, with some additions and alterations. The words "*when the sale of immovable property is postponed in order to enable the judgment debtor to raise the amount of the decree,*" have been added in Cl. (a) after the word "proceed." The other changes are merely verbal.

subject to the provisions contained in order those sections should be referred

**Payment by instalments.**—A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under S. 68, is limited to one of the three courses specified in this rule, and may not depart from them, much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments—*Mahadaji v. Hari*, 7 B 332 (referred to in *Chinna Sutayya v. Krishnaramanna*, 19 M 435). *Krishna Das v. Ram Gopal*, 50 A 827: 115 I C. 125: 26 A L J. 769: A I. R. 1928 All 558. The Collector has no jurisdiction to reduce the amount of the decree by reducing the rate of interest—*Ind.* Nor has the Collector jurisdiction, when mortgaged property is sold under Or XXXIV, to settle accounts as to what is due on each 46 A. 414: 78 I C 429: A I. R. 1924 All, 307: receives sale proceeds, they are assets held by rateable distribution must be made before receipt of *Dattatraya v. Pundlik*, 22 Bom. L. R. 1001: 58 I. C. 992.

2. Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided. [S. 322.]

Procedure of Collector in special cases.

## COMMENTARY.

This para. corresponds to S. 32, C. P. Code, 1882, with some verbal alterations only.

*Held*, that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under S 72, whilst such property was under the management of the Collector, were not entitled to be placed on the list of in any case, application to the Collector and not to

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Notice to be given to decree-holders and to persons having claims on property.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

(a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

[S. 322-A.]

## COMMENTARY.

This para. corresponds to S. 322-A of the C. P. Code, 1882, with several additions and alterations.

In sub-rule (1), the words "allowing a period of sixty days from the date of publication for compliance" have been transposed from the last para. of the old section. The alterations have been made by transposition and substitution of words and phrases, as will appear on comparison.

Power of Collector to hear objections.—Where a decree for money is obtained against a person whose property has been taken over by the Collector under S 72, the Collector may, if he thinks fit, hear any objection made by any person claiming an interest in the property, and may, if he thinks fit, order the property to be sold or otherwise disposed of.

to decide whether the property has or has not been properly attached—Onkar Singh v. Mohan Kuar, 20 A. 428

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders of claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

[S. 322-B.]

### COMMENTARY.

This para. corresponds to S. 322-B with some verbal alterations.

"Appeal from decision of a dispute under this rule."—An appeal from the decision of a dispute under S. 322-B of the C. P. Code, is a miscellaneous appeal, i. e., an appeal from a decree. *Srinivasa Ayyangar v. Peria Tambi*, 4 M. 420. The *Ahmad Khan v. Madho Das*, 7 A. 565, where it has been held that a decision of a dispute under S. 322-B (this rule) is to be regarded as an appeal from a decree in a suit and not a miscellaneous appeal, and should, therefore, be presented upon an *ad valorem* stamp. See 18 A. 313, noted under r. 2.

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector. [S. 322-C.]

Where District Court may issue notices and hold inquiry.

## COMMENTARY.

This para. corresponds to S. 322-C of the C. P. Code, 1882, with some verbal alterations.

Effect of decision of Court as to dispute.

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree. [S. 322-D.]

## COMMENTARY.

This para. corresponds to S. 322-D of the C. P. Code, 1882, with some verbal alterations.

Scheme for liquidation of decrees for payment of money.

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may—

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
  - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or
  - (ii) by mortgaging the whole or any part of such property ; or
  - (iii) by selling part of such property ; or
  - (iv) letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or
  - (v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such Property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in

incumbrance, the Collector may discharge the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government. [S. 323.]

### COMMENTARY.

This para. corresponds to S. 323, C. P. Code, 1882, with some modifications.

In sub-rule (4) the words "*Local Government*" have been substituted for the words "*Chief Controlling Revenue Authority.*" The other alterations are verbal.

The powers under S. 323, C. P. Code, 1882, conferred on the Collector and those conferred on the Talukdari Settlement Officer by S. 31 of the Talukdari Act (VI of 1888), as amended by Act II of 1905, are both enabling or discretionary, and are not necessarily of a mutually contradictory character.—*Purshotam v. Harbhamji*, 33 B. 443.

8. Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representatives in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly. [S. 324.]

### COMMENTARY.

This rule corresponds to S. 324, C. P. Code, 1882, with verbal alterations.

Mortgage.—Instead of selling, the Collector may mortgage the property.—*Bechar-sang v. Naran Moti*, 27 Bom. L. R. 217; 86 I. C. 846; A. I. R. 1925 Bom. 274.

9. (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

Collector to render  
accounts to Court

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs the expense of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entirely to be maintained out of the income of the property, to such amount in the case of such member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2,—

(i) in keeping down the interest on incumbrances on the property;

(ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs. [S. 324-A.]

### COMMENTARY.

This para. corresponds to S. 324-A of the C. P. Code, 1882, with some verbal alterations.

**Collector to render accounts.**—Though the Collector is bound to render accounts under this rule, he cannot be compelled to deliver the account books in Court. This rule also does not require him to pay the balance in Court.—*Rupali v. Katyan Singh*, 6 Bom. L. R. 825

The Collector has no power to dispose of the balance in excess of the decree amount as he likes without instructions from the Civil Court.—*A. E. Jones v. Ram Charan*, 133 I. C. 423; 29 A. L. J. 1064; A. I. R. 1931 All. 700.

10. Where the Collector sells any property under this schedule Sales how to be he shall put it up to public auction in one or more conducted. lots, as he thinks fit, and may—

(a) fix a reasonable reserved price for each lot ;

(b) adjourn the sale for a reasonable time whenever, for reason to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

[S. 325.]

### COMMENTARY.

This para. corresponds to S. 325 of the C. P. Code, 1882, with verbal alterations.

as far as the Collector has exercised or performed the powers or duties conferred

behalf by Government under the second paragraph of S. 320, C. P. Code, 1882.—*Lallu Trikam v. Bhavja Mithia*, 11 B. 478 See 18 A 313 under paragraph 2 of this Schedule.

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

[S. 325-A.]

### COMMENTARY.

This rule corresponds to S. 325-A of the C. P. Code, 1882, with some verbal alterations.

**Object of the Para.**—The object of Sch. III, para. 11, C. P. Code is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachment alone the property is not exposed to the risk of such loss; *Bansilal v. Sitaram*, A. I. R. 1922 Nag. 238 : 68 I. C. 188.

312 (*Magniram v Bakubai*, 36 B. 510, *dissented from*). See also *Ganga Prasad v. Ganga Bakhsh*, 29 A. 415 : (1907) A. W. N. 112; *Rankisan v. Mohammed, Abdul Sattar*, 82 C. W. N. 1149 : 109 I. C. 574; A. I. R. 1928 P. C. 163; *Tskaram v. Narayan*, 92 I. C. 44; A. I. R. 1916 Nag. 146; *Abdul Rahman v. Gaya Prasad*, 6 O. W. N. 843; A. I. R. 1929 Oudh 435. Failure to object on behalf of the Collector to an alienation is not tantamount to a written permission to alienate.—*Haider Khan v. Kanhiya*, 6 O. W. N. 750;

*Held*, that the judgment-debtor was incompetent to make the transfer as until the sale by the Collector was confirmed, his power and duties under Sch. III, para 11, C. P. Code had not ceased and until then the property was under his management.—*Mahadco v. Krishnaji*, 60 I. C. 310 : 16 N. L. R. 194.

*Prasad*, 122 I. C. 369 : A. I. R. 1930 Nag. 237.

1930 Nag. 220

A junior member of a Hindu joint family cannot be allowed to deal with the family property which has been placed in charge of the Collector.—*Sarju Prasad v. Ramsaran Lal*, 132 I. C. 568 : 29 A. L. J. 400.

The stage at which any person entitled to say that the mortgage was void is when the property was raised It is not open the previous decree  
*Rahman v. Collector*

**Limitation.**—When the property of the judgment-debtor was taken under management by the Collector and released more than 12 years after the date of the decree, that period was excluded in the computation of limitation both under the Limitation Act and under S. 48 of the Code.—*Shayam Karan v. Collector of Benares*, 42 A. 118 : 52 I. C. 742.

The word "alienate" contemplates a transfer which is to take effect immediately and not after death. A disposition of property by will does not therefore come under its purview, *Muhammad Sayed v. Muhammad Ismail*, 33 A. 233 : 8 I. C. 834 : 7 A. L. J. 1176

The last clause of the first paragraph of S. 325 A. C. P. Code, 1882 (para. 11) prevents a Civil Court in execution of a decree for money from issuing any process against the judgment-debtor's immoveable property in the hands of the Collector.—*Girdhar Das v. Har Shankar*, 20 A. 383, p. 285.

"The same period shall be excluded in calculating the period of limitation"—The presentation of a *darkhast* for execution by one of the surviving coparceners of the deceased decree-holder cannot be said to be invalid so as to render the proceedings before



the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of para. 11 of the Third Schedule of the Code.—*Madhav Prabhakar v. Balaji Govind*, A. I. R. 1927 Bom. 123; 29 Bom L. R. 75.

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct. [S. 325-B.]

### COMMENTARY.

This rule corresponds to S. 325-B of the C. P. Code, 1882, with verbal alterations only.

Powers of Collector to compel attendance and production, 13. In exercise of the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents. [S. 325-C.]

### COMMENTARY.

This rule corresponds to S. 325-C of the C. P. Code, 1882, with verbal alterations only.

# THE FOURTH SCHEDULE.

(See Section 165).

## ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment
1870	VII	The Court-fees Act, 1870.	<p>In Article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted.</p> <p>From Article 11 of Schedule II, the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to Article 19, the following entry shall be substituted namely:—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908"</p>

# THE FIFTH SCHEDULE.

## [ENACTMENTS REPEALED.]

*[Enactments repealed.] Repealed by S. 3 and Schedule II of the Second  
Repealing and Amending Act, 1914 (XVII of 1914).*

# APPENDIX I

## THE HIGH COURTS ACT OR THE CHARTER ACT, 1861

*An Act for Establishing High Courts of Judicature in India*<sup>1</sup>  
(24 & 25 Vict., C. 104) ; (6th August 1861)

[Repealed and re-enacted with slight modifications by the Government of India Act, 1915 (5 & 6 Geo. V: C. 61.)]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows:

1. It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William*, aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively, such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

2. The High Court of Judicature at *Fort William* in *Bengal* and at the Presidencies of *Madras* and *Bombay* respectively shall consist of a Chief Justice and, as many Judges not exceeding fifteen<sup>2</sup> as Her Majesty may, from time to time, think fit and appoint who shall be selected from—

*1st.* Barristers of not less than five years' standing ; or

*2nd.* Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period ; or—

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1. By the terms of this Act the exercise of jurisdiction in any part of Her Majesty's Indian Territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Imperial Legislative Council. An exercise of legislative authority by which any place or territory is removed from the jurisdiction of a High Court is one expressly contemplated by this Statute. See *Empress v. Burah* (1879) 1 C. 172; 1 L. R. 5 L. A. 178.

2. Increased to twenty by 1 and 2 Geo. V. C. 18, S. 1. and now Sec 8. 101 (2) (ii) of the Government of India Act, 1915, *Post*.

3rd. Persons who have held judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years ; or

4th. Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court.

Provided that not less than one-third of the Judges of such High Courts, respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.<sup>1</sup>

3. Provided always that the persons, who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose ; and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of India in Council or Governor in Council of the Presidency in which such High Court is established.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents.

6. Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of India to fix the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same. Provided always such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

1. By S. 3. of 1 & 2 Geo. V. C. 18 the Governor-General in Council was empowered to appoint temporary Judges to act for 2 years, such additional Judges, whilst so acting, to have all the powers of a Judge of the High Court appointed by His Majesty but not to be taken into account in determining the proportions specified in this proviso. See Now S. 101 of the Government of India Act. S. 101.

post.

2. See S. 102, Government of India Act, 1915. post.

3. See S. 103, *ibid.*

4. See S. 104, *ibid.*

7. Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence, and upon the happening of a vacancy in the office of any other Judge of any such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorised to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council as aforesaid, shall see cause to cancel the appointment of such acting Judge.

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamat Adawlut at *Calcutta*, in the same Presidency, shall be abolished.

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished.

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished:

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

9. Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.

1. See s. 105, Government of India Act, 1915, *post*.

2. See s. 106 (1), *ibid*.

[10. Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts, respectively]

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in India of Acts of Parliament or of any Order of Her Majesty in Council, or Charters, or of any Acts of the Legislature of India which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

13. Subject to such may be made by the High Courts under this Act may, by its exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which

1. Repealed by 28 & 29 Vict. C. 15, s. 2.

2. See S. 108 (1), Government of India Act, 1915 *post*.

3. See S. 108 (2), *ibid*.

4. See S. 107, *ibid*.

it shall think necessary that a form be provided, also for keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table; and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Court; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Fort William of the Governor-General in Council, and in Madras or Bombay, of the Governor in Council of the respective Presidencies.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty shall so think fit, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local

jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by her Letters Patent, to revoke all or such part or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

18. It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet

Other or supplementary Charters may be granted within three years after establishment of a Court.

Territorial limits of jurisdiction of Court may be altered by order in Council.

1. See 1 & 2, Geo. V. C. 18 S. 2 by which a High Court may be established under S. 16, whether or not the territories be included within the limits of the local jurisdiction of another High Court.

2. By 28 & 29 Vic. C. 15 S. 1. the time was extended to 1st January, 1861.

3. Repealed by 28 & 29 Vic. C. 15. 5. 2.



19. The word "Barister" in this Act shall be deemed to include  
Interpretation of terms. Barristers of *England* or *Ireland*, or Members of the  
Faculty of Advocates in *Scotland*; and the words  
"Governor-General and Governor" shall comprehend the officer adminis-  
tering the Government.

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# GOVERNMENT OF INDIA ACT, 1915.

## *An Act to Consolidate Enactments relating to the Government of India.*

(29th July, 1915)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

### PART IX.

#### THE INDIAN HIGH COURTS.

##### *Constitution.*

101. [Ch. Act, no. 2, 19].—(1) The High Courts referred to in this Act are the High Courts of Judicature for the time being established in British India by Letters Patent.

(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint : Provided as follows :

(i) the Governor-General in Council may appoint persons to act as additional Judges of any High Court, for such period, not exceeding two years, as may be required ; and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act ;

(ii) the maximum number of Judges of a High Court, including the Chief Justice and additional Judges, shall be twenty.

(3) A Judge of a High Court must be—

(a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing ; or

(b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a District Judge ; or

(c) a person having held judicial office, not inferior to that of a subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years ; or

(d) a person having been a pleader of a High Court for a period of not less than ten years.

(4) Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such Barristers or Advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The High Court for the North-Western Provinces may be styled the High Court of Judicature at Allahabad, and the High Court at Fort William in Bengal is in this Act referred to as the High Court at Calcutta.

102. [Ch. Act, s. 4].—(1) Every Judge of a High Court shall hold Tenure of office of his office during His Majesty's pleasure.  
Judges of High Courts.

(2) Any such Judge may resign his office, in the case of the High Court at Calcutta, to the Governor-General in Council, and in other cases to the local Government.

103. [Ch. Act, s. 5].—(1) The Chief Justice of a High Court shall have Precedence of, Judges, rank and precedence before the other Judges of of High Courts. the same court.

(2) All the other Judges of a High Court shall have rank, and precedence according to the seniority of their appointments, unless otherwise provided in their patents.

104. [Ch. Act, s. 6].—(1) The Secretary of State in Council may fix the Salaries, etc. of Judges (where necessary) expenses for equipage and voyage of High Courts. for the Chief Justice and other Judges of the several High Courts, and may alter them, but any such alteration shall not affect the salary of any Judge appointed before the date thereof.

(2) The remuneration fixed for a Judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If a Judge of a High Court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a Judge of a High Court dies while in possession of his office, and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

105. [Ch. Act, s. 7].—(1) On the occurrence of a vacancy in the office of Chief Justice of a High Court, and during any absence of such a Chief Justice, the Governor-General in Council in the case of the High Court at Calcutta, and the local Government in other cases, shall appoint one of the other Judges of the same High Court to perform the duties of Chief Justice of the Court, until some person has been appointed by His Majesty to the office of Chief Justice of the Court, and has entered on the discharge of the duties of that office, or until the Chief Justice has returned from his absence, as the case requires.

(2) On the occurrence of a vacancy in the office of any other Judge of a High Court and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice the Governor-General in Council in the case of the High Court at Calcutta, and the local Government in other cases, may appoint a person, with

such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the Court; and the person so appointed may sit and perform the duties of a Judge of the Court until some person has been appointed by His Majesty to the office of Judge of the Court, and has entered on the discharge of the duties of the office or until the absent Judge has returned from his absence, or until the Governor-General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting Judge.

### *Jurisdiction.*

106. [Ch. Act, s. 9].—(1) The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the Practice of the Court, as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act.

(2) [21 Geo. 3, c. 70].—The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

107. [Ch. Act, s. 15].—Each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

- (a) call for returns;
- (b) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction;
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts;
- (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts; and
- (e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of Courts:

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

108. [Ch. Act, ss. 13, 14].—(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges of the High Court of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of the High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts.

109. [28 & 29 Vict. c. 15, s. 3, 4, 6].—(1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India.

(2) The Governor-General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, through the Secretary of State in Council his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance, but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance.

110. [13 Geo. III, c. 63, s. 15, 17; 21 Geo. III, c. 70, s. 1; 37 Geo. III, c. 142 s. 11; 39 & 40 Geo. III, c. 79, s. 3; 4 Geo. IV, c. 41, s. 7].—(1) The Governor-General, each Governor, and each of the members of their respective executive councils, shall not—

Exemption from Jurisdiction of High Court.

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other Judges of the several High Courts.

111. [21 Geo. III, c. 70, s. 2, 3, 4].—The order in writing of the Governor-General in Council for any act, shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject; but nothing in this section shall exempt the Governor-General, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent Court in England.

Written order by Governor-General  
Justification for act in any court in India.

#### *Law to be administered.*

112. [21 Geo. III, c. 70, s. 17; 37 Geo. III, c. 142, s. 13].—The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, in the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide

Law to be administered in cases of inheritance and succession.

according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

### *Additional High Courts.*

113. His Majesty may, if he sees fit, by Letters Patent, establish a High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act; and where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may, by Letters Patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

### *Advocate-General*

114 [33 Geo. III, c. 155, s. 111; 21 & 22 Vict. c. 106, s. 29].—(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate-General for each of the presidencies of Bengal, Madras and Bombay.

(2) The Advocate-General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

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# DESPATCH FROM THE SECRETARY OF STATE

## SIR CHARLES WOOD'S DESPATCH ACCOMPANYING THE :FIRST LETTERS PATENT OR CHARTER.

Judical, No. 24

INDIA OFFICE,  
London, 14th May, 1862

To

HIS EXCELLENCY THE RIGHT HONOURABLE  
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter 1, under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25, Victoria, Chapter 104, for establishing High Court of Judicature in India, and request that you will take immediate measure for instituting the Court, the first Judges of which, including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature, possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place (as soon as the Charter shall issue) the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently, deemed unnecessary that the Charter should

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1. The Letters Patent, dated the 14th May, 1862, forwarded with this despatch were afterwards revoked by further Letters Patent, dated 28th December, 1865, for which see *post*.

exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if those powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds.

5. But the Charter is intended positively to declare all such Civil, Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose, namely, the fusion of the afore-said Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require. It has been however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of section 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me call for special remark.

9. By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries subject, however,  
**Clause 6.** in both cases, to the approval and confirmation of the Governor-General in Council. This provision does not refer to the settling of tables of fees, where fees are allowed, which under section 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which, of course, must be uniformly applicable to all the officers of the Court. Constituted as the High Court will be, it will merit all the confidence you can repose in it; but as a question of policy, the extension of the liberty of



application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the advocate pleads, and the Attorney acts, for the suitors of the Supreme Court, and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex-officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the Court is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provisions in the Act, section 2, clause 4, which declares that Pleaders of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless in any special cases there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels and Attorneys of the High Court.

13. With reference to the concluding sentence of clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter in the Insolvent Court, as newly regulated by clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorizing the Letters Patent and will continue a separate Court though, for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will as heretofore, practice in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business; the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency

Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so.

17. The terms of clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil procedure (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 8th section of the 21st George III. C. 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision\* of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitations as to whether that Court should administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Court of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Courts, as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court, but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 300 or 500 Rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This subject, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council.

20. As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By clause 13, however, the High Court is empowered to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some

\* Reported in 6 Moo. J. A. 348.

other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William" in this and in several other clauses, may appear to require explanation. The Court about to be established is called in section 2 of the Act, 24 and 25 Victoria, C. 104, a Court "for the Bengal Division of the Presidency of Fort William." That title is, of course, preserved in the Charter. By section 8, the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William, and also over some of the Non-Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlat, and a new appellate jurisdiction in Civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause on the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contains no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And

the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself. I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

25. Under clauses 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. It appears, however, to Her Majesty's Government that some modification of the existing practice, both at the capital and in the provinces, is necessary and on these points I shall address you in a separate despatch.

26. The Sudder Court exercises no original jurisdiction, but by clause 23, original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside.

27. The remaining clauses of the Letter Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by section 10 of the Act under the authority of which the High Court is established.

28. As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

29. Clause 30, respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting is a very important provision and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

30. With reference to this clause, it has been considered whether the precedence of section 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangement for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole, it was thought that nets partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely for me to add that Her Majesty's Government

entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31. The Supreme Court exercises at present, Admiralty Jurisdiction under its Charter. The Chief Justice has Vice-Admiralty Jurisdiction under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C. 79, section 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited, by the expression "other maritime questions" in general, mention is made of all the jurisdictions conferred as above-mentioned in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to "matters matrimonial" in general as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic. C. 85, and in regard to which further provisions were made by 22 and 23 Vic. C. 61, and 23 and 24 Vic. C. 144. The Act of Parliament for establishing the High Court, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such, for instance, as those which prescribe the period of remarriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The object of the proviso at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

35. Clause 36 refers to the powers of single Judges and Division Courts appointed or constituted under the provisions of the 13th section of the Act. By section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be

for the Chief Justice to consider whether, in cases exclusively between Natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, clause 40 is introduced, as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament will be of great advantage to the suitors and the public. I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39. In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court, to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India which may impede the proper action of the Courts, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the

trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it in every respect adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble Servant,

(Sd.) C. WOOD.

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# APPENDIX II

## LETTERS PATENT FOR THE HIGH COURT OF CALCUTTA.

(December 28, 1865.)

[N. B.—The Letters Patent for the High Courts of Madras and Bombay are mutatis mutandis in almost the same terms.]

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith  
Recital of Acts 24 & To all to whom these presents shall come, greeting :  
25, Vic., c. 104 Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India" it was amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared : Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of the High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Interstate and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby ; and save as by such Letters Patent might be otherwise directed subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have, and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke



Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby.

2. And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any of the said High Court of Judicature at Fort William in Bengal, shall continue to be Chief Justice and Judges or acting Chief Justice or Judges, of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with said recited Act for establishing High Courts of Judicature in India.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:-

"I, A. B. appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

6. And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription, "The Seal of the High Court at Fort William in Bengal." And



We do further grant, ordain and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act; and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever by what ways and means soever the same may have come to his, her, or their possession.

7. And We do hereby further grant, ordain, and appoint that all Writs, etc. to issue in name of the Crown and under the Seal. writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal shall run and be in the name and style of Us, Or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

8 And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of Justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always and it is Our will and pleasure, that all and every the officers, and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

*Admission of Advocates, Vakeels, and Attorneys,*

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet; such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

1. The following words which appeared here have been annulled by s. 1 (a) of the Letters Patent of 1919 :—

And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council and shall be either confirmed or disallowed by the Governor-General in Council

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-sutor.

*Civil Jurisdiction of the High Court.*

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety-four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

14. And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall

be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

15 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, and *not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of s. 107 of the Government of India Act or in the exercise of criminal jurisdiction*) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Sec. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Sec. 108 of the Government of India Act made *on or after the first day of February one thousand nine hundred and twenty-nine* in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, our heirs or successors in our or their Privy Council as hereinafter provided.

16 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

(1) The words in black type were inserted by S. 1 (a) of the Letters Patent dated the 9th December 1927 (published in the Gazette of India of 14th January 1928).

The words in italics were substituted by the S. 1. (b) of the Letters Patent of the 11th March 1919 for the following words :—"not being a sentence or order passed or made in any criminal trial."

The words "*On or after the first day of February one thousand nine hundred and twenty-nine*" in bold italics, were added by the amending Letters Patent dated 12th December 1928.

The clause as it stood originally ran as follows :—

And We do further ordain, that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court or of one Judge of any Division Court, pursuant to s. 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment not being a sentence or order as aforesaid of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being ; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Courts, shall be to us, our heirs or successors, in our or their Privy Council as hereinafter provided.

17. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

18. And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.

*Law to be administered by the High Court of Judicature at Fort William in Bengal.*

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case, if these Letters Patent had not issued.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied, to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

*Criminal Jurisdiction.*

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these Presents.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in the course of law.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction, original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence of order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law, decided by the Court of original Criminal jurisdiction, or that point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officer now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

*Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.*

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

*Admiralty and Vice-Admiralty Jurisdiction.*

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India as may now be exercised by the said High Court.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

*Testamentary and Intestate Jurisdiction.*

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division, subject to the order of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects, professing the Christian religion: Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

*Powers of single Judges and Division Courts*

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided accordingly to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

*Civil Procedure.*

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

38. And We do further ordain that the proceedings in all criminal cases, which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for other criminal cases shall be prescribed by an Act passed by the Legislature of Bengal, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

1. The words in italics were substituted for the words,—"Under the provisions of the thirteenth section of the aforesaid Act of the twentyfourth and twenty-fifth years of our Reign" by s. 1 (c) of the Letters Patent of 11th March 1919. The words in black types were substituted for the words "then the opinion of the senior Judge shall prevail" by s. 1 (b) of the Letters Patent of 8th December, 1927.



*Appeals to Privy Council.*

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order

**Power to appeal.**

of the said High Court of Judicature at Fort William in Bengal made on appeal and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents: . Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000, or from any other final judgment, decree or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council. Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion on the motion, or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and

**Rule as to transmission of copies of evidence and other documents.**

transmit to Us, Our heirs and successors in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed, such judgment and orders as We, Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

*Calls for Records, etc. by the Government.*

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal, shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Governments may deem proper.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor-General in case of emergency under section seventy-two of that Act and may be in all respects amended and altered thereby.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

In Witness thereof, We have caused these Our Letters to be made Patent. Witness Ourself at Westminster the twenty-eight day of December, in the twenty-ninth year of Our reign.

(sd.) C. ROMILLY,

# LETTERS PATENT FOR THE HIGH COURT OF ALLAHABAD.

(March 17, 1866.)

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such 'number' of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor-General or Governor of the Presidency, in which such High Courts were established shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories;

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

1 Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of the Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature for the North-Western Provinces shall, until further or other provisions shall be made by Us, or Our heirs and successors, in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

Establishment of High Court for the North-Western Provinces.

Constitution and first Judges of the High Court.

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it :

"I, I *Be* appointed Chief Justice [or a Judge] of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4-8. [These clauses are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1864.]

#### *Civil Jurisdiction of the High Court.*

9. And we do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power Extraordinary original civil jurisdiction. to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reason for so doing being recorded on the proceedings of the said High Court.

10-11. [These clauses are similar to clauses 15 and 16 of the Calcutta Letters Patent of 1865 and of the former clause as amended by the Letters Patent of that High Court dated 3rd November 1927.]

12. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like Jurisdiction as to power and authority with respect to the persons and infants and lunatics. estates of infants, idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency or Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

13-14. [These clauses are similar to clauses 20 and 21 of the Calcutta Letters Patent of 1865.]

#### *Criminal Jurisdiction.*

15. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have ordinary Ordinary original jurisdiction of the original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date: Provided, nevertheless that criminal proceedings which shall at such date have been commenced in the said last-mentioned High Court shall continue as if these presents had not been issued.

16. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

18. [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865.]

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

20. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations of trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

23. [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865.]

*Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of the High Court.*

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superin-

tendency of any Sudder Dewany Adawlut or the Sudder Nizamat Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

#### *Testamentary and Intestate Jurisdiction.*

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like **Testamentary and intestate jurisdiction.** power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation hereto shall cease from the date of the publication of these presents: Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26-27. [These clauses correspond to clauses 35 and 36 of the Calcutta Letters Patent of 1861 and of the latter clause as amended by the Letters Patent of that High Court dated 3rd November 1927.]

#### *Civil Procedure.*

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces **Regulation of proceedings.** from time to time to make rules and orders for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively.

#### *Criminal Procedure.*

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, **Regulation of proceedings.** in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

#### *Appeals to Privy Council.*

30 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their **Power to appeal.** Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces, made

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

18. [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865.]

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

20. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations of trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

23. [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865].

*Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of the High Court.*

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by the said Our Letters Patent, or by the recited Act vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superin-

tendency of any Sudler Dewany Adawlut or the Sudler Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

*Testamentary and Intestate Jurisdiction.*

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation hereto shall cease from the date of the publication of these presents: Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26-27. [These clauses correspond to clauses 35 and 36 of the Calcutta Letters Patent of 1865 and of the latter clause as amended by the Letters Patent of that High Court dated 3rd November 1927.]

*Civil Procedure.*

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively.

*Criminal Procedure.*

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

*Appeals to Privy Council.*

30. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces, made



on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 10th Clause of these presents: Provided in either case, that the sum or matter at issue is of amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council: subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectively, are hereby varied and subject also to such further rules and orders, as We may, with the advice of our Privy Council, hereafter make in that behalf.

31, 32, 33, 34, 35.—[These clauses are similar to clauses 40, 41, 42, 43 and 44 of the Calcutta Letters Patent of 1865.]

By Warrant under the Queen's Sign Manual.

(Sd.) C. ROMILLY.

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# LETTERS PATENT FOR THE HIGH COURT OF PATNA.

( February 9, 1861 )

GRANTETH THE FORTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To all to whom these Presents shall come, greeting, WHEREAS by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was amongst other things enacted by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William;

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared;

and by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished;

and by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed, thereby; and that, save as by such Letters Patent might be otherwise directed, and, subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts;

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies; and that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges, of such Courts, and to the Governor-General or Governor of the Presidency in which such

High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and did constitute that the Court to be a Court of Record,

**Recital of establishment of High Courts at Fort William and Allahabad.**

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord One thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record:

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty-ninth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record:

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1861, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India, including the Chief Justice, should be twenty;

**Recital of Act 1 & 2 Geo. 5. c. 18.**

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits.

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915;

**Recital of Act 5 & 6 Geo. 5. c. 61.**

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council,

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1917, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Channier, Knight, and the six other Judges being Saiyid Shurfa-ud-din, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson, and Jounala Persad, Esquire, being respectively qualified as in the said Act is declared.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor in Council may commission to receive it:

"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to him, her or their possession.



5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor in Council to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, may approve of: Provided always and it is our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this provision shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

#### *Admission of Advocates, Vakils and Attorneys.*

7. And we do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

8. And we do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-law of the said High Courts and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-law; and no person whatsoever but such Advocates, Vakils and Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-sutor.

#### *Civil Jurisdiction of the High Court.*

9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think

proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section One hundred and seven of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court pursuant to Section One hundred and eight of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from or judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made in the exercise of appellate jurisdiction by a Court in respect of a decree or order made on or after the 1st day of February 1929, in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents.

#### *Law to be administered by the High Court.*

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law of equity and rule of good conscience which the Court in which

the proceedings in such case were originally instituted ought to have applied to such case.

### *Criminal Jurisdiction.*

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents.

16. And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

17. And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

20. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

21. And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Province of Bihar and Orissa who were, immediately before the publication of these presents, authorized to refer

cases to the High Court of Judicature at Fort William in Bengal and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal.

22. And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

#### *Criminal Law.*

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

#### *Admiralty Jurisdiction.*

24. We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

#### *Testamentary and intestate Jurisdiction.*

26. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testament, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.



*Matrimonial Jurisdiction.*

27. And we do further ordain that the High Court of Judicature at Patna shall have jurisdiction within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

*Powers of single Judges and Division Courts.*

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the majority of the Judges who have heard the case including those who first heard it.

*Civil Procedure.*

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

*Criminal Procedure.*

30. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

*Appeals to Privy Council.*

31. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges

of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents; Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

33. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa.

34. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And we do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court, should or might have been executed.

*Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.*

35. And We do further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the

Judges to visit Orissa by way of circuit.

Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court: Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council otherwise directs: Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by

Special commissions and circuits.

or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Proceedings of Judge<sup>s</sup> on special commission or circuit.

*Delegation of Duties to Officers.*

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Power to delegate duties.

*Cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal.*

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court.

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa.

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

- (a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question; and
- (b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, or 35th clause of the Letters Patent bearing date at Westminster the Twenty-eighth day of December, in the year of Our Lord One thousand eight hundred and sixty-five, relating to that Court and
- (c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court;

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

*Calls for records, etc., by the Government.*

40 And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant-Governor in Council for records, returns and statements, in such form and manner as he may deem proper.

High Court to comply with requisitions from Government for records etc.

*Powers of Indian Legislatures*

41. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor-General in Legislative Council, and also of the Governor-General in Council under section Seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section Seventy-two of that Act, and may be in all respects amended and altered thereby.

Powers of Indian Legislatures preserved.

In Witness whereof we have caused these Our Letters to be made Patent, Witness Ourselves at Westminster the Ninth day of February, in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign.

By warrant under the King's Sign Manual.

(Sd) SCHUSTER.

## LETTERS PATENT FOR THE HIGH COURT OF LAHORE

(March 21, 1919.)

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act:

And whereas the Provinces of the Punjab and Delhi are now subject to the Jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor-General of India in Council, being Act No. XXIII of 1865, and was continued by later enactments and no part of the said provinces is included within the limits of the local jurisdiction of any High Court,

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the Province of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our heirs and successors in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Ruttiman, Knight, and the six other Judges being William Chevis, Esquire, Henry Scott-Smith, Esquire, Shadi Lal, Esquire, Rai Bahadur, Walter Aubinle Rossignol, Esquire, Leicester Hudson Leslie Jones, Esquire, and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore, previously to entering in the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor of the Punjab may commission to receive it :-

"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Lahore do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.



1. And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a Seal having a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Lahore." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the Office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is our further will and pleasure, and we do hereby, for Us, Our heirs and successors give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, subject to the control and approval of the Lieutenant-Governor of the Punjab, subject to the control and approval of; Provided always, and it is Our will and pleasure, that the officers and clerks to be appointed as aforesaid shall be appointed within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself or leave of absence under rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

#### *Admission of Advocates, Vakils and Attorneys*

7. And We do hereby authorize and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

8. And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

*Civil Jurisdiction of the High Court.*

9. And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reason for so doing being recorded on the proceedings of the said High Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of Criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act, 1915, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section one hundred and eight of the Government of India Act, 1915, made on or after the first day of February 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall lie to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent authority for India.

12. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates, of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

*Law to be administered by the High Court.*

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore in each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

*Criminal Jurisdiction.*

15. And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents.

16. And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

17. And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as afore-said, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.



20. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

21. And We do further ordain that the High Court of Judicature at Lahore shall be a court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab.

22. And we do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer or any original case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

#### *Criminal Law.*

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

#### *Testamentary and Intestate Jurisdiction.*

24. And we do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

#### *Matrimonial Jurisdiction.*

25. And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing

herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces, which is lawfully possessed of that jurisdiction.

#### *Powers of Single Judges and Division Courts.*

26. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

#### *Civil Procedure*

27. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

#### *Criminal Procedure*

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other law in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

#### *Appeals to Privy Council*

29. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents: Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares

that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

30. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi.

32. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

*Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.*

33. And We do further ordain that whenever it appears to the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India, Act, 1915, vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction

of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any Law relating thereto which has been or may be made by competent legislative authority for India.

*Delegation of Duties to Officers.*

35. The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

*Calls for records, etc., by the Government.*

36. And it is Our further will and pleasure that the High Court of Judicature at Lahore shall comply with such requisitions as may be made by the Governor-General in Council or by the Lieutenant-Governor of the Punjab for records, returns and statements, in such form and manner as he may deem proper.

*Powers of Indian Legislatures.*

37. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915; and also of the Governor-General in cases of emergency under section seventy-two of that Act, and may be in all respects amended and altered thereby.

In Witness thereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the 21st day of March in the Year of Our Lord one thousand nine hundred and nineteen and in the ninth Year of Our reign.

By Warrant under the King's Sign Manual.

(Sd.) SCHUSTER

## LETTERS PATENT FOR THE HIGH COURT OF RANGOON

(November 11, 1922)

GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting: Whereas in the Government of India Act, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local Jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act:

And whereas that portion of the Province of Burma known as Lower Burma is now within the limits of the jurisdiction of the Chief Court of Lower Burma which was established by an Act of the Governor-General of India in Council, being Act No VI of 1900, and whereas that portion of the said Province known as Upper Burma is with certain exceptions now within the limits of the jurisdiction of the Judicial Commissioner of Upper Burma appointed in pursuance of a Regulation of the Governor-General of India in Council, being Regulation No. V of 1892, and of the Court of the Judicial Commissioner of Upper Burma which was established by a Regulation of the Governor-General of India in Council, being Regulation No. VIII of 1886, and was continued by a Regulation of the Governor-General of India in Council, being Regulation No. I of 1896:

And whereas no part of the said Province is included within the limits of the local jurisdiction of any High Court.

1. Now know ye that We, upon full consideration of the premises and of Our special Grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for those portions of the Province of Burma, at present within the limits of the jurisdiction of the said Chief Court of Lower Burma and of the said Judicial Commissioner and of the said Court of the Judicial Commissioner of Upper Burma, as aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Rangoon, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature at Rangoon shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section one hundred and one of the Government of India Act, ordinarily consist of a Chief Justice and not less than seven other Judges, the first Chief Justice being Sir Sydney Maddock Robinson, Knight and the other Judges being Leslie Harry Saunders, Esquire, Companion of the Most Exalted Order of the Star of India, Manning Kin, Esquire, Charles Philip Radford Young, Esquire, Henry Sheldon Pratt, Esquire, Benjamin John Herbert Heald, Esquire, Guy Rutledge, Esquire, one of Our Counsel learned in the Law, and Hugh Ernest MacColl, Esquire, being respectively qualified as in the said Act is declared.



*Admission of Advocates and Pleaders.*

7. And We do hereby authorize and empower the High Court of Judicature at Rangoon to approve, admit and enrol such and so many Advocates, Pleaders and Attorneys as to the said High Court may seem meet; and such Advocates, Pleaders and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine and subject to such rules and directions.

8. And We do hereby ordain that the High Court of Judicature at Rangoon shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause the said Advocates, Pleaders or Attorneys, and no person whatsoever but such Advocates, Pleaders or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor of the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

*Civil Jurisdiction of the High Court.*

9. And We do hereby ordain that the High Court of Judicature at Rangoon shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any Law made by the local legislature and until some local limits shall be so declared and prescribed, within the limits of the ordinary original civil jurisdiction of the Chief Court of Lower Burma immediately before the publication of these presents, and the ordinary original civil jurisdiction of the High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

10. And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court.

11. And We do further ordain that the High Court of Judicature at Rangoon shall have power to remove, and to try and determine, as a Court of extraordinary original civil jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

12. And We do further ordain that when the plaintiff has several causes of action against the defendant, such causes of action not being for land or other immovable property and the High Court of Judicature at Rangoon shall have original jurisdiction in respect of one such cause of action, it shall be lawful

for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit

13. And We do further ordain that an appeal shall lie to the High Court of Judicature at Rangoon, from the Judgment (not being a judgment made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made on or after the first day of February 1929, in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court of such Division Court shall be to Us, Our Heirs or Successors in Our or their Privy Council, as hereinafter provided.

14. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which, immediately before the publication of these presents, the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal, and from all other Civil Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

15. And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority with Jurisdiction as to Infants and Lunatics. vested in the Chief Court of the Province of Upper Burma

16. And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court, and any such Judge thereof, shall have and exercise within the Province of Burma, such power and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma.

17. And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued.

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction.



18. And We do further ordain that, with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case.

19. And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Rangoon, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall, until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Rangoon, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

### *Criminal Jurisdiction.*

21. And We do further ordain that the High Court of Judicature at Rangoon shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all persons beyond such limits over whom the Chief Court of Lower Burma has such criminal jurisdiction immediately before the publication of these presents.

22. And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law.

23. And We do further ordain that the High Court of Judicature at Rangoon shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Government Advocate, or by any magistrate or other officer specially empowered by the Government in that behalf.

24. And We do further ordain that there shall be no appeal to the High Court of Judicature at Rangoon, from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

*Civil Procedure.*

35. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make Regulation of proceedings. rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and matrimonial jurisdiction, respectively: Provided always, that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General of India in Legislative Council, and being Act No. V of 1908, and the provisions of any law which has been or may be made, amending or altering the same by the local legislature or by competent legislative authority for India.

*Criminal Procedure.*

36. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Regulation of proceedings. Rangoon shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General of India in Legislative Council, or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India.

*Appeals to Privy Council.*

37. And We do further ordain that any persons may appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, Power to appeal in civil cases. in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction of Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 13th clause of these presents:

Provided in either case that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs and Successors, in our or Their Privy Council; but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Burma, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

38. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the Appeal from interlocutory judgment. motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council subject to the same rules, regulations and limita-

*Admiralty Jurisdiction.*

30. And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date.

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize.

*Testamentary and Intestate Jurisdiction.*

32. And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Burma by the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate : Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

*Matrimonial Jurisdiction.*

33. And We do further ordain that the High Court of Judicature at Rangoon shall have jurisdiction, within the Province of Burma, in matters matrimonial between Our subjects professing the Christian religion : Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction.

*Powers of Single Judges and Division Courts.*

34. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Rangoon in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act ; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

*Civil Procedure.*

35. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and matrimonial jurisdiction, respectively: *Provided* always, that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General of India in Legislative Council, and being Act No. V of 1908, and the provisions of any law which has been or may be made, amending or altering the same by the local legislature or by competent legislative authority for India.

*Criminal Procedure.*

36. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1893, passed by the Governor-General of India in Legislative Council, or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India.

*Appeals to Privy Council.*

37. And We do further ordain that any persons may appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction of Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 18th clause of these presents.

*Provided* in either case that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs and Successors, in our or Their Privy Council; but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourself in Council from the Courts of the Province of Burma, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

38. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council subject to the same rules, regulations and limita-

tions as are herein expressed respecting appeals from final judgment, decrees and orders.

39. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Rangoon made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 24th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, provided the said High Court shall declare that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourelves in Council from the Courts of the Province of Burma.

40. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Rangoon to Us, Our Heirs and Successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our Heirs and Successors in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, conform to and execute, or cause to be executed, such judgments and orders as We, Our Heirs and Successors, in Our or Their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal or other order or rule of the said High Court, should or might have been executed.

*Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.*

41. And We do further ordain that unless the Governor of Burma in Council otherwise directs, one or more Judges of the High Court of Judicature at Rangoon, as the Chief Justice may from time to time direct, shall sit at Mandalay, in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court provided that the Chief Justice may, in his discretion, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon.

42. And We do further ordain that wherever it appears convenient to the Governor of Burma in Council, that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the said High Court shall visit such place or places accordingly.

43. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 11st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India.

*Provisions regarding Pending Proceedings.*

44. And We do further ordain that all suits, appeals, revisions, applications, reviews, executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma, or before the Judicial Commissioner of Upper Burma or in the Court of the Judicial Commissioner of Upper Burma, in the exercise of any jurisdiction vested in them by any law, shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court; and the High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents.

*Delegation of Duties to Officers.*

45. The High Court of Judicature at Rangoon may, from time to time, make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial and non-judicial duties.

*Calls for Records, etc., by the Government.*

46. And it is Our further will and pleasure that the High Court of Judicature at Rangoon shall comply with such requisitions as may be made by the Governor-General of India in Council or by the Governor of Burma in Council for records, returns and statements, in such form and manner as he may deem proper.

*Powers of Indian Legislatures.*

47. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature, and also of the Governor-General in Council under section seventy-one of the Government of India Act; and also of the Governor-General under section seventy-two of that Act; and may be in all respects amended and altered thereby.

IN WITNESS whereof We have caused these Our Letters to be made Patent.

WITNESS Ourself at Westminster the eleventh day of November in the Year of our Lord one thousand nine hundred and twenty-two and in the thirteenth Year of Our reign.

BY WARRANT under the King's Sign Manual

(Sd.) SCHUSTER.

# APPENDIX III

## RULES MADE BY THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL UNDER SECTION 122

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### ORDER V.

#### Rule 5.

*Insert the words "for the ascertainment whether the suit will be contested" after the words "issues only."*

*(Notification No. 12121-G., dated the 25th August, 1927.)*

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#### Rule 15 and 17.

*Cancel rules 15 and 17 and substitute therefor the following:—*

"15. When in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of [the family of the defendant who is residing with him :

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

*Explanation.*—A servant is not a member of the family within the meaning of this rule."

"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

*(Notification No. 10428-G., dated the 25th July, 1928.)*

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#### Rule 19.

*Cancel rule 19 and substitute therefor the following:—*

"19 Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit"

*(Notification No. 10428-G., dated the 25th July, 1928.)*

**Rule 19A.**

*Insert the following after rule 19:—*

"19A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons."

*(Notification No. 10125-G., dated the 25th July, 1928.)*

**ORDER VI.****Rule 14A.**

*Insert the following after rule 14:—*

"14A. Every pleading when filed shall be accompanied by a statement in a pre-cried form, signed as provided in rule 11 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

*(Notification No. 10128-G., dated the 25th July, 1928.)*

**ORDER VII.****Rule 3**

*After rule 3, add the words:—*

"and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures."

*(Rule No. 11 of 1918)*

**Rule 9.**

*Cancel clause (1) and substitute therefor the following:—*

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1A) The plaintiff shall present with the plaint:—

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(ii) a petition for service of summons to appear and answer together with the fees and draft forms of summons."

*(Notification No. 10428-G., dated the 25th July, 1928.)*

*Substitute for clause 1 (a) (ii) above the following:—*

"(ii) draft forms of summons and fees for the service thereof."

*(Notification No. 3516-G., dated the 3rd February, 1933.)*



**Rule 11.**

*Add the following as clause (c):—*

"(c) Where any of the provisions of rule 9 (1.1) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so."

*(Notification No. 10428-G., dated the 25th July, 1928.)*

**ORDER IX.****Rule 0.**

(a) *Renumber* sub-rule (2) as sub-rule (3) and *insert* therein after the words "notice of the application" the words "with a copy thereof (or concise statement as the case may be)."

(b) *Insert* the following as sub-rule (2):—

(2) The plaintiff shall, for service on the Opposite Parties, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grant permission in this behalf, a like number of concise statements

*(Notification No. 3516-G., dated the 3rd February, 1933.)*

**Rule 13.**

*Renumber* rule 13 as rule 13 (1) and *add* the following as rule 13 (2):—

(2) The defendant shall, for service on the Opposite Party, present along with his application under this rule either

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

*(Notification No. 3516-G., dated 3rd February 1933.)*

**Rule 14.**

*Cancel* the word "thereof" in rule 14 and *substitute* therefor the following words:—

"together with a copy thereof (or concise statement as the case may be)"

*Notification No. 3516-G., dated 3rd February, 1933.*

**ORDER XVI.****Rule 2.**

*Cancel* clauses (1) and (2) and *substitute* therefor the following:—

"(1) The Court shall fix in respect of such summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case."

*(Notification No. 10428-G., dated the 25th July, 1928.)*

**Rule 3.**

*Cancel rule 3 and substitute therefor the following :—*

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally."

(Notification No. 10128-G., dated the 25th July, 1928.)

**Rule 4**

*Cancel clause (1) and substitute therefor the following :—*

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid."

(Notification No. 10128-G., dated 25th July, 1928.)

**Rule 7A**

*Insert the following after rule 7 .—*

"7A. (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order V shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant."

(Notification No. 10128-G., dated the 25th July, 1928.)

**Rule 8.**

*Cancel rule 8 and substitute therefor the following :—*

"8. (1) Every summons under this Order not being a summons made over to a party for service under rule 7A (i) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under rule 2 of this Order."

(Notification No. 10128-G., dated the 25th July, 1928.)

**Rule 21.**

*Cancel rule 21 and substitute therefor the following :—*

"21. (1) When any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf, the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

(Notification No. 15264-G., dated the 11th November, 1927.)

## ORDER XVIII.

### Rule 2A.

*Insert the following as rule 2A :—*

"2A. Notwithstanding anything contained in clauses (1) and (2) of rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit."

(Notification No. 15165-G., dated the 8th November, 1927.)

## ORDER XXI.

### Rule 16.

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words:—

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferee admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

(Notification No. 3516-G. Dated 3. 2. 33.)

### Rule 17.

In sub-rule (1) *cancel* the words "the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following words:—

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application."

(Notification No. 3516 G. Dated 3. 2. 33.)

### Rule 22.

*Add the following as sub-rule (3) :—*

(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree."

(Notification No. 3516 G. Dated 3. 2. 33.)

### Rule 24

*Add the following to sub-rule (3) :—*

"and a day shall be specified on or before which it shall be returned to the Court."

(Notification No. 3516 dated 3. 2. 33.)

**Rule 26.**

In sub-rule (3), *cancel* the words "the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit" and *substitute* therefor the following words:—

"the Court shall require security from the judgment-debtor unless sufficient case is shown to the contrary"

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 31.**

*Substitute* the words "three months" for the words "six months" in sub-rules (2) and (3).

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 32.**

*Substitute* the words "three months" for the words "one year" in sub-rule (3).

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 39.**

*Omit* the words "in the civil prison" in sub-rule (5).

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 45.**

Add the following to sub-rule (1):—

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time."

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 53.**

(a) In sub-rule (1) (b) *insert* after the words "then by the issue to such other Court" the words "and to any Court to which it has been transferred for execution" and also *insert* therein the words "or Courts" after the words "requesting such other Court"

(b) In sub-rule (1) (b) (i) *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

(c) In sub-rule (4), *insert* after the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution."

(d) In sub-rule (6) *substitute* the words "in contravention of the said order with knowledge thereof" for the words "in contravention of such order after receipt of notice thereof."

(*Notification No. 3516 G. Dated 3. 2. 33.*)

**Rule 54.**

Add the following as sub-rule (3).—

"(3) Such order shall take effect, where there is no consideration for such transfer or charge, from the date of the order, and where there is consideration for such transfer, or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order is proclaimed under sub-rule (2) whichever is earlier."

(*Notification No. 3516, G. dated 3. 2. 33.*)

## Rule 57.

*Add* the following words at the end of rule 57 :—

"Unless the Court shall make an order to the contrary."

(Notification No. 3516 G. Dated 3. 2. 33.)

## Rule 58.

*Add* the following words at the end of sub-rule (2) :—

"upon such terms as to security, or otherwise, as the Court shall seem fit."

(Notification No. 3516 G. Dated 3. 2. 33.)

## Rule 69.

*Substitute* the words "one calendar month" for the words "seven days" in sub-rule (2).

(Notification No. 5316 G. Dated 3. 2. 33.)

## Rule 75.

(a) *Insert* the following words in sub-rule (2), *after* the words "where the crop from its nature does not admit of being stored" :—

"Or can be sold to greater advantage in an unripe state (e. g. as green wheat.)"

(b) *Cancel* the word "and" between the words "tending" and "cutting" in sub-rule (2) and *substitute* therefor the word "or."

(Notification No. 3516 G. Dated 3. 2. 33.)

## Rule 89.

In sub-rule (1), *cancel* the words "either owning such property or holding an interest therein by virtue of a title acquired before such sale" and *substitute* the words "whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale)."

(Notification No. 3516 G. Dated 3. 2. 33.)

## Rule 90.

(a) *Add* the following words to Rule 90 (1) :—

"or on the ground of failure to issue notice to him as required by rule 22 of this Order."

(b) *Cancel* the proviso to rule 90 (1), and *substitute* therefor the following :—

Provided (i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure.

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon."

(Notification No. 3516 G. Dated 3. 2. 33.)

## Rule 98.

*Insert* the words "or on his behalf" *after* the words "at his instigation" occurring twice.

(Notification No. 3516 G. Dated 3. 2. 33.)

**Rule 99.**

*Insert the words "to have a right" after the words "in good faith."*

*(Notification No. 3516-G, Dated 3. 2. 33.)*

**ORDER XXII.****Rule 11.**

*Add the following :—*

"Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XXI, rule 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party."

*(Notification No. 10128-G., dated the 25th July, 1928.)*

**ORDER XXXII.****Rule 4.**

*Substitute the words "Except as otherwise provided in this Order," for the words "Where there is no other person fit and willing to act as guardian for the suit," in clause (1).*

*(Notification No. 8318-G., dated the 13th June 1927.)*

**ORDER XXXIV.****Rule 4.**

*Renumber sub-rules (3) and (1), as sub-rules (4) and (5) respectively and insert the following as sub-rule (3) :—*

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgager shall pay the balance personally."

*(Notification No. 3516-G., dated 3. 2. 33.)*

**ORDER XXXIX.****Rule 1.**

*Renumber Rule 1 as Rule 1 (1) and add the following as sub-rules (2) and (3) :—*

"(2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

"(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto."

*(Notification No. 3561-G., dated 3. 2. 33.)*

**ORDER LXI.****Rule 14.**

*Insert the following as clause (3) :—*

"(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or, *ex parte*, dispensing

with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent :

Provided that—

(a) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct.

(b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal."

(Notification No. 8318-G., dated 13th June, 1927.)

### ORDER LXIII.

#### Rule 1.

Insert the following after clause (i), Rule 1.

"(1) a. An order under rule 57 of Order XXI, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue.

(Notification No. 3516-G., dated 3. 2. 33.)

### APPENDIX A.

#### Form No. 13.

In the form of "Breach of agreement to purchase land," cancel the word "bighas" and substitute therefor the words "<sup>"acres"</sup>~~"bighas"~~

(Rule No. 11 of 1918.)

### APPENDIX B.

#### Form No. 1A.

Insert the following form and number it as 1A :—

#### No. 1A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT WILL BE CONTESTED. (Order V, rules 1 and 5.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS \_\_\_\_\_ has instituted a suit against you for \_\_\_\_\_ you are hereby summoned to to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit on the \_\_\_\_\_ day of 19 \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part directions may be given you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_

19 \_\_\_\_\_

Judge.

Seal.

NOTICE.—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit, to avoid execution of any decree which may be passed against your person or property, or both."

(Notification No. 12421-G., dated the 25th August, 1927).

### Form No. 10.

Insert the words "(or proof of the above having been duly made by the declaration of \_\_\_\_\_)" after the words "proof of the above having been duly taken by me on the oath of \_\_\_\_\_."

(Notification No. 10128-G., dated the 25th July, 1928.)

### Form No. 11.

Substitute the following for the existing Form No. 11:—  
"No. 11.

DECLARATION OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (Order V, rule 18.)

(Title.)

I, \_\_\_\_\_, a process-server of this Court declare:—  
(1) On the \_\_\_\_\_ day of \_\_\_\_\_ 19 I received a summons/notice issued by the Court of \_\_\_\_\_ in suit No. \_\_\_\_\_ of 19 \_\_\_\_\_ in the said Court, dated \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ for service on \_\_\_\_\_  
(2) The said \_\_\_\_\_ was at the time personally known to me, and I served the said summons/notice on him/her on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

Or

(2) The said \_\_\_\_\_ not being personally known to me pointed out to me a person whom he stated to be the said \_\_\_\_\_, and I served the said summons/notice on him/her on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

Or

(2) The said \_\_\_\_\_ and the house in which he ordinarily resides being personally known to me, I went to the said house, in \_\_\_\_\_ and there on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, I did not find the said \_\_\_\_\_

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.



$Q_r$ 

(a)

(b)

(b) Signature of process-server.

(Or)

(Notification No. 10428-G., dated the 25th July, 1928.)

## APPENDIX D.

## Form No. 1.

Cancel the table under the head "Costs of suit" in Form No. 1 and substitute therefor the following :—

"Plaintiff.

**Defendant.**

Rs. A. P.

RE. A. P.

- |   |   |
|---|---|
| 1. Stamp for plaint . . . . .   | 1. Stamp for power . . . . .  |
| 2. Stamp for power . . . . .  | 2. Stamp for petitions and affidavits . . . . .   |
| 3. Stamp for petitions and affidavits . . . . .   | 3. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891. . . . .                  |
| 4. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891 . . . . .                 | 4. Pleadings' fee . . . . .   |
| 5. Pleadings' fee on Rs. . . . .  | 5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) . . . . . |
| 6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) . . . . . | 6. Process fees . . . . .   |
| 7. Process fees . . . . .   | 7. Commissioners' fees . . . . .  |
| 6. Commissioners' fees . . . . .  | 8. Demi-paper . . . . .   |
| 9. Demi-paper . . . . .   |   |
| 10. Cost of transmission of records . . . . .   | 9. Cost of transmission of records . . . . .  |
| 11. Other costs allowed under the Code and General Rules and Orders . . . . .                                   | 10. Other costs allowed under the Code and General Rules and Orders . . . . .                                   |

- |  |   |
|--|---|
| 12. Adjournment costs not paid in cash (to be added or deducted as the case may be). | 11. Adjournment costs not paid in cash (to be deducted or added as the case may be) |
|--|---|

(Notification No. 15264-G., dated the 11th November, 1927.)

### Form No. 2.

Cancel the table under the head "Costs of suit" in Form No. 2, and substitute therefor the following:—

"Plaintiff.

Defendant.

Rs. A. P.

- | Plaintiff.   | Defendant.   |
|--|--|
| 1. Stamp for plaint  | 1. Stamp for power   |
| 2. Stamp for power   | 2. Stamp for petitions and affidavits  |
| 3. Stamp for petitions and affidavits  | 3. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891                |
| 4. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891                | 4. Pleadings' fee  |
| 5. Pleadings' fee on Rs.   | 5. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge) |
| 6. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge) | 6. Process fees  |
| 7. Process fees  | 7. Commissioners' fee  |
| 8. Commissioners' fee  | 8. Demi-paper  |
| 9. Demi-paper  | 9. Cost of transmission of records   |
| 10. Cost of transmission of records  | 10. Other costs allowed under the Code and General Rules and Orders                                  |
| 11. Other costs allowed under the Code and General Rules and Orders                                  | 11. Adjournment costs not paid in cash (to be deducted or added as the case may be)                  |
| 12. Adjournment costs paid in cash (to be added or deducted as the case may be)                      |  |

2. This rule will come into force from the 1st January, 1928 "

(Notification No. 15264-G., dated the 11th November, 1927)

### APPENDIX G.

#### Form No 9

In the form of "Decree in Appeal," cancel the words from "Memorandum of Appeal" to "the following reasons, namely":—

(Rule No 11 of 1910)

### APPENDIX H.

#### Form No. 14.

Cancel columns 20 to 27 of Form No. 14—and substitute therefor the following columns—

Execution.	Return of Executions.
20 No. of execution application as per execution application—register and the date of application.	33 Appeal, if any, against order in execution and if so, the result.
21 Relief sought. If money, amount claimed.	32 If petition instructious, why and to what extent.
22 Order and date thereof. If portion of relief not granted, what portion.	31 Amount or relief still due and why execution petition is closed.
23 Against whom order made.	30 Minute of other return, other than arrest and payment.
24 For what, amount to be stated.	29 Whether judgment-debtor committed to jail, if not, why not. If committed to jail the period of stay in it.
25 Amount of costs.	28 Persons arrested.
26 Adjustments and satisfaction reported, if any.	27 Amount paid into court.
27 Amount paid into court.	28 Persons arrested.

# RULES MADE BY THE HIGH COURT OF JUDICATURE AT MADRAS UNDER SECTION 122.

## ORDER III.

### Rule 4.

In Sub-Rule (1) the words "subscribed with his signature in his own hand" have been substituted for the words "in writing signed" and in Sub-Rule (2) the words, "a document subscribed with his signature in his own hand" have been substituted for the words "a writing signed" by P. Dis. 535 of 1928.

The following has been added as Sub-rule (6) in Madras by P. Dis. 548 of 1928.

(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act.

#### Note :

The amendments to old Rule 4 (3) and the insertion of old Rule 4 (4) made in Madras by Dis. 1241 and 1093 of 1925 have been abrogated by the substitution of new Rule 4, Sub-Rules (1) to (5) for the old Rule by Act 22 of 1926 and by the addition of Sub-Rule (6) by P. Dis. 548 of 1928.

### Rule 5.

*At the end insert the following :—*

*"Explanation.—Service on a pleader who does not act for his client shall not raise the presumption under this rule."*

*(R. O. C. No. 1810 of 1926.)*

## ORDER IV.

### Rule 2.

*In Order IV, delete sub-rule (2) of rule 2 added under Dis. No. 908 of 1912, and re-number the existing rule 2 (1) as rule 2.*

*[G. O. No. 2606. Law (General). dated 6th August 1928.]*

## ORDER V.

### Rule 5.

*Delete the first paragraph and substitute the following in lieu thereof:—*

*"5. The Court shall determine, at the time of issuing the summons, whether it shall be—*

*Summons to be either (1) to settle issues, or (2) to ascertain whether the suit is contested or not or (3) for final disposal.*

*disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly."*

*(P. Dis. No. 7 of 1927)*

## Rules 15.

*Delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent."*

*(R. O. C. No. 1810 of 1926.)*

## Rule 18A (new)

*Insert the following as rule 18A :—*

**Chief Ministerial Officer, District Courts, may be empowered to order issue of fresh summons.** "A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board.

*(P. Dis. No. 777 of 1929.)*

## Rules 25 and 26.

*Substitute the following for rules 25 and 26:—*

**Service where defendant resides out of British India and has no Agent.** "25. Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate:

Provided that if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

26. Where—

**Service in foreign territory through Political Agent or Court or by special arrangement.** (a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the Gazette of India, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an

endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

(*Dis. No. 40 of 1917.*)

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#### Rules 27 and 28.

*In rule 27 after the words "send it" insert the words "by registered post prepaid for acknowledgment."*

*In rule 28 after the words "shall send" insert the words "by registered post prepaid for acknowledgment."*

(*Dis. No. 209 of 1912.*)

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#### Rule 29A (new)

*Insert as rule 29A:—*

"29A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

(*Dis. No. 209 of 1912.*)

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### ORDER VII.

#### Rule 9.

*In rule 9 after the word "and" occurring in the third line delete the comma and the five words following viz, "if the plaint is admitted" and insert the expression "along with the plaint" after the words "shall present."*

(*R. O. C. No. 1810 of 1926.*)

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### ORDER IX.

#### Rule-13.

*Re-number rule 13 as of rule 13(1).*

(*Dis. No. 621 of 1914*)

*Insert the following as proviso to sub-rule (1):—*

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

(*R. O. C. No. 1810 of 1926.*)

*Add the following as sub-rule (2):—*

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

(*Dis. No. 621 of 1914.*)

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## Rule 15

1. Add the following as rule 15 of Order IX of the Code of Civil Procedure :—

"15. (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within section 17 of the Code in which notice to the opposite party is required under the provisions of the Code.

(2) Subject to the provisions of sub-rule (2) of rule 13, an application under this rule shall be made within thirty days of the date of the order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order."

(Dated 6th March 1933)

## ORDER XII.

## Rule 6.

Re-number the existing rule 6 as sub-rule (1) and insert the following as sub-rules (2) and (3) :—

"(2) The Court may also of its own motion make such order to give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

(R. O. C. No. 1729 of 1926.)

## ORDER XIII.

## Rule 7.

Add the following proviso to rule 7 (2)—

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

(Dis. No. 434 of 1916.)

## Rule 9.

Add the following as Sub-Rule (2) :—

"Subject to the provisions of Rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such orders as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court the original document shall be returned to the applicant without further delay (*Vide Fort St. George Gazette*, dated 27-1-1931, Pt. II, p. 178.)

Add the following as sub-rule (3) :—

(3) "Every application under the first proviso to sub-rule (1) above shall be made by a verified petition setting forth facts justifying the immediate

return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application including any costs 'incidental to the preparation of the certified copy to be substituted for the original' and may further direct that any party against whom any order for costs is made shall have such costs, if paid, 'included as costs in the cause'."

(Dis. No. 1991 of 1925.)

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## ORDER XV.

### Rule 2.

*Re-number rule 2 as sub-rule 2 (1) and insert the following as sub-rule (2) :—*

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

(R. O. C. No. of 1729 of 1926.)

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## ORDER XVI.

### Rule 4A (new)

*Insert the following as rule 4A after rule 4.—*

"4A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

*Special provision for public servants summoned as witnesses in suits to which the Government is a party.*

(2) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance.

(Dis. No. 1207 of 1918.)

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## (i) ORDER XVI.

### Rule 4A (2).

*Substitute the following for O. XVI. R. 4A (2):—*

4-A (2). When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under rule 4 according to the same scale; and the money so deposited or paid shall be credited to Government.

P. Dis. No. 22 of 1932.

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## ORDER XVIII.

## Rule 2.

*At the end of rule 2 insert the following "Explanation" :—*

*"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court for reasons to be recorded in writing, to direct any party to examine any witness at any stage."*

*(R. O. C. No. 1729 of 1926.)*

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## ORDER XX.

## Rule 1.

*The existing rule 1 is re-numbered as sub-rule 1 (1) and the following is added as sub-rule (2) :—*

*"(2) The judgment may be pronounced by dictation to a shorthand writer in open Court."*

*(Dis. No. 1870 of 1911.)*

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## Rule 3.

*Substitute the following for rule 3 :—*

*"3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the presiding Judge pronounces his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."*

*(Dis. No. 1680 of 1917 as amended on 6-5-30.)*

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## ORDER XX.

## Rule 6 (1).

*Substitute the following :—*

*(1) The decree shall agree with the judgment. It shall contain the number of the suit, the names and descriptions of the party, their addresses for service and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit (Vide Fort St. George, Gazettee, dated 31-3-31, Pt. II, p. 607.)*

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## Rule 6 (2A)

*In rule 6, after sub-rule (2) the following shall be inserted as sub-rule (2A) :—*

*"(2A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."*

*(R. O. C. No. 3019 of 1926.)*

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**Rule 11.**

*Substitute the following for rule 11:—*

11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and *after notice* to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit."

(R. O. C. No. 2191 of 1926—BI as amended on 6-5-30)

**Rule 12.**

*Add the following to rule 12:—*

"(3) Where an Appellate Court directs such an inquiry, it may direct the Court of First Instance to make the inquiry; and in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass the final decree."

(Dis. No. 550 of 1911.)

**ORDER XXI.****Rule 2 (2)**

*Substitute the following for the existing Rule 2 (2):—*

Any party to the suit, or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly

(R. O. C. No. 4955 B. I. of 1930)

**Rule 11.**

*In sub-rule (2) of rule 11 between clauses (f) and (g) insert the following new clause:—*

"(ff) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer."

(P. Dis. No 776 of 1929)

**Rule 22.**

*In rule 22 between sub-rules (1) and (2) insert the following:—*

"(1A) Where from the particulars mentioned in the application in compliance with rule 11 (2) (ff) *supra* or otherwise the Court has information that the

original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

*In sub-rule (1) of rule 22, after clause (b) insert the following:—*  
 "or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency."

(P. Dis. No. 776 of 1929.)

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### Rule 25.

*Add the following proviso to clause (2):—*

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause."

(Dis. No. 2282 of 1916.)

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### Rule 25 (2).

*Insert the words "or cause him to be examined by any other Court" after the words "examine him."*

(Dis. No. 1752 of 1915.)

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### Rule 39.

*Delete the present sub-rules (4) and (5) and substitute the following:—*

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

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### Rule 40.

*Substitute the following for rule 40:—*

"40. (1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that an insolvency petition has been presented by or against the judgment-debtor or that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the burden of proving the inability to pay being on the judgment-debtor, the Court may upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court shall take into consideration any allegation of the decree-holder touching any of the following matters, namely:—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;
  - (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;
  - (c) any undue preference given by the judgment-debtor to any of his other creditors;
  - (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;
  - (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of this decree.
- (3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1) it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provision of this Code, commit him to the civil prison:

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed, to pay into Court such sum as the Judge deems sufficient to cover such costs including batta for process-server, subsistence of the judgment-debtor and cost of conveyance, if any, and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in this suit.

(5A) During the temporary absence of the Judge who issued the warrant under rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality, or where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsiff, empowered in writing by the District Judge in this behalf.

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending

the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison.

Sub-rule (5) of rule 39 shall apply to such payments."

(B. O. C. No. 2191 of 26—B1.)

### *Rule 43.*

*Substitute the following rules for rule 43:—*

"43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also

order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings."

(*Dis. No. 166 of 1913.*)

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#### Rule 48.

*Substitute a comma for the period at the end of sub-rule (1) of rule 48 and add the following words at the end of the sub-rule:—*

"such amount or instalment being calculated to the nearest anna by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies."

(*R. O. C. No. 1310 of 1926.*)

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#### Rule 53.

*Add the following as sub-rule (1) (c):—*

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

[*G. O. No. 87, Home (Judicial), dated the 11th January, 1918.*]

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#### Rule 89.

*At the end of sub-rule (1) insert the following proviso:—*

"Provided that where the immoveable property sold is liable to discharge only a portion of the decree-debt, the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

(*P. Dis. No. 56 of 1927.*)

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#### Rule 92.

*In sub-rule (2) after the words "within thirty days from the date of sale" insert the following words:—*

"and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court."

(*P. Dis. No. 56 of 1927.*)

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### ORDER XXII.

#### Rule 4.

*Remove the period at the end of sub-rule (3) and add the following words:—*

"except as hereinafter provided"

*Insert the following as new sub-rule (4):—*

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the Legal Representative of any such defendant who

has been declared *ex parte* or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(P. Dis. No. 4 of 1927.)

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### Rule 5.

*Add the following as a proviso:—*

"Provided that an appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question."

(Dis. No. 387 of 1919.)

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### Rule 11A (new).

*Add the following as rule 11A:*

"11A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

(Dis. No. 1601 of 1914.)

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## ORDER XXV.

### Rule 1.

*The following shall be inserted as sub-rule (4):—*

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may on the application of the defendant demand security for the estimated amount of the defendant's costs, or such proportion thereof as from time to time during the progress of the suit the Court may think just."

(R. O. C. No. 3019 of 1926.)

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## ORDER XXVIA (new).

*Read the following Order as XXVIA:—*

"1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the Commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

(Dis. No. 1685 of 1914.)

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# ORDER XXVII.

## Rule 5.

*Substitute the following for rule 5:—*

"5. The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion."

*(Dis. No. 644 of 1911)*

# ORDER XXIX.

## Rule 1A (new)

*Insert the following as rule 1A:—*

"1A. in suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

*(Dis. No. 644 of 1911)*

# ORDER XXXII

*Delete rules 3 and 4 and substitute in lieu thereof the new rule 3 set forth below:—*

"3. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:—  
Qualifications to be a next friend or guardian. the suit:—

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or to be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be.  
Appointed or declared guardians to be preferred and to be superseded only for reasons recorded.

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.  
Guardians to be appointed by Court.

(4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability, a list of persons (with their full addresses for service or notice in Form No. 11A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded, in any particular case, exempt the applicant from furnishing the list referred to above.  
Appointment to be on application and where necessary after notice to proposed guardian.



(5) The application referred to in the above sub-rule whether made by the plaintiff or on behalf of the minor defendant shall be supported by an affidavit verifying the fact that the proposed guardian has not or that on one of the proposed guardians has, any interest in the matters in controversy, in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state according to the circumstances of each case (a) particulars of any existing guardian appointed or declared by competent authority, (b) the name and address of the person, if any, who is the *de facto* guardian of the minor, (c) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardian for the minor for the suit.

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party.

(6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

(7) No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

(8) Where the . . . ff, be shall, along with his referred to, in sub-rules (4) . . . necessary forms in duplicate, that is possible at that stage, for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-rule (4) above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid.

If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list referred to in sub-rule (4) above, but no fresh application under sub-rule (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in.

(9) No person shall, without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

No person shall be appointed guardian without his consent.

(10) Where the Court finds no person fit and willing to act as guardian for the suit, the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance monies to the guardian for purpose of his defence and all monies so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the monies so received by him."

### ORDER XXXII

#### Rule 6 (2).

*Add the following proviso to Sub-Rule (2):—*

Provided that the Court may in its discretion dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the Karanvan of a Malabar Tarwad and the decree is passed in favour of the joint family or the tarwad.

(R. O C No. 4806 B. I of 1930).

#### Rule 7.

*Insert the following as sub-rule (1A):—*

\* Rule—(1A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter in which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24\* in Appendix D to this schedule."

(Dis. No. 1647 of 1910.)

#### Rule 14A.

*Add the following as rule 14A:—*

"14A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its

\* This rule and form 24 supersede rule No. 119 and Form No. 35 of the Civil Rules of Practice, 1905, and rule No. 33A of the Rules of the High Court, Madras, Appellate Side.

appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (6) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications represented out of time shall be posted before a Judge for disposal."

(*Dis. No. 1601 of 1911.*)

### Rule 17.

*Add the following as rule 17:—*

"17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

(*Dis. No. 644 of 1911.*)

## ORDER XL.

### Rule 4.

*1. Substitute the following for rule 4 of Order XL of the Code of Civil Procedure:—*

(1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence, and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver; but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs:

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property or by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under rule 3, or attachment and sale of his property, or, if his property has been attached under sub-rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver.

(*P. Dis. No. 60 of 1933.*)

## ORDER XLI.

## Rule 1.

*Add the following sentence to sub-rule (1) of rule 1:—*

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for for the purpose of appeal."

[G. O. No. 933, Home (Judicial), dated the 3rd May, 1917.]

*Add the following as a proviso to sub-rule (1) of rule 1:—*

"Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court."

(Dis. No. 2135 of 1918.)

*Add the following sentences to sub-rule (2) of rule 1:—*

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-fees Act."

(Dis. No. 2057 of 1917.)

*Add the following as a new sub-rule (3) to rule 1—*

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908 have been heard."

[G. O. No. 191, Home (Judicial), dated the 27th January, 1921.]

## Rule 5

*Substitute the following for the existing sub-rule (1) to rule 5 of Order XLI:—*

5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of any such final, if already made.

(P. Dis. No. 164 of 1932.)

**Rule 9.**

*In rule 9, delete sub-rule (2) and substitute the following in lieu thereof:—*  
 "Such book shall be called the Register of Appeals."

[G. O. No. 2606, Law (General), dated the 6th August, 1928.]

**Rule 14.**

*Insert the following as a proviso to sub-rule (1):—*

"Provided that the Appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred."

(P. Dis. No. 4 of 1927.)

**Rule 18.**

*In rule 18 after the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."*

(Dis. No. 1333 of 1913.)

**Rule 19.**

*Re-number rule 19 as rule 19 (1) and insert the following as sub-rule (2):—*  
 "(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

(Dis. No. 612 of 1926.)

**ORDER XLI.****Rule 23.**

*Substitute the following for the present Rule 23:—*

Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate court in reversing or sitting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of the judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

(R. O. C No. 5105-B. 1 of 1930).

**Rule 31.**

*Substitute the following for rule 31:—*

"31. The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reason for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein ; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."

[G. O. No. 1852, Home (Judicial), dated the 4th September, 1917.]

## ORDER XLI.

### Rule 35 (2).

*Substitute the following:—*

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, *their addresses for service* and a clear specification of the relief granted or other adjudication made.

(Vide Fort St. George Gazette, dated 31st March 1931, P. T. II, P. 607 .

*After Order XLI, insert the following as Order XLIA :*

## "ORDER XLIA.

*Appeals to the High Court from original decrees of Subordinate Courts.*

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this Order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in rule 22 of Order XLI the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross-Objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by sub-rule above, he shall not be allowed to translate or print any part of the record .

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service

of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred :

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court: Provided that, after a party has given notice of an address for service in accordance with rule 4, service of any notice or process shall be made at such address.

6. All notices and processes, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 A. M. and 5 P. M. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under rule 6, or which are sent from the office of the Registrar, may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice-board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party, the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

#### *Memorandum of Objections.*

12. (1) If the acknowledgment mentioned in rule 22 (3) of Order XLI is not filed, the respondent shall, together with the memorandum of objections, file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in rule 22 (3) of Order XLI the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in rule 12 (f).

14. Rule 31 of Order XLI shall not apply to the the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary."

[O. O. No. 2128 Home, (Judicial), dated the 18th October, 1917.]

*Insert the following as Order XLIB:—*

#### "ORDER XLIB.

1. The rules of Order XLIA shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court:—

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by Order XLIA, rule 6, or if the party to be served has appeared in person, in manner prescribed by rule 5 of the said Order."

[G. O. No. 2128, Home (Judicial), dated the 18th October, 1917.]

*Substitute the following for the existing Order XLII:—*

#### "ORDER XLII.

##### *Appeals from appellate decrees*

1. The rules of Order XLI and Order XLIA shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order:

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

2. (f) The memorandum of appeal shall be printed or type-written and shall be accompanied by the following papers:—

One certified copy of the decrees of Court of first instance and of the Appellate Court; and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document a printed or type-written copy of such document shall be presented with the memorandum of appeal:

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.



(3) If the appellant fails to comply with this rule, the appeal may be dismissed."

[G. O. No. 2128, Home (Judicial), dated, the 18th October, 1917  
as amended on 12-11-29],

### ORDER XLIII.

#### Rule 1.

*Substitute the following for 1(d) of Order XLIII of the Code of Civil Procedure :-*

(d) and order under rule 13 or rule 15 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed ex parte.

(Dated 6th February 1933)

*Substitute the following for sub-rule (s) of rule 1 of Order XLIII of the Code of Civil Procedure :-*

(s) An order under rule 1 or 4 of Order XL, except an order under the proviso to sub-rule (2) of rule 4.

(P. Dis. No. 60 of 1933)

#### Rule 2.

*Substitute the following for rule 2 :-*

"2. The rules of Order XLI and of Order XLIA shall apply, so far as may be, to appeals from the orders specified in rule 1 and other orders of any civil Court from which an appeal to the High Court is allowed under any provision of law :

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

#### Rule 3.

*Substitute the following for rule 3 of Order XLIII of the Code of Civil Procedure :-*

3. (1) The provisions of Order XLII shall apply, so far as may be, to appeals from Appellate orders.

(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order in the Appellate Court.

(2) If any ground of appeal is based upon the construction of a document shall be presented with the memorandum of appeal.

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.

(Dated 30th September 1932.)

## ORDER XLVII

## Rule 7.

*In sub-rule (1) substitute the word "order" for the word "application" occurring after the words "on the ground that the."*

*(P. Dis. No. 131 of 1929.)*

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## APPENDIX B

## Form No. 1.

*Insert the following "Note" in Form No. 1, namely:—*

"NOTE.—Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out."

*[Dis. No. 369 (c) of 1916.]*

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*After Form No. 1, insert the following as Form No. 1A:—*

## "No. 1A.

SUMMONS FOR ASCERTAINING WHETHER A SUIT IS CONTESTED OR  
NOT, AND IF NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL.

(O. V, rr. 1, 5.)

(Title)

To

(Name, description and place of residence.)

Whereas \_\_\_\_\_ has instituted a suit against you for \_\_\_\_\_ you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit (or who shall be accompanied by some person able to answer all such questions) on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ at \_\_\_\_\_ o' clock in the \_\_\_\_\_ noon and to state whether you contest or do not contest the claim and, if you contest, to receive directions of Court as to the date on which you have to file the written statement, the date of trial and other matters.

Take notice that in the event of the claim not being contested the suit shall be decided at once.

Take further notice that in default of your appearance on the day and hour before mentioned, the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

Judge.

*Notice—If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property or both."*

*(P. Dis. No. 7 of 1927.)*

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After Form No. 12, insert the following as Form No. 12A:—

"No. 12A.

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR <sup>DEFENDANT</sup><sub>RESPONDENT</sub>  
(O. XXXII, rr. 3 and 4.)

(Title)

To

(Name, description and place of residence of proposed guardian.)

Take notice that X <sup>plaintiff</sup><sub>appellant</sub> in \_\_\_\_\_ has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor <sup>defendant (s)</sup><sub>respondent (s)</sub>, and that the same will be heard on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said <sup>defendant (s)</sup><sub>respondent (s)</sub> you are required to sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under O. XXXII, r. 4. Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor <sup>defendant (s)</sup><sub>respondent (s)</sub> aforesaid.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

(Signed)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor <sup>defendant (s)</sup><sub>respondent (s)</sub> therein mentioned.

(Signed) Y. Z.

Witnesses :

1.  
2."

[G. O. No. 1997, Law (General), dated the 24th November. 1921.]

Substitute the following for Form No. 13-A of Appendix B:—

No. 13-A. Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party.

ORDER XVI.

Rule 4-A.

(Cause Title.)

This is to certify that \_\_\_\_\_ (name) \_\_\_\_\_ (designation) being a Government servant from the Province of \_\_\_\_\_ (name) was summoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this Court from the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, (inclusive) and that a sum of Rs \_\_\_\_\_ has been paid into Court by the \_\_\_\_\_.

plaintiff/defendant towards his travelling and subsistence allowance for days according to the scale prescribed by the Government of Province of (name) and that the said amount has been will be remitted to the Government treasury at to be created to Government under the head "XVI. A.—Miscellaneous Fees and Fines."

Dated the                      day of                      193 ,

*Presiding Judge or Chief*

*Ministerial Officer.*

(P. Dis. No. 22 of 1932.)

# APPENDIX D.

*Insert the following as Forms Nos. 10A and 10B\* :—*

## \*No. 10A.

### †FINAL DECREE FOR SALE.

[O. 34, r. 5 (2), or O. 34, r. 8 (4).]

(Title.)

Upon reading the preliminary decree passed in the above suit and the application of the <sup>plaintiff</sup>/<sub>defendant</sub> dated                      and upon hearing Mr.                      for plaintiff and Mr.                      for defendant and it appearing that the payment directed by the said decree has not been made:

It is hereby decreed as follows:—

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to <sup>plaintiff</sup>/<sub>defendant</sub> in the nforesaid preliminary decree together with subsequent interest and subsequent costs and that the balance, if any, be paid to the <sup>defendant</sup>/<sub>plaintiff</sub> or other person entitled to receive it; (2) that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the <sup>plaintiff</sup>/<sub>defendant</sub> be at liberty to apply for a personal decree for the amount of the balance; and (3) that the <sup>defendant</sup>/<sub>plaintiff</sub> do also pay <sup>plaintiff</sup>/<sub>defendant</sub> Rs.                      for the cost of this application. [Here enter description of mortgaged property in English or in the language of the Court.]

(Dis. No. 583 of 1915.)

\* The forms relating to mortgage decree in Appendix D to Schedule I have been superseded in whole by the provisions of s. 8 and Sch. of Act 21 of 1929.

† NOTES.—(1) In the case of a decree under Order 34, rule 5 (2), score out the words "plaintiff" and "defendant" below the lines and in the case of a decree under order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist.

## No. 10B.

## \*FINAL DECREE FOR REDEMPTION.

[O. 31, r. 3 (1), O. 31, r. 5 (1), and O. 31, r. 8 (1).]

(Title).

Upon reading the preliminary decree in the above suit on and the application of the <sup>defendant</sup> ~~plaintiff~~ I. A. No. dated and after hearing Mr. pleader for the and Mr. pleader for the and it appearing that the payment directed by the nforesaid decree has been made:

It is hereby decreed as follows:—

That the <sup>plaintiff</sup> ~~defendant~~ do deliver up to the <sup>defendant</sup> ~~plaintiff~~ or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the <sup>defendant</sup> ~~plaintiff~~ free from the mortgage and from all incumbrances created by the <sup>plaintiff</sup> ~~defendant~~ or any person claiming under him (or by those under whom he claims) and do also put the <sup>defendant</sup> ~~plaintiff~~ in possession of the property.

NOTES:—(1) In the case of a decree under Order 31, rule 8 (1), score out the words "plaintiff" and "defendant" above the lines; in the case of decrees under Order 31, rule 3 (1) and rule 5 (1), score out the words "plaintiff" and "defendant" below the lines.

(2) The words "or by those under whom he claims" will be inserted only if the mortgagee derives title from an original mortgagee.

## SCHEDULE.

*Description of the mortgaged property.*

The costs of the <sup>defendant</sup> ~~plaintiff~~ in the proceeding:—

Particulars.

Amount.

(Dis. No. 583 of 1925.)

## Form No. 24.

Add the following form as Form No. 24, viz.:—

## \*No. 24.

77 DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR  
OR LUNATIC.

(Title)

This suit coming on this day for final disposal in the presence of, etc., and C. D., the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing dated the day of and made between A. B., the plaintiff, of the one part, and the said C. D. by the said guardian *ad litem* of the other part, (or, on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise

on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise.)"

(Dis. No. 1647 of 1910.)

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## APPENDIX E.

### Form No. 15.

For the word "Dated" substitute the words "Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_."

(Dis. No. 212 of 1912.)

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### Form No 15A.

Add the following Form:—

"No. 15A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O. XXI, r. 43)

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Civil Suit No. \_\_\_\_\_ of \_\_\_\_\_  
 A. B. of \_\_\_\_\_ against  
 C. D. of \_\_\_\_\_

Know all men by these presents that we, I. J. of \_\_\_\_\_ etc., and K. L. of \_\_\_\_\_ etc., and M. N. of \_\_\_\_\_ etc., are jointly and severally bound to the Judge of the Court of \_\_\_\_\_ in Rupees \_\_\_\_\_ to be paid to the said Judge, for which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
 AND WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, in execution of a decree in favour of \_\_\_\_\_ in suit No \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_, on the file of \_\_\_\_\_ and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force.

I. J.  
 K. L.  
 M. N.

Signed and delivered by the above bounden \_\_\_\_\_ in the presence of \_\_\_\_\_

(Dis. No. 166 of 1913.)

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## Form No. 29.

Add the following as a "Note" to Form No. 29—*Proclamation of Sale* :—

"NOTE.—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate."

(Dis. No. 2134 of 1918.)

## Form No. 39.

Substitute the following for the old one (P. Dis. No. 607 of 1931) :—

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE  
IN EXECUTION. (O. 21, r. 95.)

(Title.) .

To

The Bailiff of the Court.

Whereas has become the certified purchaser of  
at a sale in execution of decree in suit No. of  
19 ; you are hereby ordered to put the said the certified  
purchaser, as aforesaid, in possession of the same ; and you are hereby further  
required to state in your return whether there are crops on the land and  
whether you have delivered them to the certified purchaser.

Given under my hand and the seal of the Court, this day of  
19 .

. . Judge.

## APPENDIX F.

Substitute the following for Form No. 9 :—

"No. 9.

## APPOINTMENT OF A RECEIVER.

(O. 40, r. 1.)

(Title.)

WHEREAS it appears to the Court that in the above suit it is just and  
convenient to appoint a receiver of the properties specified below (or whereas  
the properties specified below have been attached in execution of a decree  
passed in the above suit on the day of 19 , in favour  
of ).

It is hereby ordered that A. B. be appointed (subject to his giving  
security to the satisfaction of the Court) the receiver of the said property and  
of the rents, issues and profits thereof under Order XL of the Code of Civil  
Procedure, 1908, with all powers under the provisions of that Order, except  
that he shall not without leave of the Court (1) grant leases for a term  
exceeding three years or (2) institute suits in any Court (except suits for  
rent) or (3) institute appeals in any Court (except from a decree in a rent  
suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the  
repairs of any property in any period of two years more than half of the  
net annual rental of the property to be repaired, such rental being calculated  
at the amount at which the property to be repaired, would be let when  
in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the <sup>parties</sup>~~defendants~~ to the above suit and all persons claiming under them do deliver up quiet possession of the properties, moveable and immovable, specified below, together with all leases, agreements for lease, kahuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immovable, and collect the rents, issues and profits of the said immovable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sums of Rs. for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of . He shall be entitled to commission at the rate of Rs. per cent on the net amounts collected by him or to the sum of Rs. per month or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment:—

(Here enter specification of property)

Given under my hand and the seal of the Court, this day  
of 19 .”

(Dis. No. 643 of 1914).

## APPENDIX G.

### Form No 6

Insert the following "Note," namely:—

"NOTE.—Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance."

[Dis. No. 369 (e) of 1916.]

Insert the following as forms Nos. 6A and 6B:

"No. 6A.

NOTICE TO RESPONDENT.

(O XLIA. r. 2)

(Cause title.)

Appeal from the  
day of  
To

of the Court of dated the

*Respondent,*



Take notice that an appeal from the above decree (order) has been presented by the above-named appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you.

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A. B. (insert address) Madras.

(If the appellant appears in person, insert his address for service.)

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

{Interlocutory application No. . of 19 has been made by  
appellant, and execution has been stayed (or other order made) by order dated  
the day of 19 .}

"No. 6B.

#### MEMORANDUM OF APPEARANCE.

(O. XLIA, r. 3.)

(Cause title.)

Take notice that the respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (insert address)

The said respondent requires a list of the papers which the appellant proposes to translate and print.

Dated the day of 19

(Signed) C. D.,

Vakil for Respondent.

To the Registrar, High Court of Judicature, Madras."

[G. O. No. 2128, Home (Judicial), dated the 18th October, 1917.]

#### Form No. 9.

Omit the entire portion beginning with the words "Memorandum of Appeal" and ending with the words "the following reasons, namely :—"

(Notification, dated High Court, Madras the 6th November, 1922.)

Forms Nos. 12A, 12B and 12C.

Insert the following as new forms after Form No. 12 :

## "No. 12A.

## CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

(O. XLV, r. 7.)

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the Courts are not concurrent).

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the  $\frac{\text{decree}}{\text{final order}}$  of this Court in suit No. \_\_\_\_\_ of 19 \_\_\_\_.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of \_\_\_\_\_ for the petitioner and of \_\_\_\_\_ for the respondent (if he appears) this Court doth certify that the  $\frac{\text{amount value}}{\text{Rs 10,000}}$  of the subject-matter of the suit in the Court of first instance is  $\frac{\text{amount value}}{\text{upwards of Rs 10,000}}$  and the  $\frac{\text{amount value}}{\text{Rs 10,000}}$  of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of  $\frac{\text{decree}}{\text{upwards of Rs 10,000}}$  or that the  $\frac{\text{decree}}{\text{final order}}$  appealed from involves  $\frac{\text{directly}}{\text{indirectly}}$  some claim or question  $\frac{\text{to}}{\text{respecting}}$  property of the value of  $\frac{\text{Rs 10,000}}{\text{upwards of Rs 10,000}}$  and that the  $\frac{\text{decree}}{\text{final order}}$  appealed from does not affirm the decision of the lower Court.

## No. 12B.

## CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

(O. XLV, r. 7.)

(In cases where the subject-matter is of sufficient value and the findings of the Court are concurrent.)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the  $\frac{\text{decree}}{\text{final order}}$  of this Court in suit No. \_\_\_\_\_ of 19 \_\_\_\_.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of \_\_\_\_\_ for the petitioner and of \_\_\_\_\_ for the respondent (if he appears) this Court doth certify that the  $\frac{\text{amount value}}{\text{Rs 10,000}}$  of the subject-matter of the suit in the Court of first instance is  $\frac{\text{amount value}}{\text{upwards of Rs 10,000}}$  and the  $\frac{\text{amount value}}{\text{Rs 10,000}}$  of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of  $\frac{\text{decree}}{\text{upwards of Rs 10,000}}$  or that the  $\frac{\text{decree}}{\text{final order}}$  appealed against involves  $\frac{\text{directly}}{\text{indirectly}}$  some claim or question  $\frac{\text{to}}{\text{respecting}}$  property of the value of  $\frac{\text{Rs 10,000}}{\text{upwards of Rs 10,000}}$  and that the affirming  $\frac{\text{decree}}{\text{final order}}$  appealed from involves the following substantial question (s) of law, viz.:

(1)

(2)

## No. 12C.

## CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

## (O. XLV, r. 7.)

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the <sup>decree</sup>~~final order~~ of this Court in suit No. \_\_\_\_\_ of 19 \_\_\_\_.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of \_\_\_\_\_ for the petitioner and of \_\_\_\_\_ for the respondent (if he appears) this Court doth certify that the <sup>amount</sup>~~value~~ of the subject-matter of the suit both in the Court of first instance and in the other Court is <sup>below Rs. 10,000 in value</sup>~~incapable of money valuation~~ this Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz. :—

(1)

(2)"

[G. O. No. 632, Law (General), dated the 9th March, 1922.]

## APPENDIX H.

## Form No. 11.

Substitute the following for Form No. 11 :—

## "No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR.

[O. XXXII, r. 3 (5).]

(Title.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

Whereas an application has been presented on the part of the \_\_\_\_\_ in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within \_\_\_\_\_ days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as <sup>his</sup>~~her~~ guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said \_\_\_\_\_

Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

day

Form No. 11A.

NOTICE TO PROPOSED GUARDIAN.

[O. XXXII, r. 4 (3).]

(Title.)

To

residing at

Take notice that the above-named petitioner has made an application to this Court to appoint you guardian for the suit of minor defendant in No. of 19 , and that the said application will be heard on the day of next.

Given under my hand and the seal of the Court, this day of 19 .

(Dis. No. 1601 of 1914.)

Forms Nos. 14 to 25.

Omitted.

[G. O. No. 2606, Law (General), dated the 6th August, 1938.]

# : RULES MADE BY THE HIGH COURT OF JUDICATURE AT BOMBAY UNDER SECTION 122.

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## ORDER III.

### Rule 2.

*Clause (a) shall be amended to read as follows:—*

"Persons holding general powers-of-attorney [or in the case of proceedings on the Original side of the Bombay High Court attorneys holding the requisite special powers of attorney] from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties."

(Words in brackets inserted, *vide* Bom. Gaz., 1931, pt. I, p. 1894.)

---

### Rule 4.

*In sub-rule (3) the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act."*

---

## ORDER V.

### Rule 21A.

*The following shall be inserted as Rule 21A:—*

"21A. Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment provided that such place is not a town or village in British India which is the head-quarters of a district or recognised subdivision of a district, such as a taluka, tahsil or mohal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the Bombay Government Gazette. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

(6. 11. 30)

---

### Rule 22.

*The following proviso shall be added to rule 22:—*

"Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons

to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

---

## ORDER VII.

### Rule 19 to 26.

*The following shall be added as rules 19 to 26 :—*

"19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

"20. An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

"21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

"22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed, and a copy of the notice, summons or other process shall be sent to the registered address by registered post prepaid for acknowledgment, and such service shall be deemed to be effectual as if the notice or process had been personally served.

"23. Where a party engaged a pleader, notice or processes on him shall be served in the manner described by Order III, rule 3, unless the Court directs service at the address for service given by the party.

"24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

"25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

"26. Nothing in these rules shall apply to the notice prescribed by order XXI rule 22.

(6-11-30.)

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## ORDER VIII

### Rules 11 and 12.

*The following shall be added as Rules 11 and 12 :—*

"11. Every party, whether original added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the sum-

mons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fail to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit.

"Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

"12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the last preceding rule."

(6-11-30.)

---

### ORDER IX.

#### Rule 4.

*Rule 4 shall be numbered rule 4 (1) and the following sub-rule (2) shall be added to it namely:—*

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

---

### RULE 9.

*The following shall be added as sub-rule (3), namely:—*

"(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

---

#### Rule 13.

*Rule 13 shall be numbered as rule 13 (1), and the following sub-rule shall be added to it, namely:—*

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

---

#### Rule 15.

*The following shall be added as rule 15:—*

"In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

---

### ORDER XIII.

#### Rule 9.

*Between the first and second proviso to sub-rule (1), the following proviso shall be inserted, namely:—*

"Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XII, rule 1, may be returned after the appeal has been disposed of by the Court."

## ORDER XVI.

### Rule 1A.

*The following shall be added as Rule 1A.—*

"1A. (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court."

### Rule 2.

*The following shall be inserted as proviso to sub-rule (1).—*

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

### Rule 3.

*The following shall be inserted as proviso :—*

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

## ORDER XXI.

### Rule 22.

*In rule 22 the words "two years" shall be substituted for the words "one year" wherever they occur.*

### Rule 24.

*The following proviso shall be added to sub-rule (2) of rule 24 :—*

"Provided that a First Class Subordinate Judge may in his special jurisdiction send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."



**Rule 44A.**

*After rule 44 the following shall be inserted, namely :—*

"44A. Where the property to be attached is agricultural produce, a copy of the warrant or the order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate."

---

**Rule 45.**

*The following words shall be added to sub-rule (1) of rule 45 after substituting a semicolon for the full stop :—*

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time."

---

**Rule 54.**

*The following shall be added to sub-rule (1) of rule 54 :—*

"Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged."

---

**Rule 69.**

*In sub-rule (2) of rule 69 "thirty days" shall be substituted for "seven days."*

---

**Rule 72A.**

*After rule 72 the following shall be inserted namely :—*

"72A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

---

**Rule 91A.**

*The following rule shall be added as rule 91A :—*

"91A. Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to him, under rules 89, 90 or 91, and in the case of the deposit required by that rule if made to the person to whom the decree is referred for execution in the Local Government under section 100, the Court shall be deemed to have been made to or in the Court within the meaning of rules 89, 90 and 91."

ORDER XXV.

Rule 2.

*The following shall be added as sub-rule (1), namely :—*

"(4) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

---

ORDER XXXII.

Rule 3.

*The words "to the minor and" in line 2 of sub-rule (4) shall be deleted.*

---

ORDER XXXIII.

Rule 1.

*the following sentence shall be added to the "Explanation" to rule 1, namely :—*

"In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded."

---

ORDER XXXIV.

Rule 2.

*Substitute for clause (d) the following :—*

"(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3."

---

Rule 4.

*In sub-rule (1) after the words "as therein mentioned" substitute "the plaintiff shall be entitled to apply for a final decree for sale under rule 5."*

---

Rule 5.

*In sub-rule (2) after the words "proceeds of the sale", substitute :—*

"(after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

---

## Rule 7.

*For clause (d) substitute :—*

"(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8."

## ORDER XXXVII.

## Rule 2.

*In sub-rule (1) of rule 2 after the words "promissory notes" the following words shall be inserted, namely :—*

"and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only."

## Rule 3.

*In rule 3 the following sub-rule (3) shall be inserted :—*

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

## ORDER XLI.

## Rule 3A.

*After rule 3 the following rule shall be inserted, namely :—*

"3A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13."

## Rule 38.

*The following shall be added as rule 38 :—*

"38. (1) An address for service of process may be filed by a party in an appeal or Order VIII, VII, rule 24, or in proceedings for setting aside or rescinding all appellate proceedings, subject to any alteration under sub-rule (3).

"(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

"(3) Rule 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings" (10. 11. 30)

## ORDER XLIII.

## Rule 1.

*Clause (w) shall be deleted.*

---

## ORDER XLV.

## Rule 3.

*In sub-rule (2) after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely :—"unless it thinks fit to refuse the certificate."*

---

## Rule 7A.

*After rule 7 the following rule shall be inserted, namely :—*

*7A. No such security as is mentioned in rule 7 (1), clause (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."*

---

## ORDER XLVI.

## Rule 8

*The following shall be added as rule 8 :—*

*"8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."*

*(6. 11. 30.)*

---

## ORDER XLVII.

## Rule 5.

*In rule 5, for the word, "six" the word "two" shall be substituted.*

---

## Rule 10

*The following shall be added as rule 10 :—*

*"10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."*

---

## ORDER XLIX.

## Rule 3.

*In rule 3 the word "and" immediately preceding paragraph (6) shall be omitted and the following paragraph shall be inserted between paragraphs (5) and (6), namely :—*

*"(5a), rule 72A of Order XXI ; and"*

*For the word and figures "rule 35" occurring below item (6) of rule 3, the words and figures "rules 31 and 35" shall be substituted.*

*The following clause shall be inserted as clause (f) namely,*

"(f) rule 21 A of Order V ;"

*For the existing clause (f) the following shall be substituted, namely,*

"(1a) rule 10, rule 11, clause (b) and (c), and rules 19 to 26 of Order VII ;"

*Below clause (6) the following shall be inserted, namely,*

"(b) rule 11 and 12 of Order VII"

*Below clause (c) the following shall be inserted, namely,*

"(7) rule 38 of Order XLI"

(16 11 30)

#### Rule 4.

*The following shall be added as rule 4 :—*

"1 Under section 128, paragraph 2, clause (i) of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay :

"Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal."

#### ORDER LII

*The following shall be added as Order LII :—*

**Applicability of Rule 38** "1. Rule 38 of order XLI shall apply, so far as of Order XLI to proceed. may be, to proceedings under section 115 of the ing under s 115. Code.

#### APPENDIX E.

Form Nos. 1, 2, 3, 5 and 6.

The following notes shall be inserted in red ink in forms Nos. 1, 2, 3, 5 and 6 :—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

#### Form No. 10.

Form No. 10 shall be amended to read as follows :—

"No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT.

(O. V, r. 23.)

(Title.)

Read proceeding from the  
in Suit No.

forwarding  
of 19 of that Court.

for service on

Read Serving Officer's endorsement stating that the  
and proof of the above having been duly taken by  
me on the oath of  
and  
that the  
be returned to the  
with this proceeding.

I hereby declare that the said summons on  
has been duly served.

Judge.

NOTE—This form will be applicable to process other than summons the service of which may have to be effected in the same manner."

#### APPENDIX D.

##### Form No. 4.

In line 4 of Form No. 1 for "realization" substitute "the day hereinafter referred to."

For clause (2) of the said form, substitute :—

"That if such payment is not made on or before the said day of  
19 . the plaintiff shall be entitled to apply to the Court  
for a final decree for sale."

Delete clause (3) of the said form.

##### Form No. 5.

For clause (2) substitute :—

"(2) That if such payment is not made on or before the said day of  
19 , the defendant shall be entitled to apply for a final decree for  
foreclosure or sale."

##### Form No. 10A.

Add the following form as form No. 10A :—

"No. 10A.

##### FINAL DECREE FOR SALE.

(Title.)

Upon reading the decree passed in the above suit on the  
day of 19 , and the application of the plaintiff dated the  
day of 19 . and after hearing  
pleader for the plaintiff and pleader for the defendant,  
and it appearing that the payment directed by the said decree has not been  
made.

It is hereby decreed as follows :—

(1) That the mortgaged property or sufficient part thereof be sold and that  
the proceeds of the sale (after defraying thereout the expenses of the sale) be  
paid into Court and applied in payment of what is declared due to the  
plaintiff as aforesaid together with subsequent interest at per cent  
per annum and subsequent costs, and that the balance, if any, be paid to the  
defendant.

(2) That if the net proceeds of the sale are insufficient to pay such amount  
and such subsequent interest and costs in full, the plaintiff shall be at liberty  
to apply for a personal decree for the amount of the balance."

# RULES MADE BY THE HIGH COURT OF JUDICATURE AT ALLAHABAD UNDER SECTION 122.

## ORDER IV.

### Rule 1.

*For rule 1 (1) substitute the following :—*

"1. (1) Every suit shall be instituted by presenting to the court or such officer as it appoints in this behalf a plaint, together with a true copy, for service with the summons upon each defendant, unless the court for good cause shown allows time for filing such copies.

(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

*Re-number the present sub-rule (2) as sub-rule (3).*

*(U. P. Gazette, Part II, dated the 24th July, 1926).*

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## ORDER V.

### Rule 2.

*Omit the words "or, if so permitted, by a concise statement."*

*(U. P. Gazette, Part II, dated the 24th July, 1926.)*

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### Rule 4A.

*Add the following rule 4A :—*

"4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial court, the court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

*(U. P. Gazette, Part II, dated the 24th July, 1926.)*

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### Rule 15.

*For the words "Where in any suit the defendant cannot be found" read "when the defendant is absent or cannot be personally served."*

*(U. P. Gazette, Part II, dated the 24th July, 1926.)*

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### Rule 25

*For the word "shall" in the third line read the word "may."*

*(U. P. Gazette, Part II, dated the 24th July, 1926.)*

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**Rule 25A**

*Add the following as rule 25A :—*

"25A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant, at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant, refused service may be deemed by the court issuing the summons to be *prima facie* proof, of service."

(U. P. Gazette, Part II, dated the 24th July, 1926.)

**Rule 28.**

*After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by rule 25"*

(U. P. Gazette, Part II, dated the 24th July, 1926.)

**Rule 28.**

*The present rule 29 shall be numbered 28 (1)*

*Add the following as rule 29 (2) :—*

"(2) Where the address of such Commanding Officer is not known, the court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub-rule (4) of this rule."

*Add the following sub-rules (3), (4) and (5) :—*

"(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable service shall be made on the defendant in person."

"(4) Where such defendant resides outside the jurisdiction of the court in which the suit is instituted, or outside British India, the court may apply over the seal and signature of the court to the officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address."

"(5) Where personal service is not practicable, the court shall issue the summons to the defendant at the address so supplied by registered post."

**Rule 29.**

*In rule 29, sub-rule (1), line 2. for the word and figures "rule 28" read "rule 28 (1)."*

**Rules 31 and 32.**

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the court."

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the court vernacular. But where a process is sent



for execution to the court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

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## ORDER VII

### Rule 9.

In rule 9 (a) for the semicolon after "it" in clause (1), substitute a full stop and delete the rest of this clause as well as clauses (2) and (3); and

(b) Re-number clause (1) as clause (2), deleting the words "or statements" therein.

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### Rule 17.

At the end of clause (2) add the following proviso :—

"Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use the procedure laid down in Order XII, rule 12, as to verification shall be followed and in that case the court or its officer need not examine or compare the copy with the original."  
(10.12.32.)

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### Rules 19 to 20.

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the district court within which the suit or petition is filed, or of the district court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the court *suo motu* or any party may apply for an order to that effect, and the court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the court thinks fit.

25. Nothing in these rules shall prevent the court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

### ORDER VIII.

#### Rules 11 and 12.

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in court a proceeding stating his address for service written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the court may act *ex motu* or on the application of any party for an order to such effect, and the court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule."

### ORDER IX.

#### Rule 2.

*After the words in the fourth line, "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint, for service on the defendant."*

#### Rule 13.

*Add the following proviso :—*

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the court is satisfied that the defendant knew, or but for his wilful conduct would have known of, the date of bearing in sufficient time to enable him to appear and answer the plaintiff's claim."

### ORDER XIII.

#### Rules 12 and 13.

"12. Every document not written in the court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the court vernacular. If any such document is written in the court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

"The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document."

(20-12-32.)

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the court shall, in addition to making the endorsement prescribed in rule 1 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, etc., AA1, BB1, etc., and those of the second A2, B2, C2, etc., AA2, BB2, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series."

## ORDER XVI.

### Rule 1.

*The following proviso to be added:—*

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor."

### Rule 2 (4).

"2. (4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a court situated more than five miles from their headquarters."

### Rule 3.

*For the words in line 1 "under this order shall be served" read "under this order may by leave of the court be served by the party or his agent applying for the same, by personal service, and failing such service shall be served"*

## Rules 22 and 23.

"22. (1) Save as provided in this rule and in rule 2, the court shall allow travelling and other expenses on the following scale:—

- (a) in the case of witnesses of the class of cultivators, labourers and menials, six annas a day ;
- (b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the court may direct ; and
- (c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the court that he has actually and necessarily incurred the additional expense.

*Illustration.*—A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the court from which the summons issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the court to be reasonable and proper :

\* Provided that the court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a court situated more than five miles from their headquarters, shall be given a certificate of attendance by the court in lieu of travelling and other expenses.

## ORDER XVII.

### Rules 1, 2 and 3.

*Add the following further proviso to rule 1:—*

"Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order XVI, rule 1."

*Add to rule 2:—*

"Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

*Explanation.*—No party shall be deemed to have failed to appear if he is either present or is represented in court by an agent or pleader, though engaged only for the purpose of making an application."

*Amend rule 3:—*

"Where any party to a suit, to whom time has been granted, fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his

witnesses, or to comply with any previous order, or to perform any other act, necessary to the further progress of the suit, for which time has been allowed, the court may, whether such party is present or not, proceed to decide the suit on the merits."

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### ORDER XVIII

#### Rule 19.

*Add as a new rule :—*

"19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings."

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### ORDER XIX.

#### Rules 4 to 15.

"4. "Affidavits shall be entitled in the court of                      at                      (naming such court). If the affidavit be in support of, or in opposition to, an application respecting any case in the court, it shall also be entitled in such case. If there be no such case it shall be entitled *In the matter of the petition of*.

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words 'I affirm' or 'I make oath and say.'

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression 'I am informed, and, if such be

the case, 'and verily believe it to be true,' and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such document.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a civil court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

11A. Such identification may be made by a person—

- (a) personally acquainted with the person to be identified, or
- (b) satisfied, from papers in that person's possession or otherwise, of his identity;

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified:—

#### Form.

I (name, address and description) declare that the person verifying this petition (or making this affidavit) and alleging himself to be A.B. has satisfied me here state by what means, *e.g.*, from papers in his possession (or otherwise) that he is A. B.

12. No verification of a petition and no affidavit purporting to have been made by a *pardah-nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if he has read the affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the

time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made."

## ORDER XX.

### Rule 21.

"21. (1) Every decree and order as defined in section 2, other than a decree or order of a court of small causes or of a court in the exercise of the jurisdiction of a court of small causes, shall be drawn up in the court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed."

## ORDER XXI.

### Rule 5.

*For the word "district" where it occurs after the words "same" and "different" read "province."*

## Rule 6.

*Rule 6 shall be re-numbered 6 (1) and the following sub-rule (2) shall be added :—*

"2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the court to which they are to be sent."

## Rule 11.

*For clause (1) of sub-rule (2) substitute the following :—*

"(f) The date of the last application, if any."

*and add the following proviso to sub-rule (2) :—*

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses, (b), (c) and (h) need not be given in the application."

## Rule 17.

*Between the words "been complied with" and "the court may" insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court."*

## Rule 22.

*For the words "one year" wherever they occur in this rule, read the words "three years."*

*To sub-rule (2) shall be added the following proviso :—*

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

## Rule 24 (3).

*After the words at the end of the sub-rule, "be executed," add the words "and a day shall be specified on or before which it shall be returned to court"*

## Rule 25 (2).

"25. (2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

## Rule 26 (3).

*For the words "the court may" read the words "the court shall, unless good cause to the contrary is shown."*

## Rule 29.

*After the words "the person against whom the decree was passed" insert the words "or any person whose interests are affected by the decree, or by any order made in execution thereof."*



**Rule 31 (2) and (3).**

*For the words wherever they occur in each sub-rule, "six months" read the words "three months, or such extended time as the court may for good cause direct."*

**Rule 32 (3).**

*For the words "one year" read the words "three months," and after the words at the end of the sub-rule, "on his application," add the words "the court may for good cause extend the time."*

**Rule 39 (5).**

*Delete the words "in the Civil Prison."*

**Rule 40 (5).**

*Add the following proviso :--*

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding 10 days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree be not sooner satisfied. When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed, to pay into Court such sum as the Judge deems sufficient to cover such costs including fees for process server, subsistence of the judgment-debtor and cost of conveyance, if any; and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in the suit."

**Rule 53.**

*In sub-rule (1) (b) in the third line, and in sub-rule (4) in the eighth line, after the words "to such other court" add the words "and to any other court to which the decree has been transferred for execution."*

*And in sub-rule (6) for the words "after receipt of notice thereof" read the words "after receipt of notice, or with the knowledge thereof."*

**Rule 54**

*Add the following as sub-rule (3) :—*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

**Rule 55.**

"55 (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—

- (a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1),] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1),] is otherwise made through the Court or certified to the Court, or
- (c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1),] is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

#### Rule 58.

*Add the following words to sub-rule (2) :—*

"(or objection), or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

#### Rule 68.

*For the words "fifteen days" read the words "seven days."*

#### Rule 69 (2).

*For the word "seven" read the word "fourteen," and add the following proviso :—*

"Provided that the court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under rule 66."

#### Rule 72.

*In sub-rule (2) for the words "with such permission" read the words "property sold," and re-number this sub-rule "72," and delete sub-rules (1) and (3).*

#### Rule 89

*In sub-rule (1) of this rule for the words "any person...before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."*

#### Rule 90.

*For the words "Provided that no" read the words "Provided that—*

(a) no"

*and add the following proviso :—*

- "(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

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### Rule 92.

*In sub-rule (1) after the words "the Court shall," insert the words "subject to the provisions of rule 58 (2)."*

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### Rule 98.

*After the words "at his instigation," wherever they occur, add the words "or on his behalf," and after the words at the end of the rule "thirty days" add the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation (vide Court's Notification No. 6376-35 ( ), dated the 12th November, 1929) made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."*

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### Rule 99.

*For the words in brackets "(other than the judgment-debtor)" read the words in brackets "(other than the persons mentioned in rules 95 and 98 hereof)."*

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### Rules 104 to 140.

104. When the certificate prescribed by section 41 is received by the court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105. Every attachment of moveable property under rule 43, of Negotiable Instruments under rule 51, and of immoveable property under rule 51, shall be made through a Civil Court Amin, or Bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the sub-registrar within whose sub-district such property is situated, showing that the sub-registrar has searched his book Nos. I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property.

107. Where an application is made for the sale of land or of any interest in land, the court shall before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I-238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue-paying or revenue-free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68 the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) out-standing claims on the part of Government.

109. The certificate of the sub-registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The court may, in its discretion, adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the enquiry.

111. If after proclamation of the intended sale has been made, any matter is brought to the notice of the court which it considers material for purchasers to know, the court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. Whenever any civil court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the commanding officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. VI of 1878) are sold by public auction in execution of decree the sale shall give due notice to the names and addresses of the purchasers, and of the names and addresses of the purchasers of such arms, so that the requirements of the Indian Arms Act.

115. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the court may direct be not paid into court, the court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

116. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the

judgment-debtor on his furnishing security, or in that of some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the court.

117. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—

- (a) the number and description of the animal ;
- (b) the day and hour on and at which they were committed to his custody ;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No. I of 1871.

And the sums so levied shall be sent to the Treasury for credit to the municipal or district board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

119. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rate as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the court may require payment to be made for maintenance at higher rates than those prescribed.

120. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and hereafter for such further period as the court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

122. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the court, make such arrangements as may be most convenient and economical.

123. With the permission of the court the attaching officer may place one or more persons in special charge of such property.

124. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than four annas, and shall ordinarily not be more than six annas per diem. The court may, at its discretion, allow a higher fee ; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

25. When the services of such person are no longer required the attaching officer shall give him a certificate on a counter-foil form of the number of the property he has served and of the amount due to him, and on the presentation of such certificate to the court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge.

Provided that, where the amount does not exceed Rs. 5, it may be paid to the person by money order on requisition by the Amil, and the presentation of the certificate may be dispensed with.

26. When in consequence of an order of attachment being withdrawn or some other reason, the person has not been employed or has remained in possession of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

27. Fees paid into court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayment.

28. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 in the Municipal Account Code), of which one part will be forwarded by the treasury officials to the district or municipal board, as the case may be. A copy of that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass-book.

29. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the court, and the court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

30. Nothing in these rules shall be deemed to prevent the court from issuing and serving on the judgment-debtor simultaneously the notices required by Order XXI, rules 22, 60 and 107.

#### *Garnishee orders.*

31. The court may, in the case of any debt, due to the judgment-debtor other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a revenue court, or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to render an account for such moveable property, calling upon him to appear before the court and show cause why he should not pay or deliver into court the debt due from or the property deliverable by him to such judgment-debtor, so much thereof as may be sufficient to satisfy the decree and the cost of execution.

32. If the garnishee does not forthwith or within such time as the court may allow, pay or deliver into court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does appear in answer to the notice, then the court may order the garnishee to comply with the terms of such notice, and on such order execution may be enforced as though such order were a decree against him.

33. If the garnishee disputes his liability the court, instead of making an order, may order that any issue or question necessary for determining

his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

131. Whenever in any proceedings under these rules it is alleged, or appears to the court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such court shall seem just and reasonable.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: *Provided* that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

*Illustration.*—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or section 47.

*The following form shall be used under the provisions of rule 131 of order XXI:—*

"SUIT No.

OF 19.

Plaintiff,

*versus*

Defendant.

To

WHEREAS it is alleged that a debt of Rs.  
the judgment-debtor:

is due from you to

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached. Take notice that you are hereby required on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ to pay into this court the said sum of Rs \_\_\_\_\_

Or

to deliver, or account to the *Amn* of this court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this \_\_\_\_\_

day of \_\_\_\_\_

19 \_\_\_\_

*Munsif.*

*Subordinate Judge.*

At \_\_\_\_\_

....."

## ORDER XXII.

### Rule 12.

12. At the end of the rule *add* the words—

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

## ORDER XXI.

### Rule 1.

After the words in lines 6 and 7, "property in suit" insert the words "or that the plaintiff is being financed by a person not a party to the suit."

## ORDER XXVI.

### Rule 18.

In clause (1) after the words "agents and pleaders" substitute a comma for the full stop, and add the following words:—

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

## ORDER XXVII.

### Rule 9.

"9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a *vakalatnama*, file a memorandum on unstamped paper signed by him and stating on whose behalf he



appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :—

### TITLE OF THE SUIT, ETC.

I, *A. B.*, Government Pleader, appear on behalf of the Secretary of State for India in Council (*or the Government of United Provinces, or as the case may be*) respondent (*or etc.*), in the suit :—

*or, on behalf of the Government [which, under Order 27, rule 8 (1) of Act No. V of 1908, has undertaken the defence of the suit], respondent (or, etc.), in the suit."*

### ORDER XXXII.

#### Rule 3.

*Add the following proviso to rule 3 (4) :—*

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

#### Rule 4.

*Substitute the following for rule 4 :—*

"4 (1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the court

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The court may in its discretion, for reasons to be recorded, award costs of the suit, or compensation under section 35A or section 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under clause (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

#### Rule 4A.

*Add the following rule 4A :—*

"4A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the court considers for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable person

who has notified the court of his willingness to act, or failing any such person an officer of the court.

*Explanation*—An officer of the court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the court, he notifies to the court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the court is appointed guardian for the suit under sub-rule (2), the court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."

#### ORDER XXXIV.

##### Rule 4 (2)\*

*After the words "the court may" insert the words "of its own motion, or."*

#### ORDER XXXVII.

##### Rule 1.

*Add the following clause (e) :—*

"(e) any court in the Province of Agra exercising the powers of a Small Cause Court."

#### ORDER XXXIX.

##### Rule 1.

*In clause (a) delete the word "sale" after the words "damaging, alienation."*

#### ORDER XLI.

##### Rule 3 (1).

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

##### Rule 7.

*For the tenth word "and" substitute a comma and between the figure 6 and the word "shall" add the word and figure "and 10."*

*(Dated 23rd July, 1932.)*

\* Rule 4 of Order XXXIV has since been substituted for by Act 21 of 1929.

**Rule 10 (1).**

*Add the following proviso :—*

"Provided also that in case of every appeal other than a pauper appeal from any decree or order passed in appeal by any court subordinate to the High Court confirming the decree or order of the court below or modifying it only in favour of the appellant or in respect of costs, the appellant shall, within two weeks of the admission of the appeal, or within such time as the court may for special reasons allow, deposit in the appellate court security for the costs of the appeal, and for all costs ordered by the courts below to be paid by him, which remain unpaid."

*Add clause (2) :—*

"2) In the second proviso to clause (1) of this rule 'costs of the appeal' means advocate's fee calculated on the valuation of the appeal together with a sum of Rs. 2 for court-fee on *rakalatnama* to be filed by the respondent, Re. 1 inspection fee, and in case of second appeals outside the jurisdiction of a single Judge a further sum of Rs. 10 for printing charges payable by respondent."

*Original clause (2) of the rule shall be numbered as (3).*

**Rule 14**

*Add the following sub-rule (3) :—*

"(3) Notwithstanding anything in sub-rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the appellate court, unless he has appeared and filed an address for service either in the trial court or in the case of a second appeal, in the lower appellate court, or has appeared in the appeal."

**Rule 38.**

"38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the court below, and notices and processes shall issue from the appellate court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings."

**ORDER XLII.****Rule 1.**

1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision :—

"It shall not be necessary for an appellant in a second appeal to produce a copy of the judgment of the court of first instance or any judgment other than the judgment on which the decree appealed against may be founded, and the record of the case shall be sent for at the expense of the appellant."

*(Dated 26th November, 1932.)*

**ORDER XLIII.****Rule 1 (a).**

*For the words "an order under the rule 23 of Order XLI" read "any order."*

**Rule 3.**

"3. In every appeal under the rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid."

**ORDER XLV.****Rule 15 (1).**

*For rule 15 (1) substitute :—*

" 15. (1) Whoever desires to obtain :—

(a) execution of any order of Her Majesty in Council ; or,

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs,

shall apply to the said Court by a petition, accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof."

**ORDER XLVI.****Rule 8.**

" 8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."

**ORDER XLVII.****Rule 10.**

" 10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."

**ORDER XLVIII.****Rule 10.**

*Before the words "Every process issued" prefix the words "Except as provided in Order IV, rule 1 (2)"*

**ORDER LII.****Rule 1.**

" 1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code."

## APPENDIX B.

## Form No. 7.

*Form No. 7*—an order for transmission of summons for service in the jurisdiction [of another court [O. 5, r. 21] is hereby cancelled.

## Form No. 10.

*Form No. 10*—a form to accompany return of summons of another court [O. 5, r. 23] is cancelled.

## Form No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No. of suit.

Names of parties  
In the court of the  
Date fixed for hearing

## (Form No. 4.)

1 Number of wit- nesses to be sum- moned.	2 Name and full address of each person to be sum- moned.	3 Rank or occupa- tion.	4 Distance of resi- dence from Court.		5 Cash paid for—		6 Name and address of person to whom unexpended travelling expenses and diet money should be returned
			Rail	Road	Travell- ing ex- penses.	Diet ex- penses.	

## APPENDIX E.

## Form No. 29.

*In Form No. 29 (Proclamation of sale) delete the sentence "No bid by, \* \* \* previously given" in the paragraph above "conditions of sale."*

## Form No. 43

The security to be furnished under section 55 (1) shall be, as nearly as may be, by a bond in the following form :

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_

A. B. of \_\_\_\_\_ against \_\_\_\_\_ Plaintiff.  
C. D. of \_\_\_\_\_ Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the court of \_\_\_\_\_ and whereas the said C. D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. \_\_\_\_\_ that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent ;

Therefore I, E. F., inhabitant of \_\_\_\_\_, have voluntarily become security and do hereby bind myself, my heirs and executors to \_\_\_\_\_ as Judge of the said court and his successors in office that the said C. D. will appear at any time when called upon by the said court, and will apply in the manner and within the time hereinbefore set forth and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said court on its order, the sum of Rs. \_\_\_\_\_

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
(Sd.) E. F., Surety.

Witnesses : \_\_\_\_\_

## APPENDIX F.

## Form No. 11.

The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form :—

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_  
Plaintiff,  
Defendant.

Amount of suit, Rupees \_\_\_\_\_

WHEREAS in the suit above specified the plaintiff aforesaid, has applied to the said court that the said defendant, \_\_\_\_\_, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, \_\_\_\_\_, may be attached ;

And whereas, on the failure of the said defendant, \_\_\_\_\_, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, \_\_\_\_\_, has been attached by order of the said court :

Therefore I, \_\_\_\_\_, inhabitant of \_\_\_\_\_, have voluntarily become security and hereby bind myself, my heirs and executors, to \_\_\_\_\_ as Judge of the said court, and his successors in office, that the said defendant,



Miscellaneous No.

of 19 .

resident of

*versus*

resident of

To

WHEREAS the abovenamed  
has made application to this court that  
you are hereby warned to appear in this court in person or by a pleader  
duly instructed on the day of 19 . at o'clock in the forenoon,  
to show cause against the application, failing wherein, the said application  
will be heard and determined *ex parte*, and it will be presumed that you  
consent to be appointed guardian for the suit.

Given under my hand and the seal of the court, this day of 19 .

Judge.

## Form No. 5.

List of document produced by <sup>plaintiff</sup>/<sub>defendant</sub> (O. 13, r. 1).

In the Court of at District.

Suit No. of 19 .

Plaintiff,

*versus*

Defendant.

List of documents produced with the plaint (or at first hearing) on behalf  
of plaintiff (or defendant).

This list was filed by this . . . day of

19

1	2	3	4
Serial number.	Description and date if any, of the document.	What became of the document.	Remarks
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.
			If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope.

Signature of party or pleader producing the list.



## Form No. 11.

In Appendix II for Form No. 11, under heading "Notice to minor defendant and guardian" substitute :—

## "No. 11.

*Notice to minor defendant and guardian.*

In the Court of \_\_\_\_\_ nt \_\_\_\_\_ district.  
 Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_

resident of \_\_\_\_\_ Plaintiff,

resident of \_\_\_\_\_ *versus* \_\_\_\_\_ Defendant.

To—

(1) \_\_\_\_\_ Minor defendant ;  
 and

(2) Or \*Natural  
Certificated guardian, the person in whose  
 care the minor is alleged to be. Whereas an application has been presented  
 on the part of the plaintiff in the above suit for the appointment of a guar-  
 dian for the suit to the minor defendant, you said minor, and you (2)

the \*natural  
certificated guardian or the person in whose care the minor is alleged to  
 be are hereby required to take notice that unless within \_\_\_\_\_ days from the  
 service upon you of this notice, an application is made to this Court to show  
 cause why the person named below should not be appointed or for the  
 appointment of any other person willing to act as guardian for the suit, the  
 Court will proceed to appoint the person named below or some other person  
 to act as the guardian of the minor for the purposes of the said suit. Pro-  
 posed guardian \_\_\_\_\_ son of \_\_\_\_\_ resident  
 of \_\_\_\_\_

Given under my hand and the seal of the Court, this \_\_\_\_\_ day  
 of \_\_\_\_\_ 19 \_\_\_\_\_

Judge "

## Form No. 16.

The security to be furnished under Order XXV, rule 1, shall be, as nearly  
 as may be, by bond in the following form :—

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_

Plaintiff,

Defendant.

WHEREAS a suit has been instituted in the said court by the said plaintiff  
 to recover from the said defendant \_\_\_\_\_ the sum of \_\_\_\_\_  
 rupees and the said plaintiff is residing out of British India (or  
 is a woman) and does not possess any sufficient immoveable property within  
 British India independent of the property in the suit :

\*NOTE : Cut out the word "natural" if the certificated guardian is named; cut  
 out the word "certificated" if the natural guardian be intended; and cut out both  
 "natural" and "certificated" and the word "OR" if the guardian be of neither class  
 but one with whom the minor lives.

Therefore, I, inhabitant of \_\_\_\_\_, have voluntarily become security, and do hereby bind myself, my heirs and executors, to \_\_\_\_\_ as Judge of the said court and to his successors, in office that the said plaintiff \_\_\_\_\_, his heirs and executors, shall, whenever called on by the said court, pay all costs that may have been or may be incurred by the said defendant, \_\_\_\_\_ in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said court on its order.

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

(Signed)

Witnesses :

*Surety.*

Form No. 17.

*Address for service.*

Under Order VII, rules 19 to 26; Order VIII, rules 11 and 12; Order XLI, rule 38; Order XLVI, rule 8; Order XLVII, rule 10; Order LII, rule 1.

In the Court of the \_\_\_\_\_ of \_\_\_\_\_  
Original suit No. \_\_\_\_\_ of 19 \_\_\_\_\_  
or case

Plaintiff,

*versus*

Defendant.

This address shall be within the local limits of the district court within which the suit is filed, or of the district court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other Province :—

Name, parentage, and caste.	Residence.	Pargana or tahsil.	Post office.	District.

Dated \_\_\_\_\_

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

*Signature of party*

{ Plaintiff.  
Defendant.  
Appellant.  
Respondent.

Or

I file the above address according to the instructions given by my client,  
(name) (and capacity).

*Signature of pleader.*

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

### Form No. 18.

#### *Notice of Change of Address for Service.*

Under Order VII, rules 19 to 26; Order VIII, rules 11 and 12; Order XLI, rule 38; Order XLVI, rule 8; Order XLVII, rule 1.

In the Court of the at

Original <sup>suit</sup>  
or case No. of 19

Plaintiff,

*versus*

Defendant.

This address shall be within the local limits of the district court within which the suit is filed, or of the district court within which the party ordinarily resides, if within the limits of the United Province of Agra and Oudh, but not within the limits of any other province:—

Name, parentage, and caste.	Residence.	Pargana or tahsil.	Post office.	District.

Dated

Any summons, notice, or process in the case may, hence-forward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

*Signature of party*

{ Plaintiff.  
Defendant.  
Appellant.  
Respondent.

Or

I file the above address according to the instructions given by my client  
(name) (and capacity).

*Signature of pleader.*

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

# RULES MADE BY THE HIGH COURT OF JUDICATURE AT PATNA UNDER SECTION 122.

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## ORDER III.

### Rule 5B

"5B. Notwithstanding anything contained in Order III, sub-rules (2) and (3) of rule 4 of the First Schedule of the Code of Civil Procedure, 1903, no pleader shall act for any person in the High Court, unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court."

---

## ORDER V.

### Rule 10.

*Add the following to rule 10 :—*

"(1) Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

---

## ORDER VII.

### Rules 19 to 22.

*Add the following rules :—*

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiffs or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars :—

1. the name of the street and number of the house (if in a town);
2. the name of the town or village;
3. the post office;
4. the district; and
5. the munsiffi (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

---

### ORDER VIII.

#### Rule 6.

*To rule 6 (1) should be added the words :—*

"and the provisions of Order VII, rules 11 to 18 shall, *mutatis mutandis* apply to a defendant claiming set-off as if he were a plaintiff."

---

### Rules 11 and 12.

*Add the following rules :—*

"11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule."

---

### ORDER XII.

#### Rule 6.

*Substitute the following for rule 6 :—*

"6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order, to give such judgment, as it may think just."

---

### ORDER XIII.

#### Rule 1.

*In rule 1, after the words "at the first hearing of the suit" should be added the words :—*

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit."

---

#### Rule 9.

*Add the following as sub-rule (1A) in rule 9 :—*

"(1A) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document

20

## ORDER XXVI

## Rule 14.

*Substitute the following for sub-rules (2) and (3) of rule 14:—*

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours the plots or portions of plots allotted to each party. In the event of a plot being subdivided, the area of each sub-plot shall be given in the schedule, and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. Where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

*(Dated 1st March, 1932).*

## ORDER XXVI.

## Rule 4.

*In sub-rule (4) for the words "where there is no other person fit and willing to act as guardian for the suit," in the first sentence of the sub-rule, substitute the following:—*

"Where the person whom the Court, after hearing objections, if any, under sub-rule (4) of rule 3, proposes to appoint as guardian for the suit, fails, within the time fixed in a notice to him to express his consent to be so appointed."

## ORDER XLII.

## Rule 14A.

*Add the following as rule 14A:—*

"14A. The Appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal."

## Rule 38.

Add the following rule:—

"38. (1) An address for service filed under Order VII, rule 19, or order VIII, rule 11, or subsequently altered under Order VII, rule 22, or Order VII, rule 12 shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from Appellate Court to such addresses.

(3) Rules 21 and 22 of Order VII shall apply, so far as may be, to appellate proceedings."

## APPENDIX D.

## Form No. 1.

Substitute the following for the schedule of costs of suits in the form of decree No. 1. —

Plaintiff.	Amount.	Defendant.	Amount.
	Rs. A. P.		Rs. A. P.
1. Stamp for plaint		Stamp for power	
2. Stamp for power		Stamp for petition or	
3. Stamp for petition or		affidavit	
affidavit		Costs for exhibits	
4. Costs for exhibits		Pleader's fee	
5. Pleader's fee on Rs.		Subsistence	
6. Subsistence		(a) for defendant or his	
(a) for plaintiff or his agent		agent	
(b) for witnesses		(b) for witnesses	
7. Commissioner's fee		Commissioner's fee	
8. Service of process		Service of process	
9. Copying or typing charge		Copying or typing charge	
Total		Total	

## APPENDIX E.

## Form No. 38.

Substitute the following form for Form No. 38:—

No. 38.

Certificate of Sale of Land (Order XXI, Rule 91).

District

In the Court of

Execution Case No.

of 19

at

Decree-holder,

versus

Judgment-debtor.

This is to certify that  
son of  
by occupation  
Thana

by caste  
resident of  
District



has been declared the purchaser at a sale by public auction on the day of 19 of the property specified below in execution of the decree in suit No. of this Court (1) and that the said sale has been duly confirmed by this Court.

Given under my hand and the seal of the Court,  
this day (2) of 19

Judge.

### Specification and price of properties. (3)

(1) If the decree has been received by transfer from other court, enter the name of that court.

(2) The date when the sale became absolute.

(3) Particulars sufficient to identify the property including the name of each registration sub-district in which any part of the property is situated should be fully stated,

## APPENDIX G.

### Form No. 3.

" form of Decree in Appeal add "copying or typing  
" ler's fee on Rs. " in the columns for  
" number the new entry in the first column as "5."

## APPENDIX H.

### Form No. 7.

Add the following "Note" at the foot:—

" NOTE.—The Commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses."

### Form No. 11.

For Form No. 11 substitute the following forms:—

#### No. 11.

Notice to minor defendant and guardian of application for appointment of the guardian to be guardian for the suit (O. 32, r. 3).

(Title.)

To

Minor defendant.

Guardian (appointed by authority, or natural, or the person in whose care the minor is, as the case may be).

.....nted on the part of the plaintiff in

..... you the said minor and you\*.....  
.....are hereby required to take notice that unless  
within 21 days from the service upon you of this notice you\*.....

\* Here insert name of guardian,

..... give your consent to be appointed to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint an officer of the Court to act as guardian to you the minor for the said suit.

Given under my hand and the seal of this Court, this  
day of 19

Judge

### Form No. 11A.

Notice to minor defendant and guardian of application for appointment of another person to be guardian for the suit (O. 32, r. 3).  
To

Minor defendant,

Guardian (appointed by authority  
or natural, or the person in  
whose care the minor is).

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of..... as guardian for the suit to the minor defendant, you the said minor and you<sup>2</sup>..... are hereby required to take notice that unless within 21 days from the service upon you of this notice you<sup>2</sup>..... make an application for the appointment of yourself or of some friend of you the minor to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint or an officer of the Court to act as guardian to you the minor for the said suit.

Given under my hand and the seal of this Court this  
day of 19

Judge.

### Form No. 11B.

Notice to the proposed guardian for the minor defendant, when the person proposed is not the guardian appointed by authority of the natural guardian or the person in whose care the minor is.

(Order XXXII, rule 4.)  
(Title.)

District

In the Court of  
Suit No

at  
of 19

Plaintiff,

versus

Defendant.

1 Here insert name and description of proposed guardian.

2 Here insert name of guardian upon whom the notice is to be served.

To

Proposed Guardian.

Whereas an application has been presented by the plaintiff in the above case for the appointment of you\*..... as guardian for the suit to the minor defendant you are hereby required to take notice that unless within .....days from the service upon you of this notice you make an application to the Court intimating your consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of this Court, this  
day of 19 .

Judge.

---

\* Here insert the name of the proposed guardian.

Substitute the following form for Form No. 14 :—  
 Register of Civil Suits (O. 4, r. 2)  
 Court of the \_\_\_\_\_ at \_\_\_\_\_  
 Register of civil suits in the year 19 \_\_\_\_

Number of suit.		Plaintiff.			Defendant.			Claim.		Judgment.			Appeal.		Adjustment or satisfaction of decree other wise than by execution		Execution.						Result of execution,		Orders in appeals, revisions or under section 141 C. P. C. with date and name of court.		Total or amount still due.	
Serial number of suit.	Serial number of suit.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued.	Date.	For whom.	For what or amount.	Number and year of appeal.	Order on appeal with date and name of appellate court.	Particulars.	Date.	Number and date of application.	Date of final order.	Against whom.	For what, and amount, if money.	Amount paid into court.	Name of person, if any, directed in civil process.	Manner of other result with date.	Under section 141 C. P. C. with date and name of court.	Serial number of suit.	Serial number of suit.	
1																												

Note 1.—Where there are numerous plaintiffs or numerous defendants, the name of the first defendant only, as the case may be, need be entered in the register.

Note 2.—Cases remanded by appellate courts under Order XLJ, rule 23, C. P. C., will be re-admitted and entered in the General Register of suits under their original numbers. In each case the letter B will be affixed to the number to be entered in column 2.

Note 3.—In column 14 should be indicated whether the decision was *ex parte*, on compromise or on contest against all or any of the defendants.

Note 4.—When the court of execution is other than the court which passed the decree, the name of the executing court should be given in column 20.

(XLIXB-4-1929, dated the 20th February, 1930).

# RULES MADE BY THE HIGH COURT OF JUDICATURE AT LAHORE UNDER SECTION 122.

## ORDER II.

### Rule 8.

*After rule 7 insert the following as rule 8 :—*

"8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-fees Act."

*(Chief Court Notification No. 2212-G., dated 12th May, 1909.)*

## ORDER V.

### Rule 10.

*The following proviso was added :—*

"Provided that in any case if the plaintiff so wishes the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

*(Chief Court Notification No. 2212-G., dated 12th May, 1909, as amended by High Court Notification No. 563-G., dated 24th November, 1927.)*

### Rule 15.

*In rule 15, after the words "where in any suit the defendant cannot be found" the following words were inserted :—*

*"or is absent from his residence."*

*(High Court Notification No. 563-G., dated 24th November, 1927.)*

## ORDER VII.

### Rule 2.

*In the second paragraph after the word "defendant" the following words were inserted :—*

*"or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate," and after the word "amount" where it last occurs the words "or value" were inserted.*

*(Chief Court Notification No. 2212-G., dated 12th May, 1909.)*

## Rule 19 to 25

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summons or other processes for service on him shall be served in the manner prescribed by order III, rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so."

(Rules 19 to 25 inserted by High Court Notification No. 567-G., dated 24th November, 1927)

## ORDER VIII.

## Rule 1.

*The following was added :—*

"and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off he shall enter such documents in a list to be added or annexed to the written statement."

(High Court Notification No. 563-G., dated 24th November, 1927.)

## Rules 11 and 12.

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule."

*Rules 11 and 12 inserted by High Court Notification No. 567-G., dated 24th November, 1927.)*

## ORDER IX.

### Rule 9.

*To sub-rule (1) the following proviso was added :—*

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

*(Chief Court Notification No. 2212-G., dated 12th May, 1909.)*

## ORDER XIII.

### Rule 9.

*To sub-rule (1) the following further proviso was added :—*

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced.

*(High Court Notification No. 563-G., dated 24th November, 1927.)*

## ORDER XVI.

### Rule 1.

*To rule (1) the following proviso has been added :—*

"provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the court made in writing and stating the reasons therefor."

*(High Court Notification No. 525-G., dated 15th October 1932)*

### Rule 2.

*To sub-rule (1) the following "Exception" was added :—*

"Exception.—When applying for any of its own officers, Government will be exempt from the operation of clause (1)."

*(High Court Notification No. 156-G., dated 9th January, 1919.)*

## Rule 3.

*The following rule was substituted :—*

"3. (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned at the time of serving the summons if it can be served personally,

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government.

*Exception (1)*—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

*Exception (2)*—A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court."

(High Court Notification No. 156-G., dated 9th January, 1919.)

## Rule 4.

*In sub-rule (1) after the words "summoned" where it first occurs the following words were inserted :—*

"or, when such person is a Government servant, to be paid into Court."

(High Court Notification No. 156-G., dated 9th January, 1919.)

## ORDER XVII.

## Rule 1.

*The following sub-rule was added :—*

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith."

(High Court Notification No. 95-G., dated 26th February, 1925)

## ORDER XXI

## Rule 1.

*In rule (1) the following explanation was added :—*

EXPLANATION.—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payments shall be given to the decree-holder.

(High Court Notification No. 193-G XI-Y-14, dated the 11th of July 1933.)

## Rule 10.

*Add as para second the following proviso :—*

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the court to which the decree has been sent the holder of the decree may apply to the Court within whose jurisdiction the



judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under section 39.

(High Court Notification No 125-G, dated 7th April, 1932.)

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### Rule 16.

Omit the words "and the judgment-debtor" after the word "transferor" in the first proviso.

(High Court Notification No 125-G, dated 7th April, 1932.)

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### Rule 17.

In Sub-clause (1) omit the words after the words "if they have not been complied with" and substitute in its place the following:—

"The Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application"

(High Court Notification No 125-G dated 7th April 1932)

---

### Rule 22.

In sub-clause (1) (a) and in the proviso, substitute "two years" for "one year" wherever they occur.

In sub-clause (2) add at the end the following words:—

"Failure to record such reason shall be considered an irregularity not amounting to a defect in jurisdiction."

(High Court Notification No. 125-G, dated 7th April, 1932.)

---

### Rule 26.

In sub-rule (3) omit the word 'may' after the word 'court' and insert the following words:—

Shall, unless sufficient cause is shown to the contrary.

(High Court Notification No. 125-G, dated 7th April 1932.)

---

### Rule 29A.

(Note.—Rule 29A, which was added by the Chief Court Notification No. 2212-G, dated 12th May 1909, has been omitted by High Court Notification No. 563-G., dated 24th November, 1927.)

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### Rule 31.

In sub-rule (2) substitute the words "three months" for the words "six months" and add as second para to it the following:—

"Provided that the Court may in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

*In sub-rule (3) omit the words "six months" and substitute in their place the following:—*

"three months or such other period as may have been prescribed by the Court.

*(High Court Notification No. 125-G. dated the 7th April, 1932).*

### Rule 32.

*In sub-rule (3) substitute the words "three months" for the words "one year" and add the following proviso:—*

"Provided that the court may for sufficient reason, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

*Is sub-rule (4) omit the words "one year" and substitute in this place the following:—*

"three months or such other period as may have been prescribed by the Court.

*(High Court Notification No 125-G. dated 7th April 1932).*

### Rule 39

*In sub-rule (5) omit the words "in the civil prison,"*

*(High Court Notification No 125-G dated 7th April, 1932.)*

### Rule 43

*The rule was numbered as sub-rule (1) and the following further proviso and sub-rules (2) and (3) were added:—*

"and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of clause (1), the Schedule of property annexed to the Bond shall be drawn up by the attaching officer in triplicate, and dated and signed by :

- (a) the custodian and his sureties.
- (b) the officer of the Court who made the attachment.
- (c) the person whose property is attached and made over.
- (d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian.

#### Rules 43A to 43D.

43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian he shall be granted a receipt for the same.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days, before the expiry of any such period of 15 days, the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43D. Any person who has undertaken to keep attached property under rule 43 (1) (c) shall be liable to be proceeded against as a surety under

section 145 of the Code and shall be liable to pay in execution proceeding the value of any such property wilfully lost by him."

(High Court Notification No. 606-G, dated the 13th of December, 1928).

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#### Rule 45.

Add the following to sub-rule (1):—

"And with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court."

(High Court Notification No. 125-G, dated 7th April, 1932.)

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#### Rule 53.

In sub-rule (1) (b) insert after the words "then by the issue to such other Court" the words "and to the court to which it has been transferred for execution."

In sub-rule (1) (b) (ii) cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or with the permission of the attaching court."

In sub-rule (b) Substitute the words "with the knowledge" for the words "after receipt of notice"

(High Court Notification No. 125-G, dated 7th April, 1932.)

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#### Rule 54

Add the following as sub-rule (3):—

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier."

(High Court Notification No. 125-G, dated 7th April, 1932.)

---

#### Rule 58

Add at the end of the proviso to sub-rule (1) —

"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

(High Court Notification No. 125-G, date 7th April, 1932.)

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#### Rule 63A.

Insert the following new rule as sub-rule 63A:—

"63-A-(1) When the property attached is a debt the court executing the decree shall investigate the claims of the judgment-debtor against the garnishee

in respect thereto and may order the garnishee to pay the amount of the debt to the court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of §47, and subjects to the provisions of that section the order passed by the court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie."

*(High Court Notification No. 125-G, dated 7th April, 1932.)*

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### Rule 65.

*Add to sub-rule (2) clause (c) after the word "property," the following proviso:—*

"provided that it shall not be necessary for the court itself to give its own estimate of the value of the property; but the proclamation shall include the estimate, if any, given by either or both of the parties."

*(High Court Notification No. 567-G, dated 4th November, 1922.)*

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### Rule 68.

*Substitute the words "fifteen days" for "thirty days" and "one week" for "fifteen days" in this rule.*

*(High Court Notification No. 125-G, dated 7th April, 1932.)*

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### Rule 69.

*In sub-rule (2) substitute the words "thirty days" for the words "seven days."*

*(High Court Notification No. 125-G, dated 7th April, 1932.)*

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### Rule 75.

*In sub-rule (2) after the word "stored" the following words were inserted:—  
"or can be sold to great advantage in an unripe state, such as green wheat or gram."*

*(Chief Court of Notification No. 2212-G., dated 12th May, 1909.)*

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### Rule 89.

*In sub-rule (1) cancel the words "either owing such property or holding an interest therein by virtue of a title acquired before such sale" and substitute the words "claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person."*

*(High Court Notification No. 125-G., dated 7th April, 1932.)*

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**Rule 90.**

*Add the following proviso as the third para:—*

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

(High Court Notification No. 125-G., dated 7th April, 1932).

---

**Rule 98.**

*Insert the words "or on his behalf" after the words "some other person at his instigation" and add the following words at the end:—*

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance."

(High Court Notification No. 125-G., dated 7th April, 1932).

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**Rule 104.**

104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24, provided that this rule shall not apply to the notice prescribed by rule 22 of this order.

(High Court Notification No. 567-G., dated 24th November, 1927).

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**ORDER XXX****Rule 1.**

*The following "Explanation" was added at the end:—*

"Explanation.—This rule applies to a joint Hindu family trading partnership."

(Chief Court Notification No. 2212-G., dated 12th May, 1909).

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**ORDER XXXII****Rule 1.**

*The following words were added:—*

"Such person may be ordered to pay any costs in the suit as if he were the plaintiff."

(Chief Court Notification No. 2212-G., dated 12th May, 1909).

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**Rule 3.**

*The following sub-rules were substituted for sub-rules (3) and (4):—*

"The plaintiff shall file a list of relatives of the minor to *prima facie* are most likely to be a minor defendant. The list shall be in accordance with sub-rule (2) above."

(4) The Court may, at any time after institution of the suit, call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any lists furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that each person proposed is a fit person to be so appointed.

(6) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under the sub-rule:

Provided that the Court may, if it sees fit, issue notice to the minor also."

(High Court Notifications No. 95-G, dated 25th February, 1925 and No. 566-G., dated 24th November, 1927.)

#### Rule 4.

*New sub-rule (2A) was inserted:—*

"(2A). Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-rule (1), appoint as his guardian for the suit a relative of the minor.

If no proper person be available who is a relative of the minor the Court shall appoint one of the other defendants, if any, and failing such other defendant shall ordinarily proceed under sub-rule (1) of this rule to appoint one of its officers," and the following words were added to sub-rule (3):—

"but the Court may presume such consent to have been given, unless it is expressly refused."

(High Court Notification No. 566-G., dated 24th November, 1927.)

#### ORDER XXXVII.

##### Rule 1.

*The word "and" and new clause (c) were added:—*

"and

(c) the Court of the District Judge and Subordinate Judges of the First Class of the Delhi Province, and the Courts of the District Judges and Subordinate of the First Class in the Civil Districts of Lahore and Amritsar in the Province of the Punjab"

(High Court Notifications No. 225-G., dated 5th July, 1923 No. 456-G., dated 4th August, 1932.)

##### Rule 3.

*The following sub-rule was added:—*

"(3) The provision of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

(High Court Notification No. 577-G., dated 15th November, 1928.)

## ORDER XLI.

## Rule 1.

*The following proviso has been added to sub-rule (1):—*

"Provided that when two or more cases are tried together and decided by the same judgment, and appeals are filed against the decrees, whether by : : : : : officer appointed in this behalf may, it be : : : : : are analogous in each appeal, dispense with the production of more than one copy of the judgment."

*(High Court Notification No. 631-G., dated 7th December, 1932.)*

## Rule 35.

*The following further proviso was added:—*

"Provided also in the case of the High Court, that in the absence of a Judge, who passed a decree, or one or more Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges; but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court."

*(High Court Notification No. 135-G., dated 9th April, 1921.)*

## Rules 38 (new).

"38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to appellate proceedings."

*(High Court Notification No. 567-G., dated 24th November, 1927.)*

## ORDER XLII.

## Rule 2 (new).

*Add the following as rule 2:—*

"2. In addition to the copies specified in Order XLI, rule 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance, unless the Appellate Court dispenses therewith"

*(High Court Notifications No. 4685-G., dated 17th October, 1919 and No. 138-G., dated 19th March, 1926.)*

## APPENDIX B.

## Form No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O. 5. r. 18.)

Title.

The affidavit of

, son of

make oath  
affirm

and say as follows:—



(1) I am a process-server of this Court.

(3) On the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ I  
received a <sup>summons</sup>/<sub>notice</sub> issued by the Court of \_\_\_\_\_ in suit  
No. \_\_\_\_\_ of 19 \_\_\_\_ in the said Court, dated the  
day of \_\_\_\_\_ 19 \_\_\_\_ for service on \_\_\_\_\_

(3) The said \_\_\_\_\_ was at the time personally known to me and I  
served the said <sup>summons</sup>/<sub>notice</sub> on <sup>him</sup>/<sub>her</sub> on the \_\_\_\_\_ day of \_\_\_\_\_  
at about \_\_\_\_\_ o'clock on the \_\_\_\_\_ noon nt \_\_\_\_\_ by  
tendering a copy thereof to <sup>him</sup>/<sub>her</sub> and requiring <sup>his</sup>/<sub>her</sub> signature to the original  
<sup>summons</sup>/<sub>notice</sub>,—

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

Or,

(3) The said \_\_\_\_\_ not being personally known  
to me \_\_\_\_\_ accompanied  
to \_\_\_\_\_ and pointed out to me a  
person whom he stated to be the said  
and I served the said <sup>summons</sup>/<sub>notice</sub> on <sup>him</sup>/<sub>her</sub>  
on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ ; at about \_\_\_\_\_  
o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by  
tendering a copy thereof to <sup>him</sup>/<sub>her</sub> and requiring <sup>his</sup>/<sub>her</sub> signature to the original  
<sup>summons</sup>/<sub>notice</sub>

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

Or,

(3) The said \_\_\_\_\_  
and his house in which he ordinarily resides being <sup>personally known to me</sup>/<sub>pointed out to me by</sub>  
I went to the said house in \_\_\_\_\_  
and there on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ I  
at \_\_\_\_\_ o'clock in the <sup>fore</sup>/<sub>after</sub> noon I did not find the said \_\_\_\_\_  
enquired \_\_\_\_\_

(a)

(b)

neighbours.

I was told that to \_\_\_\_\_ had gone  
 and would not be back till \_\_\_\_\_  
 Signature of process-server.

Or,

*If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service*

<sup>sworn</sup>  
 affirmed by the said \_\_\_\_\_ before me this  
 day of \_\_\_\_\_ 19 .

Empowered under section 139 of  
 the Code of Civil Procedure to  
 administer the oath to deponents.

(Chief Court Notification No. 2212-G., dated 12th May, 1909.)

### APPENDIX E.

#### Form No. 15A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN  
 CHARGE OF PERSON INTERESTED AND SUBETIES.

(G. XXI, r. 43.)

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Civil suit No. \_\_\_\_\_ of \_\_\_\_\_

A. B. of \_\_\_\_\_  
 against \_\_\_\_\_

C. D. of \_\_\_\_\_

Know all men by these presents that we, I. J. of \_\_\_\_\_, etc., and K. L. of \_\_\_\_\_, etc., and M. N. of \_\_\_\_\_, etc., are jointly and severally bound to the Judge of the Court of \_\_\_\_\_ in Rupees \_\_\_\_\_ to be paid to the said Judge, for which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators, jointly, and severally by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 .

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 . in execution of a decree in favour of \_\_\_\_\_ in suit No \_\_\_\_\_ of \_\_\_\_\_ 19 on the file of \_\_\_\_\_ and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force.

I. J.  
 K. L.  
 M. N.

Signed and delivered by the above bounden  
 presence of \_\_\_\_\_

in the

## Form No. 15B.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PRISON AND SURETIES.

(O. XXI, r. 43 (1) (c).)

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Civil Suit No. \_\_\_\_\_ of \_\_\_\_\_  
 A. B. of \_\_\_\_\_  
 C. D. of \_\_\_\_\_ against \_\_\_\_\_

Know all men by these presents that we, I. J. of \_\_\_\_\_, etc., and K. L. of \_\_\_\_\_, etc., are jointly and severally bound to the Judge of the Court of \_\_\_\_\_ in Rupees \_\_\_\_\_ to be paid to the said Judge for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the 19 \_\_\_\_\_, in execution of a decree in favour of \_\_\_\_\_ in suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_ on the file of \_\_\_\_\_ and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force and be enforceable against the above bounden I. J. in accordance with the procedure laid down in section 145, Civil Procedure Code, as if the aforesaid I. J. were a surety for the restoration of property taken in execution of a decree.

I. J.  
 K. L.  
 M. N.

Signed and delivered by the above bounden \_\_\_\_\_ in  
 the presence of \_\_\_\_\_

(High Court Notification No. 606-G., dated 13th December, 1928.)

# RULES MADE BY THE HIGH COURT OF JUDICATURE AT RANGOON UNDER SECTION 122.

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## ORDER V.

### Rule 15.

*For the words "Where in any suit the defendant cannot be found" in the first line of rule 15 substitute the words "Where the defendant is absent."*

*Omit the word "mile" between the word "adult" and the word "member" in the third line of rule 15.*

---

### Rule 20A.

*After rule 20, the following shall be inserted as rule 20A, namely :—*

"20A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall, at the same time, file in Court a proceeding stating his address for service.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall, on or before the date fixed for his appearance in the summons or notice served on him, file in Court a proceeding stating his address for service.

(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides.

(4) Where any party fails to file an address for service, as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may, on such application, make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and service shall be deemed to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect,

## Form No. 15B.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES.

(O. XXI, r. 43 (1) (c).)

In the Court of  
Civil Suit No.

at  
of

A. B. of

against

C. D. of

Know all men by these presents that we, I. J. of , etc.  
, etc., and K. L. of )  
and M. N. of , etc. are jointly and  
severally bound to the Judge of the Court of  
in Rupees to be paid to the said Judge for which pay-  
ment to be made we bind ourselves, and each of us, in the whole, our and  
each of our heirs, executors and administrators, jointly and severally, by these  
presents.

Dated this day of 19 .

And whereas the moveable property specified in the schedule hereunto  
annexed has been attached under a warrant from the said Court, dated the  
19 , in execution of a decree in favour of in suit No. of  
19 on the file of and the said property has  
been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall  
duly account for and produce when required before the said Court all and  
every the property aforesaid and shall obey any further order of the Court in  
respect thereof, then this obligation shall be void; otherwise it shall remain in  
full force and be enforceable against the above bounden I. J. in accordance  
with the procedure laid down in section 145, Civil Procedure Code, as if the  
aforesaid I. J. were a surety for the restoration of property taken in execution  
of a decree.

I J.  
K. L.  
M. N.

Signed and delivered by the above bounden  
the presence of

in

(High Court Notification No. 606-G., dated 13th December, 1928.)

## RULES MADE BY THE HIGH COURT OF JUDICATURE AT RANGOON UNDER SECTION 122.

---

### ORDER V.

#### Rule 15.

*For the words "Where in any suit the defendant cannot be found" in the first line of rule 15 substitute the words "Where the defendant is absent."*

*Omit the word "male" between the word "adult" and the word "member" in the third line of rule 15.*

---

#### Rule 20A.

*After rule 20, the following shall be inserted as rule 20A, namely:—*

*"20A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall, at the same time, file in Court a proceeding stating his address for service.*

*(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall, on or before the date fixed for his appearance in the summons or notice served on him, file in Court a proceeding stating his address for service.*

*(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides.*

*(4) Where any party fails to file an address for service, as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may, on such application, make such order as it thinks just.*

*(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and service shall be deemed to be as effectual as if the notice or process had been personally served on the party.*

*(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 3, unless the Court directs service at the address for service given by such party.*

*(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect."*

and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so."

### Rule 21A.

*The following shall be inserted as rule 21A :—*

"21A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English, or in the language of the locality in which it is to be served."

### Rule 22.

*The following proviso shall be added, namely :—*

"Provided that where such summons is to be served within the limits of the town of Rangoon the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

### Rule 23A.

*The following shall be inserted as rule 23A :—*

"23A. (1) Before retransmitting a summons received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when, and the manner in which the summons was served; or cause the peon to make an affidavit before the Bailiff, if the Bailiff has been empowered to administer oaths; and shall transmit the same, together with the summons, to the Court whence the summons originally issued. In the case of processes received from other Provinces the deposition or affidavit of the peon serving the summons, if not recorded in English, shall be translated into English, before the summons is returned to the issuing Court.

(2) In the case of processes received from India, if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person, who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server the case, in connection with which the process was issued, shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence.

The oath shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person is to be served or his ordinary residence or place of business.

4) When the summons has been returned by the process-server under rule 17, a declaration of due service or of failure to serve shall be recorded in Form, Civil 47 and sent with the summons to the Court by which it was issued.

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### Rule 25.

*In rule 25 the words "may be addressed" shall be substituted for the words "shall be addressed."*

---

### Rule 25A.

*After rule 25, the following shall be inserted as rule 25A, namely:—*

"25A. Where the defendant resides in British India, but outside the limits of the province of Burma, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof.

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## ORDER VII.

### Rule 9.

*After the word "present" in the fourth line of rule 9 add the following:—  
"on the day on which the plaint is admitted."*

---

## ORDER XI.

### Rule 13.

*Add the following as second proviso to rule 13:—*

"Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

*Substitute "decree or order" for "decree" wherever this word occurs in rule 13.*

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## ORDER XII.

### Rule 6.

*For the words "judgment or order" where they first occur substitute "judgment, decree or order."*

*For the last part of the rule substitute the following —*

"and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just."

*Add the following as sub-rule (2):—*

"(2) A decree or order passed under this rule may be executed at any



time, notwithstanding that other questions between the parties still remain to be decided in the case."

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### ORDER XIII.

#### Rule 1.

*To rule 1, the following shall be added as sub-rule (3):—*

"(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in Form <sup>Judicial</sup> General 23 which will be given free of charge to parties wishing to tender documents in evidence."

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#### Rule 4.

*To rule 4, the following shall be added as sub-rules (3), (4) and (5):—*

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus A, B, C, etc., and the documents admitted on behalf of the defendant with figures, thus, 1, 2, 3, etc.

(4) When a number of documents of the same nature are admitted, as, for example, a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

(5) Every document on admission shall be entered in a list in Form <sup>Judicial</sup> General 23, prepared by the Bench Clerk and signed by the Judge."

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#### Rule 5.

*To rule 5, sub-rule (3), the following shall be added :—*

"A note of the return should be made in the list in Form <sup>Judicial</sup> General 23."

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#### Rule 7.

*To rule 7, sub-rule (2), the following shall be added :—*

"who shall give a receipt for them in column 6 of the list in Form <sup>Judicial</sup> General 23."

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#### Rule 10

*In rule 10, sub-rule (3) shall be renumbered as (5) and the following shall be inserted as sub-rules (3) and (4) :—*

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record-keeper, Chief Clerk, or Official of any Court.

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made."

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## Rules 10A. and 10B.

*The following shall be inserted as rules 10A and 10B:—*

"10A. Exhibits, with their accompanying lists, shall not be filed with the record until after termination of the trial.

10B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not."

## ORDER XVI.

## Rule 2.

*Add the following to rule 2 (1) :—*

"Provided that in cases to which Government is a party—

(a) no payment into Court will be required for the travelling and other expenses of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity;

(b) the amount to be paid into Court for the travelling and other expenses of a Government servant whose salary exceeds Rs. 10 and who may be summoned at the instance of a party other than in his official capacity in a Court within five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations."

*In rule 2, the following shall be substituted for sub-rule (3).—*

(3) Subject to the provisions of sub-rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale:—

(1) *Ordinary labouring classes*:—The actual railway or steam-boat fare to and from the Court by the lowest class; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2 a day by boat and of four annas a mile by road; and an allowance for each day's absence from home of ten annas to those who are residents of places other than the place where the Court is held and of eight annas to those who are residents of the place where the Court is held.

(2) *Petty village officers*.—The same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road; and an allowance for each day's absence from home of fourteen annas to those who are residents of the places other than the place where the Court is held, and of twelve annas to those who are residents of the place where the Court is held.

(3) *Persons of higher ranks of life, such as clerks, trades-people, village headmen and headmen of circles*.—Second class railway or steam-boat fare to and from the Court; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to the limit of Rs. 4 a day by boat and annas six a mile by road; and an allowance not to exceed except in special cases Rs. 1-8-0 per each day's absence from home.

- (4) *Persons of superior rank.*—The actual sum spent in travelling to and from the Court with an allowance according to circumstances, not to exceed except in special cases Rs. 5 for each day's absence from home.
- (5) *Witnesses following any profession, such as Medicine or Law.*—A special allowance according to circumstances.
- (6) *Lodging allowance.*—In addition to the above, a lodging allowance not exceeding except in special cases Re.1 for persons in class (3) and Rs. 2 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent.

Provided that—

- (i) a Government servant whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government is a party—
- (a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance;
- (b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court consider it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.
- (ii) A Government servant whose salary does not exceed Rs. 10 per mensem, giving evidence in his official capacity shall receive his expenses from the Court.

**NOTE.**—when the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat-allowance in respect of the latter part of the journey.

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares."

### Rule 3.

To rule 3, add the following:—

"This rule does not apply, where the person summoned is a Government servant summoned to give evidence in his official capacity in a case to which the Government is a party."

### Rule 8.

To rule 8, the following proviso shall be added, namely:—

"Provided that, at the request of a party or his pleader, summons for service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in Order V as to service and proof of service shall apply in such case as if the person employed by such party

or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons."

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### Rule 9.

To rule 9, the following shall be added:—

"Where the person summoned is a public officer or servant of the Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post."

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### ORDER XVIII.

#### Rule 2.

Add the following as a proviso to sub-rule (2):—

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence for the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided."

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#### Rule 5.

The following shall be substituted for rule 5:—

"5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence.

Such person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows:—

<sup>Read over</sup>  
<sup>Interpreted</sup> by me in Burmese or  
the case may be) and acknowledged correct.

(as

(Signature)

Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it."

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#### Rule 6A.

The following shall be inserted as rule 6A:—

"6A. Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs 2 *per diem*, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreters' fees shall be made through the Court and duly entered in Buhll's Register II."

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## Rule 8.

*Rule 8 shall be deleted.*

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## Rule 14.

*In the second line of sub-rule (1) for the words "this order" the word and figures "rule 13" shall be substituted.*

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## ORDER XXVI.

## Rule 4 to 12.

*The following shall be added as rules 4 to 12:—*

"4. The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

5. Every affidavit to be used in a Court of Justice should be entitled 'In the \_\_\_\_\_ Court of \_\_\_\_\_', naming the Court. If there is a case in Court the affidavit in support of or in opposition to an application respecting it, must also be entitled 'In the case of \_\_\_\_\_'.

If there is no case in Court, the affidavit should be entitled 'In the matter of the petition of \_\_\_\_\_'.

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit, shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words 'I affirm' (or 'make oath') 'and say.'

9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression 'I am informed (and, if such be the case, should add) 'and verily believe it to be true,' or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify in the foot of the petition, or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit, the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873."

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### ORDER XX.

#### Rule 11.

*The following amendment shall be made to the sub-section of rule 11:—*

*For the words "and with the consent of the decree-holder" substitute the words "and after notice to the decree-holder."*

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#### Rule 21 and 22.

*The following shall be added as rules 21 and 22:—*

"21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate."

22. The certificates shall be in the prescribed form, and shall be signed by the presiding officer of the Court."

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### ORDER XXI.

#### Rule 5.

*To rule 5, the following proviso shall be added, namely:—*

*"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings."*

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#### Rule 6.

*To rule 6, the following proviso shall be added, namely:—*

*"Provided that where a transfer is effected under the proviso to rule 5 it shall not be necessary to send the above documents."*

## Rule 10.

*To rule 10, the following shall be added, namely:—*

"At the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in Court the fees requisite for all necessary proceedings in the execution."

---

## Rule 10A.

*The following shall be inserted as rule 10A:—*

"10A. If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by section 41."

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## Rule 13.

*For rule 13, the following shall be substituted:—*

"13 (1) When application is made for execution of a decree relating to immoveable property included within the Cadastral or Towa Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *lwiri* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immoveable property, must also be furnished so far as they are not given in the plan. In the case of other immoveable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied:—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *lwiri* number, latest holding number (if different kinds of holding, e.g., rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *lwiri* map from which the holding number is taken, and revenue last assessed upon the land, must be given.
2. In the case of other agricultural land, the area and village-tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.
3. In the case of land in large towns the area, block or quarter name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given.
4. In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given.
5. In the case of immoveable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all encumbrances and municipal taxes should be stated.
7. The judgment-debtor's share or interest in the property should be specified.

(2) The cost of the certified extract should be reckoned in the costs of the application."

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#### Rule 16.

*For the first proviso to rule 16, the following shall be substituted, namely:—*

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

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#### Rule 17.

*In sub-rule (1) of rule 17 for the words:—*

"the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it"

*the following shall be substituted, namely:—*

"the Court may reject the application if the defect is not remedied within a time to be fixed by it."

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#### Rule 22.

*In clause (a) of sub-rule (1) of rule 22 for the words "one year" the words "three years" shall be substituted.*

*In the second line of the proviso to sub-rule (1) of rule 22 for the words "one year" the words "three years" shall be substituted.*

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#### Rule 24.

*To sub-rule (3) of rule 24 the following shall be added, namely:—*

"and a day shall also be specified on or before which it shall be returned to the Court."

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#### Rule 26.

*In sub-rule (3) of rule 26 for the word "may" the words "shall, unless sufficient cause is shown to the contrary" shall be substituted.*

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#### Rule 31.

*In sub-rules (2) and (3) of rule 31 for the words "six months" the words "three months" shall be substituted.*



*The following shall be added as sub-rule (4) of rule 31:—*

"(4) The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

### Rule 32.

*In sub-rule (3) of rule 32 for the words "for one year" the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment-debtor" shall be substituted.*

### Rule 38A.

*The following shall be inserted as rule 38A:—*

"38A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor."

### Rule 39.

*In rule 39, the following shall be inserted as sub-rule (2A):—*

"(2A) When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders, and paid to them."

*In sub-rule (5) of rule 39 the words "in the civil prison" shall be deleted.*

### Rules 45A and 40B.

*The following shall be inserted as rules 45A and 45B:—*

"45A. (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15A, Appendix E, from the Bailiff that he has paid in cash as process-fees under rule 17 (1) (c) (ii) (2) of the Process Fees Rules not less than Rs. 10, for each person who the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15A, for payments made by the decree-holder as required by sub-rule (1), the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted,

warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in rule 15 of the rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules.

Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilised, the fees paid shall be credited direct into the Treasury to 'Process-Servers' Fees'—'XVI-A, Law and Justice'—'Court-fees realized in cash.'

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case, of the unexpended balance of such deposits, and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rules (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record to make such refund.

If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff that officer shall make the refund in the ordinary way prescribed in his Register II for re-payments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must

satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or Sub-Treasury.

45B. (f) In addition to the fees payable before a warrant issues for the attachment of moveable property under rule 45A the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

*Explanation.*—The cost in question might be for example, (a) Rent of building in which to store attached furniture, (b) Cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) Cost of feeding and tending live-stock, (d) Cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition the warrant shall not be issued.

(8) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any re-payments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property, shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court.

Where the attached property consists of cattle these may be employed, so far as is consistent with rule 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when rule 45 applies. Whenever live-stock is placed at the place it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized.

(8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle-pound maintained by Government or any Local Authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property, so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-rule (2) or (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-rule (1) or (4) remains unexpended it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-rule (9) of rule 45A. Any difference between the cost of attachment of moveable property (other than the costs referred to in rule 45A) and the sum deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government."

#### Rule 46.

*Sub-rule (3) of rule 16 shall be deleted.*

#### Rule 53.

*In clause (b) of sub-rule (1) of rule 53 after the words "to such other Court" occurring in the second and third lines of the clause, the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" occurring in the fifth line, the word "the" shall be substituted.*

*In sub-clause (ii) of clause (b) of sub-rule (1) of rule 53 for the words, "its own" the words "the attached" shall be substituted.*

*To sub-clause (ii) of clause (b) of sub-rule (1) of rule 53 the following shall be added namely:—*

*"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court.*

*In sub-rule (6) of rule 53 for the words "after receipt of notice thereof" the words "with the knowledge thereof" shall be substituted.*

#### Rule 54

*To rule 54 the following shall be added as sub-rule (3), namely:—*

*"(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is the earlier."*

## Rule 57A.

*The following shall be inserted as rule 57A:—*

"57A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court.

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## Rules 63A to 63G.

*The following heading and rules shall be added after rule 63, namely:—*

*"Garnishee orders.*

63A Where a debt has been attached under rule 46, the debtor prohibited under clause (1) of sub-rule (1) of rule 46 hereinafter (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

63B. Where a debt has been attached under rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

63C (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under rule 63B, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under rule 63B and dispute his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63D Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

63E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think upon such terms to all cases with respect to the lien, charge or interest, if any, or such third or other person, as shall seem just and reasonable.

63F. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

63G. The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree."

### Rule 65.

*The following shall be substituted for rule 65:—*

"65. (1) Sales shall be conducted by the Bailiff or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs. 53 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to rule 43 and of rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property whether moveable or immovable, attached in execution of the decree, shall be sold at the time and place selected.

The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission:—

When the proceeds of sale do not exceed Rs. 500,—5 per cent.

Where they exceed Rs. 500 and do not exceed Rs. 5,000,—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder.

Where they exceed Rs. 5,000,—at the above rate on the first Rs. 5,000 and 1 per cent. on the remainder.

The calculation of the commission shall be on the whole amount realised in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of rule 45B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds.

NOTE.—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see rule 43 of the Burma Travelling Allowance Rules.

(6) When the sale of immovable property is set aside under the provisions of rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a Subordinate Court shall receive any larger commission or fee in respect of any sale or property (mortgaged or otherwise) held in execution or pursuance of any decree or order of the Court directing or authorising such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I and shall be paid into the Treasury."

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#### Rule 66.

*In rule 66, the following shall be added at the end of sub-rule (2):—*

"Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs. 250 in value."

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#### Rule 69.

*In sub-rule (2) of rule 69 for the words "seven days" the words "thirty days" shall be substituted.*

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#### Rule 72.

*In sub-rule (2) of rule 72 for the words "with such permission" the words "the property" shall be substituted.*

*Sub-rules (1) and (3) of rule 72 shall be cancelled, and the figure and brackets "(2)" occurring at the beginning of sub-rule (2) shall be deleted.*

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#### Rule 81A.

*The following shall be inserted as rule 81A:—*

"81A. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act."

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#### Rule 90.

*For the present proviso to rule 90 the following shall be substituted, namely:—*

"Provided that no application to set aside a sale shall be admitted unless—  
(a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(b) the applicant deposits with his application the amount mentioned in the sale-warrant or an amount equal to the amount realised by the sale, whichever is less; and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited.

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

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## Rules 94A and 94B.

*The following shall be inserted as rules 94A and 94B*

"94A. A copy of every sale certificate issued under rule 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

94B. If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under rule 92 (D)."

## Rule 98.

*For rule 98, the following shall be substituted, namely:—*

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

## Rule 99.

*For rule 99, the following shall be substituted, namely:—*

"99. Where the Court is not so satisfied it shall make an order dismissing the application."

## ORDER XXIII.

## Rule 3.

*Add the following proviso to rule 3:—*

"Provided that before recording and passing a decree in accordance with an agreement, compromise or satisfaction in a suit instituted under the provisions of section 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent the suit was instituted, of the agreement, compromise or satisfaction proposed to be recorded. The Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction."

## ORDER XXV.

*The following shall be substituted for Order XXV:—*

## "ORDER XXV.

*Costs and Security for Costs in Special Cases.*

1. (1) Where at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may either of its own



motion or on the application of any defendant order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

2. Where, it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant,

(a) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant;

(b) at any stage of the suit, order the plaintiff, within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just.

3. (1) In the event of security demanded under rule 1 or rule 2 not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant."

## ORDER XXVI.

### Rule 18.

*The following shall be substituted for sub-rule (1) of rule 18:—*

"(1) When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

### Rules 19 to 26.

*The following shall be added as rules 19 to 26, respectively:—*

"Fees to Commissioners for local investigation, and Commissioners of partition, or to take accounts, or for the examination of witnesses.

19. Civil Courts in issuing commissions will be guided by the provisions of rule 15, and subject to the provisions of rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

20. Under Government of India Resolution in the Home Department (Judicial No. 10-1101, dated the 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which Judicial Officers are bound to perform when called upon and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

23. The following fees are to be allowed to Commissioners of partition or to take accounts, or for the examination of witnesses, namely:—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

*Fees to Commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.*

24. When under the orders of a Court in the Town of Rangoon, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit, at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant:

Provided that—

- (a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing;
- (b) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first;
- (c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80;
- (d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under rule 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in rule 24."

## ORDER XXXII.

### Rule 3.

*For rule 3, the following shall be substituted, namely:—*

"3 (1) Where any of the defendants is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper guardian for the suit for such minor.

(2) For this purpose there shall be filed by the plaintiff with the plaint a list of all persons whom the plaintiff considers to be capable of acting a

guardian of the minor for the suit. Such list shall be in the form of an application duly verified and requesting that one of such person may be appointed guardian of the minor for the suit, and shall state for each of such persons whether he is a guardian appointed or declared by competent authority, or a natural guardian, or the custodian of the minor, or a stranger, and shall give the address of each of such persons.

(3) An order for the appointment of a guardian for the suit may also be obtained upon application in the name and on behalf of the minor.

(4) An application under sub-rule (2) or sub rule (3) shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule."

#### Rule 4.

*For rule 4, the following shall be substituted, namely:—*

"(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit; provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, the guardian shall act as the next friend of the minor, for reasons for the suit unless the Court considers, for the minor's welfare that another person be appointed, as the case may be.

(3) In the event of there being no such guardian, the natural guardian of the minor, or, if there is no natural guardian, the person in whose care the minor is, should, subject to the proviso to sub-rule (1) ordinarily be appointed his guardian for the suit.

(4) No person shall without his consent be appointed his guardian for the suit.

(5) Where none of the aforementioned persons, or of the persons mentioned by the plaintiff in the list filed by him under sub-rule (2) of rule 3, is fit and willing to act as guardian for the suit, and where no application is made on behalf of the minor under sub-rule (3) of rule 3, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties to the suit, or out of any fund in Court in which the minor is interested and may give directions for repayment or allow the costs to be paid out of the fund and the circumstances of the case may require. The Court shall be an officer of the Court for this purpose.

ORDER XXXIV.

Rule 2.\*

*The following shall be substituted for rule 2 :—*

"2. In a suit for foreclosure if the plaintiff succeeds the Court shall either—

- (I) pass a preliminary decree declaring the amount which will be due to the plaintiff on the mortgage for principal and interest (at the mortgage rate) six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—
  - (A) that if the defendant within the said period pays into Court the said amount the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required by the defendant, retransfer to him, free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims and shall also if necessary put the defendant in possession of the property, but
  - (B) that if such payment is not made within the said period the defendant shall be debarred from all right to redeem the property, or
- (II) order that an account be taken of the amount due on the mortgage for principal and interest; and after the taking of the said account, pass a preliminary decree as above."

Rule 3.

*The following shall be substituted for sub-rule (1) of rule 3 :—*

"(1) Where the defendant pays into Court the amount declared due as aforesaid, within the said period together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

- (b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

- (c) ordering him to put the defendant in possession of the property."

Rule 4.

*The following shall be substituted for sub-rule (1) of rule 4 :—*

"(1) In a suit for sale, if the plaintiff succeeds, the Court shall act as prescribed in rule 2, except that instead of the direction contained in clause B thereof, there shall be the following direction :—

That if such payment is not made within the said period the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and

\* Rules 2 to 8 of Order XXXIV have since been substituted by Act 21 of 1929.

applied in payment of what is due to the plaintiff as aforesaid together with subsequent interest on the said amount at the rate of six per cent. per annum from the last day of the said period up to the actual date of realisation by the plaintiff and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same."

### Rule 5.

*The following shall be substituted for sub-rule (1) of rule 5:—*

"(1) Where the defendant pays into the Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,—
- (b) ordering him to retransfer the mortgaged property as directed in the said decree, and, also, if necessary,—
- (c) ordering him to put the defendant in possession of the property."

### Rule 7.

*The following shall be substituted for rule 7:—*

"7. In a suit for redemption, if the plaintiff succeeds, the Court shall either—

- (I) pass a preliminary decree declaring the amount which will be due to the defendant on the mortgage for principal and interest at the mortgage rate six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—
- (A) that if the plaintiff within the said period pays into Court the said amount, the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff in possession of the property, but
- (B) that if such payment is not made within the said period the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem, or (unless the mortgage is by conditional sale) that the mortgaged property be sold, or
- (II) order that an account be taken of the amount due to the defendant on the mortgage for principal and interest and after the taking of the said account, pass a preliminary decree as above."

### Rule 8.

*The following shall be substituted for sub-rule (1):—*

"(1) Where the plaintiff pays into Court the amount due as aforesaid

within the said period together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,—

(b) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property."

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### ORDER XXXVII.

#### Rule 2.

*In rule 2, sub-rule (2), the following shall be inserted after the words "pursuance thereof":—*

*"or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before."*

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### ORDER XXXIX.

#### Rule 1.

*In clause (a) of rule 1 the words "or wrongfully sold in execution of a decree" shall be deleted.*

*In the last sentence of rule 1 the word "sale" occurring between the words "alienation" and "removal," shall be deleted.*

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### ORDER XL.

#### Rule 2.

*For rule 2, the following shall be substituted, namely:—*

*"2. The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale:—*

(a) *On rents or outstandings recovered or on the proceeds of the sale of moveable or immoveable property, unless for special reasons, to be recorded, the Court orders the remuneration to be at some other rate—5 per cent.*

(b) *For taking charge of money or of moveable or immoveable property which is not sold, unless for special reasons it is otherwise ordered by Court, on the estimated value—1 per cent.*

(c) *For any special work not provided for above, such remuneration as the Court on the application of the receiver shall order to be paid."*

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**ORDER XLII.****Rule 1.**

*The following shall be substituted for sub-rule (2) of rule 1 :—*

"(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. When Burmese dates are given the corresponding English dates shall be added. The memorandum shall also contain :—

- (i) the full names and addresses of all parties ;
- (ii) particulars (class, number, year and Court) of the original proceedings ; and
- (iii) the value of the appeal (a) for Court-fees, and (b) for jurisdiction.

Material corrections or alterations shall be authenticated by the initials of the person signing the memorandum"

*To rule 1, the following shall be added as sub-rule (3) :—*

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

**Rule 14.**

*Add the following as sub-rule (3) to rule 14 :—*

"(3) Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or to the legal representative of any such opposite party or respondent if deceased."

( No. 10 (Schedule), dated the 3rd December, 1926. )

**ORDER XLIII.****Rule 1.**

*To rule 1, the following shall be added as clause (ii), namely :—*

"(ii) a garnishee order under rule 63C or rule 63E, and an order as to costs in garnishee proceedings under rule 63G of Order XXI."

**ORDER XLV.****Rule 9A.**

*Substitute the following for rule 9A :—*

"9A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court or at any proceedings subsequent to the decree of that Court, or to the legal representative of any such opposite party."

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of

the Judge of the district in which the suit was originally brought, and by publication in such newspapers as the Court may direct."

[No 10 (Schedule), dated the 3rd December, 1926.]

### ORDER XLVIII.

#### Rule 3.

In rule 3, the following shall be inserted after the word "appendices", :—  
"or such forms as may be prescribed by the High Court of Judicature at Rangoon."

### ORDER LII.

The following shall be inserted as Order LII :—

#### *Appellate Side Rules of Procedure.*

The rules contained in the First Schedule to the Code of Civil Procedure, 1908, shall so far as they are inconsistent with or contrary to the Rules here published and so far as the practice and procedure of the Appellate Side of the High Court of Judicature at Rangoon only are concerned, be deemed to have been thereby altered or superseded. The Rules relating to Appeals from Original decrees contained in Order XLI of Schedule 1 to the Code of Civil Procedure, so far as they are not inconsistent with or contrary to these rules, shall apply to appeals under clause 13 of the Letters Patent from decrees and orders made by a single Judge of the High Court or by Division Court in the exercise of its Original Civil Jurisdiction.

#### *Preliminary.*

"In the absence of the Deputy Registrar, the Superintendent, Appellate Side, shall exercise all the functions of the Deputy Registrar, under these rules.

The term 'Deputy Registrar' shall include the Deputy Registrar and the Assistant Registrar, Appellate Side."

[Notification No. 33 (Schedule) dated the 21st August, 1933]

2. Except upon close holidays the offices of the Court shall be open to the public on business from 10-30 A.M. until 4-30 P.M. on all week days except Saturdays, and on Saturdays from 10-30 A.M. until 2 P.M.

#### *Initiation of Proceedings.*

3. Memoranda, . . . . . shall be either printed, typewritten or written in a clear language on durable white foolscap paper so as to leave a clear margin one inch and

They shall contain :—

- (i) The full names and addresses of all parties.
- (ii) Particulars (No., Class, Year and Court) of the original proceedings and in the case of Second Appeal of the First Appeal,
- (iii) The value of the appeal or application :—
  - (a) For Court-fees, and
  - (b) For jurisdiction :



Provided that the Deputy Registrar for cause shown may accept an appeal or application without any of these particulars on an undertaking that such particulars will be supplied as soon as may be.

The matter shall be divided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a separate ground of objection or allegation. Dates and figures shall be filled in before presentation. When native dates are given, the corresponding English dates shall always be added.

Material corrections or alterations shall be authenticated by the initials of the person signing a memorandum, application or affidavit.

4 All memoranda of appeal and applications shall be presented to the Deputy Registrar.

[The next sentence as deleted by Notification No. 33 (Schedule) dated 21st August, 1933.]

5. Memoranda of appeal and applications shall be accompanied by as many copies thereof as there are respondents and by certified copies of the following documents :—

- (1) the decree or order against which an appeal or an application is made;
- (2) the judgment on which such decree or order is founded, unless the Court dispenses therewith, and
- (3) in appeals and applications from appellate decrees or orders the judgment of the Court of first instance, unless the Court dispenses therewith.

† \* \* \* \* \*

6. Whenever a memorandum of appeal or application is presented to the Deputy Registrar and it is in his opinion insufficiently stamped, or if he considers that the relief claimed is undervalued, he shall fix a time under section 107 (2) or 141 within which such memorandum of appeal or application shall be properly stamped or the valuation amended.

Appeals and applications which are insufficiently stamped must be submitted for orders to the Judges.

- (a) if presented on the last day of the period of limitation ; or
- (b) if the period of limitation will expire within the time asked for to pay the deficient Court-fees.

7. Where a memorandum of appeal or application is amended the Deputy Registrar shall sign or initial the amendment.

8. The date of hearing an appeal or application for revision shall be fixed by the Deputy Registrar and shall be notified in the manner prescribed by Order XLI, rule 14. He shall also fix the time for filing a memorandum of objections as provided for in rule 26.

9. (f) Process-fees for the issue of notice or notices of the date of hearing to the respondent or respondents shall be deposited within seven days from the date of order directing such notice or notices to issue. In default of payment thereof within the time allowed the Deputy Registrar shall strike off the appeal or application for non-payment of process-fees, unless, for good cause shown he grants an extension of time. An endorsement, over the signature of the

† The proviso was deleted by Notification No. 26 (Schedule.) dated the 15th February, 1930.

(2) On the application,\* of the appellant or applicant and on sufficient grounds being shown to his satisfaction, a Judge may order an appeal or application struck off the file under this rule to be restored to the file, as of the date on which it was originally filed.

(3) When an appeal is taken from a judgment or order of a court, the appellant or the party presenting a fresh plea shall be deemed to have taken off the file under this rule, the subject to the law of Limitation, to the same matter.

10. When an appeal or application has been admitted and the Records of the Lower Courts have been received the Deputy Registrar shall proceed as provided in the Rules for the preparation of Translations and Bench copies.

11 and 12. [Cancelled by Notification No. 3 (Schedule), dated Rangoon, the 12th March, 1925].

13. The Deputy Registrar is authorized to take necessary steps to cause the service of fresh notices, if required, to dispose of applications for substituted service, to grant postponements by consent and dispose of applications for bringing legal representatives of deceased parties on the record and granting postponements, if necessary, for the purpose of service.

14. When a notice is returned unserved or not duly served, and the Deputy Registrar orders the issue of fresh notice and fixes a fresh date, the case should be called out before the Deputy Registrar on the date originally fixed, in case the respondent may put in an appearance, and, if he does, he should be informed of the postponed date and his signature taken.

### Process

15. Warrants, notices and other processes shall be signed, sealed and issued by the Deputy Registrar provided that every warrant or order committing a person to custody in jail shall be signed by the Judge.

16. Notices and other processes to be served within the local limits of the original jurisdiction of the Court shall be delivered for service to the Bailiff, who shall endorse thereon the date of receipt by him.

17. If the person to be served is personally known to him or to any of his officers who is at the time available, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known the Bailiff shall forthwith communicate with the party desiring to have the process served or with his advocate appointing a time at which one of his officers will be available and ready to proceed to effect service, and requesting that some one who personally knows the person to be served, may accompany the officer to point him out.

18. The oath of process-servers and identifiers to affidavits in proof of service of process may be administered by the Bailiff. With his return of service of the process, the Bailiff shall submit the affidavits as to service.

19. Notices and other processes to be served in Burma, but beyond the local limits of the original jurisdiction of the Court, or outside of Mandalay

\* The words "made within eight days of the date of the order of the Deputy Registrar" were deleted by Notification No. 31 (Schedule) dated 22nd June, 1931.

Town shall be sent by post to the Court of widest jurisdiction not being a District Court at the headquarters of the Township in which the person to be served resides. If the notice is to be served out of Burma it shall be sent for service as provided by section 28, Order V, rules 21—23 and 25 to the Court named by the party.

20. Unless otherwise ordered a second or subsequent notice or process shall not be issued until after the one previously issued has been returned.

21. Processes to be served on a party to a case may be served on his advocate, if any, and when so served shall be presumed to be duly communicated and made known to the party for whom such advocate appears. For the purposes of this rule an advocate who has once appeared or entered an appearance on behalf of a party shall be deemed to continue to be his advocate unless and until he withdraws his appearance by a statement to that effect made in and recorded by the Court or unless and until he or such party intimates in writing to the Deputy Registrar that he has ceased to be the advocate for such party.

22. To bring promptly to notice the failure to serve process, every process issued after the first shall have its number, second, third, fourth and so on written clearly on it.

23. *[Deleted by Notification No. 28 (Schedule), dated the 28th April, 1930]*  
\* 24—32.

*List to be maintained by the Deputy-Registrar.*

33. The Deputy Registrar will maintain and keep posted up three lists of pending Civil appeals, applications for revision, and miscellaneous applications :—

A. List of all incomplete cases.

B. List of cases ripe for hearing that are to be called on a fixed date.

C. List of cases ripe for hearing that await their turn for hearing.

The Chief Clerk shall be responsible that the lists are properly kept from day to day.

34. No case shall be put on the B or the C list until notices on all respondents have been duly served, and the necessary Translations and Bench copies have been prepared.

35. The B list shall contain all cases ripe for hearing in which any party is not known to be represented by an advocate.

36. When a case has been placed on the B list and the Deputy Registrar before the date fixed for hearing receives intimation that all parties are represented by advocates the case shall forthwith be transferred to the bottom of the C list.

37. Cases in the B list shall be called on the day fixed for hearing and shall either be for disposal on that or immediately subsequent days of sitting or shall be postponed under the orders of the Court to some subsequent fixed date.

38. When a case has once been transferred to the C list, no further date will be fixed for hearing but it will come up for hearing in its turn, as it

\* Rules 24—32 having been issued under section 108 of the Government of India Act and clause 35 of the Letters Patent are not reproduced in this notification. They will be found in their appropriate place in the High Court Rules and Orders.

stands on that list, unless for special reasons it is otherwise ordered, with notice to the parties or their advocates.

39. When a case on the C list is called for hearing, and hearing is for any reason postponed, the case shall remain in its original place in the C list. It will appear in the duty list of the next Court day appropriate to such case, unless the Judge, or Bench, when postponing it directs that it shall not be called again before a specified date.

40. \*On every Friday the Deputy Registrar shall issue a list of cases which will be on the lists for disposal during the following week. This list will include cases fixed for admission, miscellaneous applications for disposal and B list cases fixed for hearing on a day in such week. On the last Friday in each month the Deputy Registrar shall issue a list of all cases on the B and C lists.

41. A daily list shall also be issued showing the cases for the day taken from the warning list issued on the Friday of the previous week.

42. At the close of the week, unless the Court has otherwise ordered, the remaining cases of the week's list shall be transferred to the top of the list of cases for hearing for the following week.

43. When a case under the Indian Divorce Act, in which a decree for dissolution or nullity of marriage has been passed is submitted for confirmation, a letter shall invariably be addressed to the District Judge who passed the decree, asking him to inform the parties that this Court will take the decree into consideration at the expiry of six months from the date on which it was pronounced with a view to confirming it or passing such order as may seem fit, that if either party wishes to make any application relating to the decree he or she must do so within the said period of six months, and that if no such application is made the Court will proceed to pass orders in the absence of the parties.

†44.

### *The Diary.*

45. The Diary shall be framed so as to show as concisely as possible every stage of and every proceeding taken in the case, and the party or parties present in person or by advocate at every proceeding. Very short proceedings and orders, such as proceedings and orders for the adjournment of a case may be written on the diary for the signature of the judge, but when orders not purely formal have to be made, the Bench Clerk should put up a judgment form with the file when submitting it to the Judge.

### *The Judgment.*

46. Judgments may be written by the Judge himself or be delivered orally. When judgment is given orally a note thereof in writing or in shorthand shall be taken by an officer of the Court, or person authorized by the Judge.

Such note shall be submitted to the Judge for correction and for signature.

Rule 31 of Order XXI shall not apply to the High Court.

\*Substituted for the previous rule by Notification No 30 (schedule) dated 22nd June, 1931.

† Rule 44 being an Office rule is not reproduced in this notification. It is reproduced at page 421, High Court Rules and Orders Manual.

*Decrees and Formal Orders.*

47. Decrees shall be signed by the Deputy Registrar.\* The advocates (if any) on both sides shall be required to affix their signatures to the decrees before they are signed by the Deputy Registrar. When any advocate has not signed the decree, the cause of his failing or refusing to sign shall be certified on the decree.

Care must be taken that each decree is in itself clear and intelligible. It should not be necessary to refer to any other documents to ascertain what it really means or implies.

48. When in interlocutory and miscellaneous proceedings an order is made by the Judge after stating his reason therefor, and in any case in which a party may desire it, a formal order shall be drawn up containing the number of case, the names of the parties, the order or result of the order made, the cost incurred and by what parties and in what proportion the costs are to be paid.

49. Every decree and formal order shall bear the date on which the judgment or order was pronounced by the judge; but the date on which the Judge or the Deputy Registrar has actually signed an order or the Deputy Registrar, a decree, shall be noted beneath his signature.

50. When the draft of a decree is ready a notice shall be posted on the Court notice-board that the draft is ready for inspection in the Deputy Registrar's office. If it is not objected to within four days from the date of the notice, a decree in the terms of the draft shall be submitted to the Deputy Registrar for signature.

If the parties do not agree to the form which the decree shall take the case shall be set down upon the daily list on as early a date as may be convenient to speak to the minutes of decree.

51. If a party or an advocate intimates to the Deputy Registrar immediately after an order has been passed by a Judge that he wishes to see the formal order before it is submitted to the Judge for signature, the same procedure as for decrees shall be adopted in respect of the draft formal order.

*General.*

52. In every appeal and petition, if any Burmese name is not spelled in accordance with the Government system of transliteration, the Deputy Registrar shall cause the spelling to be corrected unless the advocate concerned shows any good reason to the contrary.

If the name was incorrectly spelled in the Lower Court it should nevertheless be correctly spelled in the High Court, the name as previously incorrectly spelled being added in brackets, if necessary, to prevent confusion. The same rule shall be applied as far as practicable to names of natives of India. But any person who writes English has the right to spell his own name in any way he likes, and the spelling of his ordinary signature should be adopted in all documents in Court.

53. No correspondence relating to cases before the Court can be attended to, but any person having business in the Court or its office shall transact the same in person or by a duly authorized agent, or advocate.

\* NOTE.—So much of rule 35 of Order XLI as requires the decree to be signed and dated by the Judge or Judges who passed it, does not apply to the High Court of Judicature in the exercise of its appellate jurisdiction.

54. The Registrar, Deputy Registrars, Assistant Registrars, the Chief Translator and the Senior Interpreters attached to the High Court for Burmese, Hindustani, Gujarati, Chinese, Tamil and Telugu, are empowered to administer the oath to deponents of affidavits to be filed in the High Court.

The Senior Interpreters shall exercise the power conferred by this rule only within the precincts of the Court.

55. The Superintendent, Appellate Side, shall certify the copies referred to in order XLI, rule 37. [as amended by Notification No. 33 (Schedule) dated 21st August, 1933.]

#### *Appeals to the Privy Council.*

56. Applications to the Court for leave to appeal to His Majesty in Council shall be made within 90 days of the decree or order to be appealed from, subject to the provisions of sections 4, 5 and 12 of the Indian Limitation Act, 1908.

57. Petitions for leave to appeal to His Majesty in Council shall be presented to the Deputy Registrar, who, if the petition is in order, will issue notice in the form attached on the Respondent to show cause before a Bench consisting of at least two Judges, why the certificate prayed for should not be granted.

58. When a certificate is granted, the Appellant shall within the period prescribed by Order XLV, Rule 7, give security for the costs of the Respondent to the extent of Rs. 4,000. In cases of special magnitude and importance, the Court may require security for a larger sum: provided that security shall not in any case be required for a sum exceeding Rs. 10,000.

59. Security shall ordinarily be furnished by the deposit of cash or Government securities to the amount required, but subject to the provisions of these rules and of the provisos to sub-rule (f) of Rule 7 in Order XLV, it may be furnished in some other form approved by the Court. Cash deposited under this rule shall be paid to the Bailiff of the Court. Government security so deposited shall be made over to the Registrar or the Deputy Registrar. [as amended by Notification No. 33 (Schedule) dated 21st August, 1933.]

60. When cash or Government securities are deposited under Rule 59 a security bond shall be executed in Form A or Form B attached, as the case may be.

61. If any other form of security is tendered, the Appellant shall ordinarily file with the petition for leave to appeal to His Majesty in Council a separate application and, if a charge on immoveable property is tendered, shall also annex thereto a draft mortgage bond together with a valuation of the property verified by affidavit. The value of immoveable property shall be at least double the amount of the security required; and in the case of land on which there are buildings which are brought into the valuation of the property, or where a mortgage of building only is tendered, the buildings must be insured. A tender of such security, if made later than the date of filing the petition for leave to appeal, will not be accepted unless the Court is satisfied that the delay in making it was inevitable, and in any case shall not be accepted after the certificate is granted.

62. On tender of security other than cash or Government securities, notice of the tender shall, if possible, be given to the opposite party requiring him to show cause, if he wishes to do so, within the time fixed *see* Rule 57 above) for granting the certificate, why the security tendered should not be accepted. No adjournment shall be granted to the opposite party to contest the nature of such security.

63. If the security tendered appears to the Court to be unsatisfactory, the Appellant shall be so informed.

64. In every security bond, the Appellant shall bind himself to pay such costs of the opposite party as may be allowed by the Court in the event of the appeal not being prosecuted.

65. Within the period prescribed by Order XLV, Rule 7, the Appellant shall also deposit with the Bailiff of the Court the sum of Rs. 1,000 or such sum as the Deputy Registrar may determine to defray the expenses of printing, translating, transcribing, indexing and transmitting, a copy of the record [as amended by Notification No. 33 (Schedule) dated 21st August, 1933].

66. Where an Appellant, having obtained a certificate for the admission of an appeal fails within the time prescribed to furnish the security or make the deposit required in accordance with Rules 58 and 65, (or apply with due diligence to the Court for an order admitting the Appeal), the Court may, on its own motion or on an application on that behalf made by the Respondent, cancel the certificate for admission of the Appeal, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

67. When the Court admits the Appeal, it shall always clearly state in its order who are actual parties at the time of admission.

68. On a certificate being granted to appeal to His Majesty in Council, the Deputy Registrar shall immediately call for the transmission of the record and all material papers. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

69. The Deputy Registrar shall on payment to him of a fee of Rs 10 prepare an index of the papers which make up the record. This index shall be prepared within three weeks of the date of receipt of the records or of the date of deposit required by Rule 65, whichever is later. As soon as the index is ready, a notice in form attached shall be issued by the Deputy Registrar requiring the Advocates of both parties to attend his office for the purpose of settling the index within the time specified in the notice. If the Advocates fail to attend or to settle the index within the time aforesaid, the matter shall be reported for the orders of the Court without further delay. Any costs incurred on such account shall be borne in manner as the Court direct.

70. The Registrar or the Deputy Registrar as well as the parties and their legal Agents shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a manuscript list to be transmitted with the Record.

71. If the parties are agreed as to the papers to be omitted, those papers shall not be transcribed. Where in the course of the preparation of a Record one party objects to the inclusion of the document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, and the Court allows the document to be included, the Records, as printed, shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers or otherwise, the

fact that and the party by whom the inclusion of the document was objected to.

72. Where there are two or more Appeals arising out of the same matter and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeal should be consolidated, the Court may direct Appeals to be consolidated.

73. An Appellant who has obtained a certificate for the admission of an Appeal may at any time prior to the making of an Order admitting the Appeal withdraw the Appeal on such terms as to costs and otherwise as the Court may direct.

74. An Appellant, whose Appeal has been admitted shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

75. Where an Appellant, whose Appeal has been admitted, desires, prior to the despatch of the Record to England, to withdraw his Appeal, the Court may upon an application in that behalf made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express order of His Majesty in Council, and costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

76. Where an Appellant whose Appeal has been admitted, fails to show due diligence in taking all necessary steps in connection with the preparation of the Record, the Court may, either on its motion or on the application of the Respondent, call upon the Appellant to show cause why a certificate should not be issued that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to issue such a certificate, the Appeal shall be deemed as from the date of such certificate, to stand dismissed for non-prosecution without express order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

77. Where at any time between the admission of an Appeal and the despatch of the Record to England the Record becomes defective by reason of the death, or change of status of a party to the Appeal, the Court may notwithstanding the admission of the Appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted, or entered on the Record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express order of His Majesty in Council. If, in the opinion of the Court, there has been undue delay in making this application, the Court may order the Appellant or the party interested, to take all necessary steps to perfect the Record within such time as the Court may direct, and, if he fails to comply with such order, the Court may call upon him to show cause why a certificate should not be issued that the Appeal has not been effectually prosecuted, and if the Court sees fit to issue such a certificate, the Appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express order of His Majesty in Council and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

78. Where the Record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal the Court may, upon an application in that behalf made by any person interested,



cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the Record, in place of, or in addition to, the party who has died, or undergone a change of status. If, in the opinion of the Court, there has been undue delay in making this application the Court may order the Appellant or the party interested, to take all necessary steps to perfect the Record within such time as the Court may direct, and, if he fails to comply with such order, the Court shall report the matter to the Registrar of the Privy Council.

79. The supplementary records dealing with revivor of Appeals should be transmitted to England in manuscript and not in print.

*Order of arrangement of the papers prefixed by index.*

80. The Deputy Registrar shall arrange the papers in the transcript in two parts in the order specified below and shall prefix an index to each part. He shall also attach to each part a certified list of all papers omitted from the transcript under Rule 70.

**PART I.**

*Original Court.*

1. Index to Part I.
2. Diary sheet of the Original Court.
3. Plaint.
4. Written statement.
5. Examination of the Court under Order X.
6. Issues settled.
7. Oral evidence for the party beginning, including evidence given by a witness for such party on commission.
8. Oral evidence for the opposite party or parties, including evidence given by a witness for such party or parties on commission.
9. The judgment of the Original Court.
10. The decree of the Original Court.

*Appellate Court.*

11. The diary sheet of the Appellate Court.
12. The memorandum of appeal to the Appellate Court.
13. Respondent's memorandum of Objections under Order XLl, Rule 22.
14. The judgment of the Appellate Court.
15. The decree of the Appellate Court.
16. The application for a certificate and for leave to appeal to His Majesty in Council.
17. The certificate granted.
18. The Deputy Registrar's certificate that the provisions of Order XLV, Rule 7, have been complied with.
19. The order declaring the appeal admitted.

*Appendix 1A.*—Interlocutory proceedings and orders in the Original Court and Appellate Court, except such as the parties agree should be excluded, or the Court directs to be excluded.

*Appendix 1B.*—List of papers excluded.

## PART II.

20. Index to Part II.

21. Exhibits.

*Appendix II.*—List of formal and other documents excluded

## NOTE.

(1) *Index.*—The index to Part I should be in chronological order and should be placed at the beginning of the volume. The index to Part II should follow the order of the exhibit mark, and should be placed immediately after the index to Part I.

*Records.*—Part I should be arranged strictly in chronological order, *i.e.*, in the same order as the index. Part II should be arranged in the most convenient way for the use of the Judicial Committee as the circumstances of the case require. The documents should be printed as far as suitable in chronological order mixing plaintiff's and defendant's documents together when necessary. Each document should show its exhibit mark, and whether it is a plaintiff's or defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as (a) a series of correspondences, or (b) proceedings in a suit other than the one under appeal, should be kept together. The order in the record of the documents in Part II will probably be different from the order of the index, and the proper page number of each document should be inserted in the printed index.

The parties will be responsible for arranging the record in proper order for the Judicial Committee, and in difficult cases counsel may be asked to settle it.

(3) *Numbering of documents.*—The documents in Part I should be numbered consecutively. The documents in Part II should not be numbered, apart from the exhibit mark.

(4) *Heading of documents.*—Each document should have a heading which should consist of the number or exhibit mark, and the description of the document in the index, without the date.

(5) *Marginal note.*—Each document should have a marginal note which should be repeated on each page over which the document extends, *viz.* :—

## PART I.

(a) Where the case has been before more than one Court, the short name of the Court should first appear. Where the case has been before only one Court the name of the Court need not appear.

(b) The marginal note of the document should then appear consisting of the number and the description of the document in the index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence 'Plaintiff's evidence' or 'Defendant's evidence' should appear beneath the name of the Court, and then the marginal note consisting of the number in the index and the witness's name, with 'examination,' 'cross-examination' or 're-examination' as the case may be.

## PART II.

The word 'Exhibit' should first appear. The marginal note of the exhibit should then appear consisting of the exhibit mark and the description of the document in the index, with the date.

(6) *Omission of formal documents, etc.*—The parties should agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the index and in the record), if desired with the words 'Not printed' against it.

A long series of documents, such as accounts, rent-rolls, inventories, etc., should not be printed in full, unless Counsel so advise, but the parties should agree to short extracts being printed as specimens.

Every document should be carefully edited for the printer, avoiding the repetition of unnecessary titles and omitting formal portions.

81. The charges for translation and copying shall be regulated by the rules dealing with these matters. (*See pages 27 et seq., High Court Rules and Orders*). It shall not be necessary to translate any papers which have already been translated.

82. All translations, whether previously made or made for the purpose of the Appeal to His Majesty in Council, shall be authenticated by the person by whom they were made.

83. The notices in India shall be limited, in the absence of any express direction by the Court, to the notice of application for the certificate of admission, notice declaring the Appeal admitted and notice of the transmission of the Record to England; and in all cases where a party has appeared, service on the advocate shall be deemed to be sufficient notice.

84. When the Record is to be printed the style to be adopted shall be as follows:—

(i) The form known as demi quarto (*i.e.*, 54 ems in length and .42 in width shall be followed.

(ii) The size of the paper used shall be such that the sheet when folded and trimmed shall be 11 inches in length and 8½ inches in width.

(iii) The type to be used in the text shall be pica type, but long primer shall be used in printing accounts, tabular matter and notes.

(iv) The number of lines in each page of pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

85. When the Record is printed in India, 100 copies of the transcript shall be struck off. Twenty copies shall be supplied to the party at whose cost the Record is printed. Any other party to the suit shall be supplied with copies of the Record on payment of the cost price. Copies so supplied shall not be certified. A charge of Re. 1 for every 750 words shall be made for proof-reading. Money paid for proof-reading shall be credited to Government.

86. When the transcript is ready, if it is to be printed in England, one certified copy shall be transmitted to the Registrar of his Majesty's Privy Council, Whitehall, at the expense of the Appellant, together with an Index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

87. Where the transcript has been printed in India, and 100 copies struck off under rule 85, 40 copies shall be sent, at the expense of the Appellant, to the Registrar of his Majesty's Privy Council one of which shall be certified to be correct by the Deputy Registrar of the Court by his signing his name on, or initialling, every eighth page thereof and by affixing the Seal of the Court thereto. Where part of the Record is printed in India and part is to be printed in England, this rule shall, as far as practicable, apply to such parts as are printed in India and such as are to be printed in England respectively.

88. All costs incurred in British India whether allowed by the Court under rule 64 or otherwise, shall be recoverable, as if they were the amount of a decree for money.

### Form A (Rule 60).

*Bond by an Appellant to His Majesty in Council for security for the costs of the Respondent when currency notes are or cash is deposited.*

KNOW ALL MEN by these presents that I

son of

native of

now residing at

am held and firmly bound to the Senior Judge of the High Court of Judicature at Rangoon in the sum of Rupees

to be paid to the said Senior Judge his successors in office or assigns for which payment well and truly to be made I bind myself my heirs and legal representatives.

IN WITNESS WHEREOF I have hereunto set my hand at

this

day of

19

*Signature of Appellant.*

Signed by the said  
in the presence of

*Address.*

*Occupation.*

son of

WHEREAS I the above-bounden :

was <sup>an Appellant</sup> the Respondent in Civil <sup>1st</sup> Appeal No. of 19 in the said High Court AND WHEREAS the decision of the Court upon the said Appeal having been adverse to me I presented a petition to the said Court praying for a certificate on which an Appeal to His Majesty in Council might be admitted AND WHEREAS such certificate was granted to me on the day of 19 19 AND WHEREAS I was called upon to furnish security for the costs which may be incurred by the Respondent in this Court and before His Majesty's Privy Council upon or in consequence of my said Appeal to His Majesty to the amount of Rupees AND WHEREAS on the day of 19 I deposited in the said High Court the sum of Rs. Now the condition of the above-written bond is such

that I will be paid such costs as I or my heirs or legal representatives shall be ordered to pay to him by the decree or order of His Majesty in Council or of this Court as costs incurred on or in consequence of the said Appeal and the above-written bond shall be void and of no effect and shall remain in full force and virtue AND I

HEREBY agree and declare that the said amount deposited by me as afore-said shall remain under the control of the said High Court as and for security for payment by me or my heirs or legal representatives of such amount or amounts as may be made payable by me or them as costs as afore-said and that upon my failure to pay such amount or amounts the Court may order that the said amount deposited or so much thereof as may be necessary shall be paid towards the discharge of the amount or amounts which may be payable by me or my heirs or legal representatives as afore-said: Provided that if no costs shall be ordered to be paid by me or by my heirs or legal representatives the amount deposited shall unless otherwise detained be returned to me or them.

## Form B (Rule 60).

*Bond by an Appellant to His Majesty in Council for security for the costs of the Respondent when Government Promissory Notes are deposited.*

KNOW ALL MEN by these presents that I \_\_\_\_\_ son  
of \_\_\_\_\_ native of \_\_\_\_\_  
now residing at \_\_\_\_\_  
am held and firmly bound to the Senior Judge of the High Court of Judicature at Rangoon in the sum of Rupees \_\_\_\_\_ to be paid to the said Senior Judge his successors in office or assigns for which payment well and truly to be made I bind myself and my heirs and legal representatives.

IN WITNESS WHEREOF I have herewith set my hand at \_\_\_\_\_ this  
day of \_\_\_\_\_ 19 \_\_\_\_\_

*Signature of Appellant.*

Signed by the said \_\_\_\_\_ in the  
presence of \_\_\_\_\_

*Address.*  
*Occupation.*

son of \_\_\_\_\_

WHEREAS I the above-bounden \_\_\_\_\_ of 19  
was <sup>an Appellant</sup> ~~the Respondent~~ in Civil <sup>1st</sup> ~~2nd~~ Appeal No. \_\_\_\_\_  
in the said High Court AND WHEREAS the decision of the Court upon the said Appeal having been adverse to me I presented a petition to the said Court praying for a certificate on which an Appeal to His Majesty in Council might be admitted AND WHEREAS such certificate was granted to me on the day of \_\_\_\_\_ 19 \_\_\_\_\_ AND WHEREAS I was called upon to furnish security for the costs which may be incurred by the Respondent in this Court and before His Majesty's Privy Council upon or in consequence of my said Appeal to His Majesty in Council to the amount of Rupees \_\_\_\_\_ AND WHEREAS on the day of \_\_\_\_\_ 19 \_\_\_\_\_ I endorsed and delivered to the Registrar of the said Court the Government Promissory notes particulars of which are set out in the Schedule hereunder Now THE CONDITION of the above-written bond is such \_\_\_\_\_ be paid such costs as I or my heirs or legal \_\_\_\_\_ to pay to him by the decree or order of His \_\_\_\_\_ order by this Court as costs incurred on or in consequence of my said Appeal then the above-written bond shall be void and of no effect otherwise the same shall be and remain in full force and virtue.

AND I HEREBY agree and declare that the Government Promissory notes deposited by me as aforesaid or such other Government Promissory notes as may be held in lieu thereof and the interest which may accrue thereon shall remain under the control of the High Court of Judicature at Rangoon as and for security for payment by me or my heirs or legal representative of such amount and amounts as may be made payable by me or them as costs as aforesaid and that upon my or their failure to pay such amount or amounts the said Court may order that the same be sold and that the proceeds be applied so far as they may extend towards the discharge of the said amount or amounts: PROVIDED that if no costs shall be ordered to be paid by me or my heirs or legal representatives to the Respondent on my said Appeal the said Government Promissory notes or such Government Promissory notes as they may have been replaced by shall unless otherwise detained be returned to me or them.

The Schedule above referred to—

No.	Date.	rate of interest.	Amount.
(1)	(2)	(3)	(4)
		Rs.	Rs.

*Notice to show cause why a certificate of Appeal to His Majesty in Council should not be granted (Rule 57).*

( Code of Civil Procedure, Order XLV, Rule 3 (2) )

# IN THE HIGH COURT OF JUDICATURE AT RANGOON.

CIVIL MISCELLANEOUS APPLICATION No.

OF 19 .

Arising out of Civil

Appeal No.

OF 19

*Applicant,*

*vs.*

*Respondent.*

To

Take notice that the applicant above-named has through applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, or that it is otherwise a fit one for Appeal to His Majesty in Council.

The                      day of                      19                      is fixed for you to show cause why the Court should not grant the certificate asked for.

Given under my hand and the seal of the Court this day of

19 .

Process fee, Rs.

realized.

*Deputy Registrar.*

*Notice to Advocates to settle index in paper book of the Privy Council Appeal (rule 69).*

# IN THE HIGH COURT OF JUDICATURE AT RANGOON.

CIVIL MISCELLANEOUS APPLICATION No.

OF 19 .

Arising out of Civil

Appeal No.

OF 19 .

*Appellant to England.*

*vs.*

*Respondent to England*

Take notice that (1) an index of all documents included in the transcript record of the above case, and (2) a list of all other papers, etc., not so included have been prepared. You are requested to attend the Office of the Deputy Registrar for the purpose of settling the Index within one week from the date hereof.

Deputy Registrar,  
Appellate Side.

The

19

Notice to Respondent of admission of Appeal to the King in Council.  
[ Code of Civil Procedure, Order XLV, Rule 8. ]

# IN THE HIGH COURT OF JUDICATURE AT RANGOON.

CIVIL MISCELLANEOUS APPLICATION No. OF 19  
Arising out of Civil Appeal No. of 19

Applicant  
vs.  
Respondent.

To

WHEREAS

the in the above case, has furnished the security and made the deposit required by Order XLV, Rule 7, of the Code of Civil Procedure, 1903.

Take notice that the Appeal of the said Applicant to His Majesty in Council has been admitted on the day of 19  
Given under my hand and the seal of the Court this day of 19  
Process fee, Rs.

Rs. realised.

Deputy Registrar.

Notice of the transmission of the Record to England.

# IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Dated Rangoon, the 19

CIVIL MISCELLANEOUS No. OF 19  
Arising out of Civil Appeal No. of 19

Applicant.  
vs.  
Respondent.

To

1. Please take notice that the printed Records in the above cause under Appeal to His Majesty in Council will be despatched to the Registrar, Privy Council, by the mail leaving on the 19

2. You are requested to send a senior clerk to the Appellate Side to receive 120 printed Records and a copy of payment order for Rs. being unexpended balance to be refunded to you under order dated the 19

Deputy Registrar,  
Appellate Side."

## ORDER LIII.

*The following shall be inserted as Order LIII:—*

*"Rules for the conduct of Suits in the Rangoon Small Cause Court."*

## PART I.

## PRELIMINARY.

1. These rules may be called the Rangoon Small Cause Court Rules, 1922, and shall form Schedule I to the Rangoon Small Cause Court Act, 1920. They shall come into force simultaneously with the Act and shall apply to all proceedings thereafter to be instituted in the said Court, and as far as may be, to all proceedings transferred thereto under proviso (b) of section 2 (1)

2. All previous rules so far as they are inconsistent with these rules are hereby superseded and the rules heretofore contained in Schedule I to the Act and in Order LV of the Code are hereby annulled, but not so as to affect anything duly done or suffered thereunder.

3. In these rules unless there be something repugnant in the subject or context:—

(1) 'The Act' means the Rangoon Small Cause Court Act.

(2) 'Bailiff' means any Bailiff of the Court.

(3) 'The Code' means so much of the Code of Civil Procedure, 1908, together with the Schedules and Appendices thereto, as is not expressly or impliedly excluded by the Act or these rules.

(4) 'Prescribed' means prescribed by these or any duly authorized rules or orders or by the Code.

(5) 'Process' includes a summons to a defendant or to a witness, a notice or any other process (not being a warrant) which has to be served through the Court.

4. The procedure to be followed in the Court shall be that laid down in the Code, subject to the provisions of the Act and of these rules.

5. All complaints, written statements, affidavits, petitions and other proceedings presented to the Court shall be in English and written or type-written or printed, fairly and legibly, and in the prescribed form. Provided always that in proceedings to which all the parties are Burmans and in which the relief sought does not exceed Rs. 500, all pleadings, petitions and affidavits may be written, typed or printed in Burmese.

6. Written statements, petitions and affidavits, unless filed in Court or before the Registrar, shall be presented to the Chief Clerk or to such other officer as may be appointed in that behalf in like manner as is hereinafter provided for the presentation of plaints.

The Chief Clerk is empowered to administer oaths to the deponents of affidavits to be filed in Court.

Copies of pleadings, petitions and affidavits must be served on the opposite party not less than 24 hours before the date fixed for hearing.

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\* Inserted in Schedule I to the Rangoon Small Cause Court Act, 1920, under the powers conferred by section 32 of that Act.



7. Unless the necessary process fees payable on a Plaint or petition are paid within 48 hours from its admission, the suit or petition may be dismissed.

*Institution of suits—The Plaint, its Presentation and Admission.*

8. Every suit shall be instituted by the presentation of a Plaint.

9. The subject-matter of the Plaint shall be divided into paragraphs numbered consecutively and each paragraph shall contain as nearly as may be a single allegation. Where a Burmese or Indian date is given the corresponding English date shall be added. The names, descriptions and places of residence of the parties must be fully set out in the title or the omission to do so must be satisfactorily explained.

10. A Plaint shall be presented to the Chief Clerk of the Court or to such officer as the Chief Judge may from time to time appoint in that behalf. If the Plaint be reasonably legible and be properly stamped, signed and verified and otherwise admissible in accordance with the provisions of the Code and of these rules it shall be received and a receipt shall be granted to the person presenting it. A diary form for the suit shall thereupon be opened by such Chief Clerk or other officer, who shall enter therein the name of the person presenting the Plaint, the date of presentation and the documents (if any) produced or filed with the Plaint. Together with the Plaint shall be filed as many copies thereof as there are Defendants to the suit. And the Chief Clerk or such other officer as aforesaid shall thereupon place the Plaint with the diary form before the Registrar for his written order for the admission of the Plaint and his direction for summons to issue upon payment of the necessary fees.

11. If it appears to the Registrar that the Plaint should for any reason be amended or rejected, the matter shall be placed in the daily cause list on a suitable date before the Registrar for admission and the Registrar shall then deal with the matter in question or (if so desired) place the matter for admission before the Judge to whom such case would ordinarily be assigned.

12. If the person desiring to verify a Plaint is not a party to the suit he shall obtain leave from the Registrar to verify and his application in that behalf shall be supported by affidavit showing his connection with the case and how the allegations made come within his knowledge or belief.

13. An agent desiring to institute a suit shall, at the time of presenting the Plaint, produce his power of attorney for the scrutiny of the Chief Clerk or such other officer as aforesaid who shall examine it and note its production in the diary, and the power of attorney shall be returned with a warning that it must be produced on the day of hearing for inspection.

14. (1) When an original document is produced by the Plaintiff under Order VII, Rule 14, of the Code, the Chief Clerk shall put thereon his initials and a note of the date of presentation.

(2) If a copy of such document is delivered to be filed with the plaint instead of the original, the Chief Clerk shall compare the copy with the original and certify as to its correctness by endorsement.

15. When a Plaint has been admitted it shall be numbered and registered as a suit duly instituted and the Chief Clerk or other officer as aforesaid shall, upon receipt of the proper fees, issue a summons directed to each Defendant.

*Summons—its Service—and the Service of Processes generally.*

16. ~~The summons to the Defendant shall require the Defendant or~~ Defendants to enter appearance before the Registrar upon a date to be therein mentioned.

17. (1) In all suits for sums not exceeding Rs. 50 the summons shall be for final disposal.
- (2) In all suits the value of which exceeds Rs. 1,000 summons shall be for the settlement of issues.
- (3) And in all other suits the Registrar shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only or for the final disposal of the suit; and the summons shall contain a direction accordingly.
18. (1) In all suits in which summons is for the settlement of issues the Defendant when he enters appearance shall be given an opportunity of filing a written statement in answer to the Plaintiff's claim and the suit shall be assigned to a particular Judge for trial and a date fixed for hearing.
- (2) In all other suits a verbal defence may be recorded unless for any reason the Court considers a written statement desirable in the circumstances.
19. Ordinarily the interval between the date of issue of a summons and the day fixed for the appearance of the Defendant or Defendants shall not be less than—
  - (a) where all the Defendants reside within the local limits of the jurisdiction of the Court—
    - (1) in suits the value of which exceeds Rs. 1,000—fourteen days;
    - (2) in all other cases—ten days;
  - (b) where any one Defendant resides in Burma but beyond the local limits of the jurisdiction of the Court—twenty-eight days;
  - (c) where any one Defendant resides elsewhere in India—eight weeks.
  - (d) where any one Defendant resides out of India—three months.
20. Ordinarily a Defendant residing within the local limits of the jurisdiction of the Court shall not be deemed to have had sufficient time to appear and answer unless the process were served on him not less than three clear days before the day fixed for appearance.
21. All processes and warrants, except committal and release warrants, shall be signed, sealed and issued by the Chief Clerk. Committal and release warrants and commissions shall be signed by the Judge who ordered their issue or by the Registrar on his behalf.
22. Processes or warrants for service or execution within the local limits of the jurisdiction of the Court shall be delivered for service or execution to the Bailiff, who shall endorse thereon the date of receipt by him. If the person to be served is known to the Bailiff, or to any of his staff, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known the Bailiff shall require the party applying for the process to provide some person to identify the person to be served and shall fix a time when one of the officers will be ready to proceed to effect service.
23. Processes for service in Burma but beyond the local limits of the jurisdiction of the Court shall unless otherwise directed be sent by post to a Court at the headquarters of a township in which the person to be served resides. If the process is to be served out of Burma it shall be sent for service as required by section 28 and Order V, Rules 21 to 23 and 25 of the Code, to the Court named by the party at whose instance the process is issued.

24. Unless otherwise ordered a second or subsequent process shall not be issued until the previous one has been returned.

25. Proof of service may be made by affidavit. Such affidavits must state fully all particulars which must necessarily be proved before the summons or process can be held to have been duly served. The Bailiff is empowered to administer the oath to the deponents of such affidavits.

26. No summons or other process shall be served or executed on a Sunday, Christmas Day or Good Friday except by the special leave of the Court.

### *Appearance.*

27. If the Defendants or any of them do not appear and the Court is satisfied that they have been duly served with the summons the suit shall be heard *ex parte* as regards such Defendants.

28. If the Defendants or any of them do appear and wish to defend the suit, the Registrar shall either direct such Defendants or Defendant to file a written statement before the Judge to whom such case is assigned for trial, allowing such time as may be reasonable for the purpose, or direct that the case be placed before such Judge the following Court day for orders.

29. Advocates or pleaders instructed to appear and defend on behalf of any one or more Defendants in a suit may enter appearance on his or their behalf at any time before the date for appearance by formal notice in writing addressed to the Chief Clerk and may at the same time file written statement in answer to the Plaintiff's claim and the case will thereupon be placed for orders before the Registrar.

30. (1) A minor can only enter appearance by his guardian *ad litem*. And the Court shall, upon being satisfied of such incompetence, appoint a proper person to be such guardian upon application made to it either in the name or on behalf of such minor or by the Plaintiff.

(2) (a) If on an application by the Plaintiff, and after due notice to the proposed guardian and to the minor, the proposed guardian is not appointed the Court may appoint one of its officers to act as guardian *ad litem*.

(b) In such case no notice need issue save to the officer concerned, and upon his signifying to the Court his consent to act as a guardian, the order appointing him shall be made, and he shall thereupon endeavour to get into communication with the minor's natural guardian or relatives with a view to ascertaining what defence should be put in in answer to the Plaintiff's claim.

(c) The Court may at any time direct the Plaintiff or other party having the conduct of the case to pay into Court a sum sufficient to defray such minor's expenses in defending the suit.

(3) The procedure provided for by this rule with regard to minors shall be adopted *mutatis mutandis* with regard to persons of unsound mind.

31. Subject to the control of the High Court, the Chief Judge may from time to time make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof. And he may whenever it is necessary or expedient withdraw any suit or proceeding from any Judge and transfer it to himself or to any other Judge for disposal.

32. Upon a written statement being filed or a verbal defence recorded the Judge to whom such case is assigned shall fix a date for trial, unless the matter can be disposed of on the pleadings.

*Daily File and Cause Lists.*

33. All pending cases shall be entered in the daily file under the respective dates fixed for hearing.

34. A daily cause list for each Judge and one for the Registrar shall be prepared from the daily file and shall show the matters for disposal in such order as the Chief Judge shall direct.

35. Cases in the daily list shall be called on in turn in the order in which they appear in the list.

36. The daily cause lists shall be affixed to the Court notice boards daily before the Court opens.

*Documents filed in Court*

37. The Chief Clerk is authorized to permit a party or his pleader to inspect in his presence or in the presence of an officer of the Court any document filed in a suit or proceeding in which he is a party or pleader.

38. Subject to the provisions of Order XIII, Rule 9 of the Code documents filed in Court may be returned after fifteen days from the date of judgment unless the proceedings have in the meanwhile been sent for by the High Court.

39. No document not in the English language shall (unless the Court otherwise orders) be read or received in evidence without an authorized translation thereof:

Provided that in cases in which the pleadings may be in Burmese, translations shall not be required of documents written in the Burmese language.

40. The Bench Clerk shall make and sign the endorsements required by Order XIII, Rules 4 and 6 of the Code, on documents admitted or rejected.

*Summons to Witnesses*

41. A party or his pleader may apply for a summons to a witness in any suit or proceeding at any time after the institution and during its pendency. The application shall be presented to the Chief Clerk. If he thinks that for any reason it should not be granted, he shall take the orders of the Registrar on the point.

42. The party applying shall within twenty-four hours from the time when the application is filed, pay to the Bailiff such sum for the travelling and other expenses of the person or persons summoned as the Bailiff may direct according to the following scale:—

	Maximum. Rs.	Minimum. Rs. A.
Soldiers, mariners, labourers, carriers, domestic servants, sircars, etc. . . . .	2	0 4
Tradesmen . . . . .	4	1 0
Merchants, managers of banks, zemindars, gentlemen of property . . . . .	16	2 0
Auctioneers, brokers, professional accountants . . . . .	10	1 0
Professional men . . . . .	10	2 0
Editors, engineer and surveyors . . . . .	10	2 0
Officers in civil employ drawing not less than Rs. 500 a month, according to rank . . . . .	16	6 0
Military and naval officers, according to rank. . . . .	16	6 0

	Maximum. Rs.	Minimum. Rs. As.
Shroffs, bunnias, schoolmasters, commanders and officers of ships . . . . .	6	2 0
Articled and other clerks . . . . .	6	2 0
Police inspectors, petty officers, military and marine . . . . .	4	2 0
Customs-house officers and engine-drivers . . . . .	4	2 0
Godown sircars . . . . .	2	1 0
Females according to station . . . . .	4	0 8

In special cases or in cases not provided for in the scale, the Court shall allow such fees as it thinks fit.

Provided—

*Firstly*,—that in cases to which Government is a party—

- (a) no payment into Court will be required for the travelling and other expenses of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity;
- (b) the amount to be paid into Court for the travelling and other expenses of a Government servant whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than Government to give evidence in his official capacity in a Court situate at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations.

*Secondly*,—that a Government servant whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government is a party—

- (a) when giving evidence at a place more than five miles from his headquarters shall not receive anything under these rules, but shall be given a certificate of attendance;
- (b) when giving evidence at a place not more than five miles from his headquarters shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special nor expert allowances.

*Thirdly*,—that a Government servant whose salary does not exceed Rs. 10 per mensem giving evidence in his official capacity shall receive his expenses from the Court.

13. The Chief Clerk shall issue summonses as soon as possible after the Bailiff has endorsed on the application his receipt for the money paid.

14. Fees paid to witnesses otherwise than through the Bailiff shall be certified to the Court before a witness is examined, and if not so certified shall not be allowed in taxation of costs.

15. In cases where the witnesses reside beyond the local limits of the jurisdiction of the Rangoon Small Cause Court, the Bailiff shall remit the expenses of the witnesses by moneyorder to the Court to which the summons is to be sent for service.

16. The Bailiff shall receive all money sent by other Courts as expenses of witnesses and commissions.

47. On receipt of a summons to a witness issued by another Court, the Chief Clerk shall send it to the Bailiff, who shall note on it whether any and if so, what money has been received as expenses of the witness. If the expenses are sufficient, the Chief Clerk shall then make an order for the issue of the summons.

48. On receiving a commission for the examination of a witness from another Court, the Chief Clerk shall send it to the Bailiff, who shall note on it whether any and, if so, what money has been received as expenses of the witness. If sufficient money has been received, the Chief Clerk shall make an order for the issue of the summons to the witness.

49. Any money received as expenses of witnesses which remains unexpended shall be returned by the Bailiff to the Court of issue, under the orders of the Registrar.

### *Commissions.*

50. The hearing of a suit in which a commission has been issued under Order XXVI of the Code shall be postponed until the return of the commission, unless the Court otherwise directs.

51. An application for commission shall be made promptly after the grounds on which it is asked for are known, and shall be accompanied by an affidavit or affidavits, setting out the facts relied upon as grounds for the issue of the commission, and stating when they first became known to the applicant.

52. In commission for the examination of witnesses which are addressed to the Court and in which the delegation of the Commissioner's duties to an Advocate or Pleader has not been authorised, the Court or the Registrar shall have power to appoint such advocate or pleader or official of the Court as he may determine to execute the commission.

53. (1) When an order for the issue of a commission to take evidence on interrogatories has been made, the party obtaining the order shall, within seven days from the date thereof, file his interrogatories, and the documents, if any, to accompany the commission, and shall serve a copy of the interrogatories on the other party or his pleader, who shall file his cross-interrogatories, with the documents, if any, to accompanying the same within seven days from such service, and shall serve a copy on the other party or his pleader.

(2) If the commission is for the examination of witnesses *via voce* the party obtaining the order shall file a list of witnesses, and all necessary papers and documents within seven days from the date of the order.

54. The party obtaining an order for a commission shall pay the necessary costs of and incident to the same within seven days of the date of the order.

55. On default in the observance of these rules by a party obtaining an order for a commission, the commission shall not issue without leave of the Court, and on default by the opposite party, he shall not be allowed to join in the commission without such leave.

### *Judgments, Orders and Decrets.*

56. (1) In all suits of over Rs. 1,000 in value, the evidence shall be recorded in manner provided by Order XVIII, Rule 5, and the judgments shall contain the particulars required by Order XX, Rule 4 (2), of the Code.

(2) In all other suits Order XVIII, Rules 5 to 12 shall not apply and judgments shall be in accordance with the provisions of Order XX, Rule 4 (1), of the Code.

57. (1) Except orally delivered judgments taken down in shorthand, judgments and orders shall be pronounced only after they are written. All judgments and orders shall bear the date on which they are delivered.

(2) Decrees shall bear the date of delivery of judgment, and also the date of signature in the hand of a Judge.

(3) If a party or his pleader intimates to the Chief Clerk immediately after a judgment or order has been passed by a judge, that he wishes to see the formal decree or order before it is submitted for signature, he may be allowed to do so, and if there is any disagreement as to the form of decree or order, of the taxing or the costs, the case shall be set down on the daily list, on as early a date as may be convenient, to speak to the minutes of decree.

58. When the Court directs that any decree may be paid by instalments, such instalments shall, in the absence of any direction to the contrary, be paid into Court monthly, and, in default of payment of any one instalment, the whole decree or the balance thereof shall become due.

#### *Execution Proceedings.*

59. Every application for executing a decree shall be in the prescribed form and shall be presented to the Chief Clerk, or such other officer as the Chief Judge may appoint in that behalf, and the application shall, after examination and check by the Execution Clerk, be put up for orders before the Third Judge with a report endorsed thereon as to whether the requirements of the Code and of these rules have been complied with.

60. Applications under section 39 of the Code to send a decree or order for execution to another Court shall be made by verified petition, and shall be accompanied by a certified copy of the decree or order.

61. The certified copy, together with the other documents mentioned in Order XXI, Rule 6 of the Code, shall be sent by registered post.

62. The process fees prescribed for the warrant of attachment and for the order of sale shall be annexed to every application for execution by attachment and sale of property.

63. In every application for the attachment of moveable property the approximate value of the property sought to be attached shall be stated according to the best of the applicant's belief.

64. In applications for execution by attachment of moveable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment-debtor or not, and the place where the property is to be found shall be clearly indicated.

65. A warrant issued under Order XXI, Rule 24. of the Code, shall be returnable within one month from the date thereof.

#### *Sale of Attached Property.*

66. As soon as possible after an attachment of moveable property, the Bailiff shall report to the Court the fact of the attachment and shall furnish a list of the articles attached and their approximate value, and shall note if any of them are not liable to attachment or sale.

If any of the articles or things fall within the proviso of Order XXI, Rule 43, of the Code, it shall be so stated in the report and list.

67. The report and the list shall be submitted to the Third Judge who shall pass such order for sale as he may think fit, although the decree-holder may not apply for a sale order. A warrant for sale shall be sent to the Bailiff, who shall forthwith prepare and issue a proclamation.

68. Every proclamation shall be advertised in a local newspaper or advertiser for at least fifteen days (except in the case of property mentioned in the proviso to Order XXI, Rule 43, of the Code), and no proclamation shall issue until the person applying for sale has deposited with the Bailiff an amount sufficient to defray the expense of advertising.

69. Moveable property falling within the proviso to Order XXI, Rule 43, of the Code, shall be sold as soon as may be convenient after it has been attached. Other moveable property shall be sold on the third Saturday after the day on which the proclamation shall have been affixed on the Court-house.

### *Security to Court.*

70. When security is required to be given it shall be taken either in cash or in the form of a bond. Such bond shall be with or without sureties as the Judge may direct, and shall be in favour of the Bailiff of the Court.

71. When sureties are required and persons resident within the jurisdiction of the Court are tendered, the Bailiff shall report whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the amount of the security required.

72. No sureties shall, without the order of the Judge, be accepted unless they make an affidavit or affidavits stating that the property which each of them possesses, or that their properties combined, are equal in value to the amount of the security demanded, over and above, any incumbrance to which such properties may be liable, and, over and above, the amount for which they have previously given security in the Court or in any other Court and for which they are at the time liable as sureties.

73. On the application of the Bailiff summonses may be issued to persons named by him to appear before him or to produce before him documents of title for the purpose of his enquiry into the value of the property of any person tendered as a surety.

### *Bailiff's Commission on Sales of Attached Property.*

74. The Commission to be drawn by the Bailiff on sales of attached property shall be at the rate of 5 per cent.

The fees paid each month shall be drawn and disbursed to the Bailiff at the end of the month under the orders of the Registrar.

### *Applications generally.*

75. All applications arising out of a suit shall bear the number of such suit unless they be applications for execution, for attachment, or arrest before judgment, for removal of attachment, for review of judgment, for sanction to prosecute, or miscellaneous applications which necessitate separate judicial proceedings, or in which the petitioner is not a party to the suit.



76. Every application in writing shall be in the form of a petition, signed by the applicant or his recognised agent, or his pleader, and if the Court requires it to be verified shall be verified in the same manner as a plaint.

77. On receiving an application the Court shall (if necessary) direct notice to issue for service on the Respondent together with a copy of the application, to be supplied by the applicant. The notice shall be served in the same manner as a summons and shall fix a date for the hearing of the application.

*Applications to set aside Dismissal Orders or ex parte Decrees.*

78. The Court may, at any time after any application to set aside a dismissal order or *ex parte* decree is presented to the Court, put the parties on such terms as to furnishing costs or for security for the amount of the claim and costs by payment into Court or otherwise as it shall think fit.

## PART II.

### EJECTMENT AND DISTRESSES.

#### *A.—Recovery of Possession of Immoveable Property.*

79. An application under section 17 of the Act shall be in the form of a Plaint in which the applicant shall be the Plaintiff and the occupant the Defendant and the matter shall be treated as a suit. For the purpose of ascertaining the value of the suit the annual rental value of the property in respect of which the claim is made shall be deemed to be the value of such suit, and such annual value shall be stated in the application.

80. When an application has been made under section 17 of the Act, the Court shall by summons call upon the occupant to show cause why he should not be compelled to deliver up the property.

81. The summons shall be served on the occupant in the manner provided by the Code for the service of summons on a Defendant.

82. If the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Court is satisfied that he is entitled to apply under section 17 of the Act, be entitled to an order addressed to the Bailiff directing him to give possession of the property to the applicant on such a day as the Court thinks fit to name in such order.

83. Any such order shall justify the Bailiff in entering after the hour of eight in the morning and before the hour of six in the afternoon upon the property named therein, with such assistants as he thinks necessary, and giving possession of such property to the applicant, after removing if necessary anything found therein.

84. When the applicant, at the time of applying for any such order as aforesaid, was entitled to the possession of such property, neither he nor any person acting in his behalf shall be deemed, on account of any error, defect or irregularity in the mode of proceeding to obtain possession thereunder, to be a trespasser; but any person aggrieved may institute a suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity.

When no such damage is proved, the suit shall be dismissed; and when such damage is proved but the amount of the compensation assessed by the Court does not exceed ten rupees, the Court shall award to the Plaintiff no more costs than compensation, unless the Judge who tries the case certifies that in his opinion full costs should be awarded to the Plaintiff.

*B—Distress Warrants*

85. Every application for a distress warrant under section 22 of the Act shall be accompanied by an affidavit in the prescribed form and (so long as the Rangoon Rent Act, 1920, remains in force) by a certificate from the Controller certifying the standard rent of the premises in respect of which the application is made.

86. The Court may issue a warrant under its seal and returnable within six days, in the prescribed form addressed to the Bailiff.

The Court may, at its discretion, upon personal examination of the person applying for such warrant, decline to issue the same.

87. Every distress shall be made after sunrise, and before sunset, and not at any other time.

88. The Bailiff directed to make the distress may enter any dwelling-house, the outer door of which may be open, and may break open the door of any room in such dwelling-house and may force open any stable, outhouse or other building for the purpose of seizing property liable to be seized:—

Provided that he shall not enter or break open the door of any room appropriated for the residence of women, which by the usage of the country is considered private.

89. In pursuance of the warrant the Bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor), or such part thereof as may, in the Bailiff's judgment, be sufficient to cover the amount of the said rent, together with the costs of the said distress.

90. The Bailiff may impound or otherwise secure the property so seized in or on the house or premises chargeable with the rent.

91. On seizing any property under Rule 89 the Bailiff shall make an inventory of such property and shall give notice in writing in the prescribed form to the debtor, or to any other person on his behalf in or upon the said house or premises that such property will be sold pursuant to the provisions of the Act. The date on which the sale will be held shall be stated in the notice and shall be not less than seven days after the date of seizure.

The Bailiff shall, as soon as may be, file in the Court copies of the said inventory and notice.

92. The debtor or any other person alleging himself to be the owner of any property seized, or the duly constituted attorney of such debtor or other person, may apply to the Court to discharge or suspend the warrant, or to release a distrained article, and the Court may discharge or suspend such warrant or release such article accordingly, upon such terms as it thinks just, and may in its discretion give reasonable time to the debtor to pay the rent due from him.

Upon any such application, the costs attending it and attending the issue and execution of the warrant shall be in the discretion of the Court, and shall be paid as the Court directs.

93. If any claim is made to, or in respect of, any property seized under these provisions or in respect of the proceeds or value thereof by any person not being the debtor, the Registrar, upon the application of the Bailiff who seized the property, may issue a summons calling before the Court the claimant and the person who obtained the warrant.

And thereupon any suit which may have been brought in the High Court

in respect of such claim shall be stayed and the High Court, on proof of the issue of such summons and of the distraint, may order the Plaintiff to pay the costs of all proceedings in such suit after the issue of such summons.

And the Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as it thinks fit:

and such order shall be enforced as if it were an order made in a suit brought in the Court.

The procedure under this rule shall conform, as far as may be, to the procedure in an ordinary suit in the Court.

91. In any case under Rule 92 or 93 the Judge by whom the case is heard may award such compensation by way of damages to the applicant or claimant (as the case may be) as the Judge thinks fit, and may for that purpose make such enquiry as he thinks necessary;

and the order of the Judge awarding or refusing such compensation shall bar any suit for the recovery of compensation for any damage caused by the distress.

\* 95. In default of any order to the contrary made by the Court or by the High Court the distrained property shall be sold on the day mentioned in the notice prescribed by rule and the Bailiff shall, on realizing the proceeds, pay the amount thereof into judicial deposit; and such amount shall be applied first in payment of the bailiff's commission and the costs of the said distress and then in satisfaction of the debt; and the surplus, if any, shall be paid to the debtor.

96. No costs of any distress under these provisions shall be taken or demanded except those mentioned in the scale of fees prescribed in Appendix B to this Schedule

The Chief Judge may apply the sum so obtained as costs towards the payment of the contingent charges and Bailiff's remuneration as appears to the said Judge expedient.

97. The Registrar shall keep a book in which all sums received as costs upon distresses made, and all sums paid as remuneration to the Bailiff, and all contingent charges incurred in respect of such distresses, shall be duly entered.

He shall also enter in the said book all sums realized by sale of the property distrained and paid over to landlords under these provisions

98. No distress shall be levied for arrears of rent except under these provisions.

99. The forms prescribed in Appendix B, with such variation as the circumstances may require, shall be used for the purposes therein mentioned.

### PART III.

#### SUMMARY PROCEDURE IN SUITS ON NEGOTIABLE INSTRUMENTS

100. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the Plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed with the original bill of exchange, hundi or promissory note annexed together with as many copies thereof as there are Defendants to the suit. The summons shall be in Form No. (c) in

Appendix C and it shall not be necessary to serve a copy of the Plaint on the Defendant.

(2) In any case in which the Plaint and summons are in such forms, respectively, the Defendant shall not appear or defend the suit unless he obtains leave from the Court as hereinafter provided so to appear and defend and in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the Plaint shall be deemed to be admitted and the Plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) to the date of the decree and such sum for costs as may be prescribed in that behalf unless the Plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith :

Provided always that, unless otherwise ordered by the Court, the summons to the Defendant shall have been served upon him :—

(a) If he resides and is served within the local limits of the jurisdiction of the Court, at least five clear days before the returnable date of the summons.

(b) If he resides and is served without such local limits but in Burma, at least ten clear days before the returnable date of the summons.

(c) If he resides and is served elsewhere in India, at least twenty-one clear days before the returnable date of the summons.

101. (1) The Court shall, upon application by the Defendant, give leave to appear and to defend the suit upon affidavits, which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application.

The said application and affidavit must be filed in the office of the Registrar and copies thereof must be served on the Plaintiff or his pleader not later than three clear days before the day fixed for the Defendant's appearance.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing or recording issues or otherwise as the Court thinks fit

(3) After decree the Court may under special circumstances set aside the decree, and, if necessary, stay or set aside execution, and may give leave to the Defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

102. In any proceeding under this Part the Court may order the bill, hundi or note, on which the suit is founded, to be forthwith deposited with an officer of the Court and may further order that all proceedings shall be stayed until the Plaintiff gives security for the costs thereof

103. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise by reason of such dishonour as he has under this Part for the recovery of the amount of such bill or note

104. Save as provided by this Part the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

## PART IV.

## MISCELLANEOUS.

105. All acts which may be done by the Court in regard to the appointment or removal of a guardian *ad litem* under Order XXXII, Rules 4 and 11, of the Code or in regard to the substitution or addition of parties to a suit may be done by the Registrar.

106. Any of these rules which require a Judge of the Court to do any act or thing, shall be read as applying equally to a Registrar, when exercising any of the powers conferred upon him under section 34 (1) of the Act or by these rules.

The Registrar is authorised to grant certificates under section 28 of the Act to parties in cases which have been disposed of by him.

107. Whenever any judgment-debtor, who has been arrested or whose property has been seized in execution of a decree of the Court, or a decree of another Court transferred to it for execution, offers security to the satisfaction of the Court for payment of the amount which he has been ordered to pay and the costs, the Court may order him to be discharged or the property to be released upon his furnishing such security.

108. Subject to the sanction of the High Court the Court shall frame such forms as it may think necessary for any proceeding before it and may from time to time alter any of such forms.

109. Any such agreement as is contemplated by section 15 of the Act must be filed with the Plaint at the time of its presentation, and shall be in the prescribed form, and the matter shall thereupon be placed before the Chief Judge for orders.

110. After the disposal of every suit in which a pauper is concerned the Chief Clerk shall send to the Collector of Rangoon a memorandum of the Court-fees due and payable by the pauper.

111. The following portions of Schedule I to the Code shall not extend to the Court, that is to say:—

(a) so much of the said schedule as relates to—

(i) suits excepted from the cognizance of the Court or the execution of decrees in such suit;

(ii) the execution of decrees against immoveable property or the interest of a partner in partnership property;

(b) Order X, Rule 3 (record of examination of parties);

(c) Order XLVII, Rules 6 and 7;

(d) Orders XLIX to LI.

## PART V.

## PROCEEDINGS UNDER OTHER ACTS.

*References under the Rangoon Rent Act, 1920.*

112 to 121. Deleted by this Court Notification No. 2 (Schedule-Corrigendum), dated the 30th October, 1924.

122. Proceedings under section 18 of the Rangoon Rent Act, 1920, shall be commenced by a petition to be presented to the Chief Clerk, who will put

the same up before the Registrar for admission and for directions for notice to issue.

123. Such petition shall be signed by the party aggrieved or by his pleader, shall set out concisely and under distinct heads the grounds of objection to the decision of the Controller and shall be accompanied by a copy of such decision.

124. Upon the admission of such petition it shall be numbered and registered as a reference under the Rangoon Rent Act, 1920, and notice shall thereupon issue to the opposite party—that is to say, to the landlord or to the tenant of the premises as the case may be.

125. The Registrar shall at the same time inform the Controller and call for the proceedings which resulted in the decision complained of and the Controller shall forward the same to the Court with all reasonable despatch.

126. Upon due service of the notice on the opposite party the matter shall be placed in the cause list of the Chief Judge for disposal.

127. If the opposite party appears, he shall be given an opportunity of answering the case made in the petition, and the matter shall thereafter be set down for hearing and dealt with in the manner provided by section 23 of the Rangoon Rent Act, 1920.

128. If the opposite party does not appear the Chief Judge shall enquire into the matter and dispose of the same *ex parte*.

129. The judgment of the Chief Judge may confirm, vary or reverse the decision of the Controller with such orders as to costs as may in the circumstances be reasonable.

130. A copy of the judgment of the Chief Judge shall be forwarded to the Controller for information and record.

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*Form of Agreement to give Jurisdiction to the Court in Cases of over Rs. 2,000 in value (Section 15 and Rule 109).*

We (or the respective advocates or pleaders, as the case may be) A. B. of \_\_\_\_\_ and C.D. of \_\_\_\_\_ do hereby agree that the Rangoon Small Cause Court shall have jurisdiction to try this suit brought by A. B. against C. D. for \_\_\_\_\_ under the provisions of section 15 of the Rangoon Small Cause Court Act, 1920

Witness our hands this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

A. B. (or E.F., advocate for A. B.)

C. D. (or G. H., advocate for C. D.)

### APPENDIX B.

*Scale of Fees to be levied in Distresses for House-rent.*

Sums sued for		Affidavit and warrant to distrain.	Order to sell.	Commis- sion.	Total.
Rs.	Rs.	Rs. A.	Rs. A.	Rs. A.	Rs. A.
1 and under 5	.	0 4	0 8	0 8	1 4
5 and under 10	.	0 8	0 8	1 0	2 0
10 and under 15	.	0 8	0 8	1 8	2 8
15 and under 20	.	0 8	1 0	2 0	3 8
20 and under 25	.	0 12	1 0	2 8	4 4
25 and under 30	.	1 0	1 0	3 0	5 0
30 and under 35	.	1 0	1 0	3 8	5 8
35 and under 40	.	1 0	1 8	1 0	6 8
40 and under 45	.	1 4	2 0	1 8	7 12
45 and under 50	.	1 8	2 0	5 0	8 8
50 and under 60	.	2 0	2 0	6 0	10 0
60 and under 80	.	2 8	2 8	6 8	11 8
80 and under 100	.	3 0	3 0	7 0	13 0
Upwards of 100	.	3 0	3 0	7 Per centum.	...

The above scale includes all expenses, except in suits where the tenant disputes the landlord's claim and witnesses have to be summoned, in which case each summons in cases where the amount claimed is Rs. 10 or under must be paid for at four annas each, and twelve annas where the amount claimed is above that amount; and also where peons are kept in charge of property distrained, four annas per day must be paid per man.

### Forms

IN THE RANGOON SMALL CAUSE COURT.

Form of Affidavit (Rules 85 and 99).

A. B.

Plaintiff.

C. D.

versus

Defendant.

I, A. B. of \_\_\_\_\_ in the town of \_\_\_\_\_  
(or affirm) and say that C. D. \_\_\_\_\_ of \_\_\_\_\_

make oath  
is



justly in debted to \_\_\_\_\_ in the sum of Rs. \_\_\_\_\_ for  
 arrears of rent of the house and premises No. \_\_\_\_\_, in  
 due for \_\_\_\_\_ months, to wit, from \_\_\_\_\_ to \_\_\_\_\_  
 at the rate of Rs. \_\_\_\_\_ per mensem.

Sworn or affirmed before me this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
 \_\_\_\_\_  
*Commissioner for Oaths.*

### IN THE RANGOON SMALL CAUSE COURT.

#### Form of Warrant (Rule 86).

I hereby direct you to distrain the moveable property of C. D. on the  
 house and premises situate at No. \_\_\_\_\_ in \_\_\_\_\_ for the sum  
 of \_\_\_\_\_ rupees, the costs of the distress, according to the provisions  
 of Schedule I, Part II, of the Rangoon Small Cause Court Act, 1920.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

Signed and sealed.

To E. F.

*Bailiff.*

### IN THE RANGOON SMALL CAUSE COURT.

#### Form of Inventory and Notice (Rule 91).

(State particulars of Property seized).

Take notice that I have this day seized the moveable property contained  
 in the above inventory for the sum of \_\_\_\_\_ rupees being the amount  
 of \_\_\_\_\_ months' rent due to A. B. on \_\_\_\_\_ and that unless you pay  
 the amount thereof, together with the costs of this distress, or obtain an order  
 from one of the Judges or the Registrar of the Rangoon Small Cause Court  
 to the contrary, the same will be sold, pursuant to the provisions of Schedule  
 I, Part II, of the Rangoon Small Cause Court Act, 1920, at (1) \_\_\_\_\_ at  
 o'clock on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

(Signed) E. F.,  
*Bailiff.*

To C. D.

### APPENDIX.

#### Rule 100.

#### (a) SUIT BY PAYEE OF PRO-NOTE AGAINST MAKER.

(Cause title)

Particulars.

Rs. A. P.

Principal

...

Interest

...

Costs

...

The plaintiff above-named states as follows:

1. By a Promissory Note dated the \_\_\_\_\_ day of \_\_\_\_\_  
 annexed hereto and marked with the letter A and duly executed by the  
 Defendant in Rangoon for value received the Defendant promised to pay to  
 the Plaintiff or order the sum of Rs. \_\_\_\_\_ on demand together with the  
 interest at the rate of \_\_\_\_\_ per cent per annum.

2. The Defendant has not paid the same or any part thereof (or except the sum of Rs. is now due to Plaintiff for principal and Rs. for interest).

3. The sum of Rs. for principal and Rs. for interest.

The Plaintiff claims judgment for the sum of Rs. and for cost, etc.

I, A. B., the Plaintiff above-named, do solemnly declare that I am personally acquainted with the facts of the case and that the facts stated in this plaint are true to my knowledge.

(Signed) A. B.  
Plaintiff.

(b) SUIT BY ENDORSEE OF A PRO-NOTE AGAINST MAKER AND ENDORSER.

(Cause title)

Particulars.	Rs.	A.	P.
Principal	..		
Interest	..		
Costs	...		

The Plaintiff abovenamed states as follows :—

1. By the pro-note dated the day of annexed hereto and marked with the letter A, which was, as I am informed by C. D. and truly believe, duly executed by the first Defendant at Rangoon for value received the said first Defendant promised to pay to the second Defendant the sum of Rs. on demand together with interest thereon at the rate of per cent. per annum.

2. On the day of 19, the second Defendant duly endorsed the pro-note to me for valuable consideration.

3. The sum of Rs. is now due to Plaintiff for principal and Rs. for interest.

The Plaintiff claims judgment for the sum of Rs. and for the costs, etc.

I, A. B., the plaintiff abovenamed, do hereby declare that except as to the matters stated to be on information and belief, which I believe to be true, I am personally acquainted with the facts of this case, and the facts stated in the Plaint are true to my knowledge

1

(Signed) A. B.

Plaintiff

(c) SUIT BY PAYEE OR CHEQUE AGAINST DRAWER.

(Cause title)

Particulars	Rs.	A.	P.
Principal			
Interest	..		
Costs	...		

The Plaintiff above-named states as follows :—

1. On the day of 19 the Defendant for value received duly signed and delivered to the Plaintiff the cheque, dated the day of and drawn on the

Bank for the sum of Rs. \_\_\_\_\_ which is annexed hereto and marked with the letter A.

2. On the \_\_\_\_\_ day of \_\_\_\_\_ the said cheque was duly presented to the said Bank and was dishonoured of which due notice was given to the Defendant.

3. The sum of Rs. \_\_\_\_\_ is now due to Plaintiff for principal and Rs. \_\_\_\_\_ for interest.

The Plaintiff claims judgment for the sum of Rs. \_\_\_\_\_ and for costs, etc.

**(d) SUIT BY THE ENDORSEE OF A BILL OF EXCHANGE AGAINST THE ACCEPTOR AND PAYEE.**

*(Cause title)*

<i>Particulars.</i>	<i>Rs.</i>	<i>A.</i>	<i>P.</i>
Principal	...		
Interest	..		
Costs	..		
Notarial charge-			

The Plaintiff above-named states as follows:—

1. The Bill of Exchange dated the \_\_\_\_\_ day of \_\_\_\_\_ hereto annexed and marked with the letter A was drawn by X. Y. of \_\_\_\_\_ upon the first Defendant for the sum of Rs. \_\_\_\_\_ payable three months after date with interest at the rate of \_\_\_\_\_ per cent. per annum, and was accepted by the first Defendant and endorsed by the second Defendant to the Plaintiff.

2. The said bill was duly presented for payment on the \_\_\_\_\_ day of \_\_\_\_\_ and was dishonoured and the Plaintiff has incurred the following Notarial charges:—

3. The sum of Rs. \_\_\_\_\_ is now due to Plaintiff for principal and Rs. \_\_\_\_\_ for interest.  
The Plaintiff claims judgment for the sum of Rs. \_\_\_\_\_ and for costs, etc.

**(e) SUMMONS (RULE 100).**

*(Cause title.)*

To A.B. of \_\_\_\_\_ (address and description of Defendant).

Whereas \_\_\_\_\_ has instituted a suit against you under Part III of the Rangoon Small Cause Court Rules for Rs. \_\_\_\_\_ balance of principal and interest due to him as the payee (or endorsee or as the case may be) of a Pro-note (or Bill of Exchange or hundi or as the case may be) of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court to appear and defend the suit. In default whereof the Plaintiff will be entitled to obtain a decree for the said sum and costs as mentioned below.

Leave to appear may be obtained on an application to the Court supported by affidavit showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit.

The \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ is fixed for your appearance before the Judge of this Court and the said application and affidavit must be filed in the office of the Registrar and copies thereof must be served on the Plaintiff or his pleader not later than three clear days before the said day.

*Particulars of Claim.*

(As stated in Plaint.)

Given under my hand and the seal of the Court this day of

19 .

*Chief Clerk.*

NOTE.—(1) If you admit the claim, you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person and property or both.

(2) The address for service of Plaintiff:—(insert address.)

**ORDER LIV***The following shall be inserted as Order LIV:—**I—Classification of Civil Records*

The records of civil judicial proceedings, whether suits or cases, in all Civil Courts, other than Small Cause Courts, and exclusive of suits and cases disposed of under Small Cause (Court procedure by Courts invested with Small Cause Court) jurisdiction, shall be divided into the following four classes:—

*Class I.—Records of—*

- (a) suits and cases affecting immoveable property including suits for foreclosure, redemption, or sale, with the exception of cases on an application for removal of attachment; suits in which any question relating to a title to land or to some interest in land, as between parties having conflicting claims thereto, is in issue;
- (b) suits in respect of the succession to an office, or to establish or set aside an adoption, or otherwise to establish the status of an individual;
- (c) suits relating to public trusts, charities or endowments, and any proceedings ancillary to such suits.

*Class II.—Records of the following suits and cases, except such of them as affect immoveable property:—*

- (a) All suits and cases for probate and letters-of-administration and for the revocation of the same;
- (b) Cases under the Guardians and Wards Act, 1890, relating to the guardianship of minors and the administration of their property;
- (c) Cases under the Indian Lunacy Act, 1912, relating to the guardianship of lunatics and the care of their estates;
- (d) Administration suits.

NOTE.—An application by an executor or administrator or by the guardian of a minor or lunatic, to sell, mortgage, etc., property belonging to the estate, is an application in the case, and, together with all the proceedings connected with it, must form part of the record of the case.

*Class III.—Records of—*

- (a) all suits which do not come under Class I or Class II;
- (b) cases under the Succession (Property Protection) Act, 1811; cases under the Succession Certificate Act, 1889; cases under Parts III and

IV of the Land Acquisition Act, 1894; cases under the Provincial Insolvency Act, 1920, other than those in which receivers appointed under that Act have transferred, or otherwise dealt with immovable property; cases under the Code of Civil Procedure to transfer a decree when no application for execution is pending;

- (c) cases on an application for removal of attachment to which immovable property is concerned;
- (d) such other cases as the High Court may from time to time direct to be included.

NOTE.—Proceedings under the Code of Civil Procedure for the restoration of a suit or appeal or for a review of judgment, are proceedings in the suit or appeal and must form part of the record relating thereto.

*Class IV.—Records of—*

- (a) execution proceedings in which any order affecting immovable property is passed;
- (b) all other execution proceedings.

NOTE.—Each application for execution shall be treated as a separate case, the record of which shall include the papers on all matters connected with the execution from the date on which the application was presented until it is finally disposed of.

In these rules the word 'suit,' 'case' or 'proceedings' includes an appeal, revision or reference; and if a suit, case or proceeding comes under two or more of the above four classes, the records of such suit, case or proceeding shall be classified under that class for which the period of preservation as hereinbefore prescribed is longest.

NOTE.—It is directed that Records of cases under section 14 of the Legal Practitioners Act, 1879, shall be included in Class III of the Rules for the Classification of Civil Records.

*II.—Arrangement of Records.*

2. Every record under Classes I, II and III shall be divided as the trial proceeds into three files, A, AA, and B provided that if there are no documentary exhibits, the AA file may be omitted.

File A shall be called the Trial Record and, in cases other than appeals, shall contain besides the fileleaf with index of contents—

- (a) Diary.
- (b) Plaint or petition instituting the case.
- (c) Plans attached to the plaint to define the land sued for.
- (d) List of documents produced with the plaint when not endorsed on the plaint, Order VII, Rule 9.
- (e) List of documents relied on by plaintiff, but not produced, Order VII, Rule 14.
- (f) List of documents produced by the parties at the first hearing, Order XIII, Rule 1 (2).
- (g) Written statements or counter petitions of the parties.
- (h) Petitions, proceedings, and orders in interlocutory matters; and summonses on defendants and process-servers' reports and affidavits of process-servers and indentifiers with the orders of the Court thereon in *ex parte* cases.
- (i) Opening proceedings.

- (j) Issues.
- (k) Oral evidence for plaintiff taken in Court and on commission.
- (l) Oral evidence for defendant† taken in Court and on commission.
- (m) Report of Commissioner appointed under Order XXVI.
- (n) Award of arbitrators or petition of compromise.
- (o) Report or account of a Receiver.
- (p) Judgment.
- (q) Decree.
- (r) Final decree in mortgage or administration suits.
- (s) Copies of orders and decree in appeal and revision.
- (t) Order absolute for sale in mortgage cases, together with proclamation, sale report, order of confirmation, and certificate of sale.

The judgment of the Appellate Court, if any, shall be filed after the decree and any further evidence recorded and any finding of the lower Court, together with the final order in appeal shall be filed thereafter in that order.

File AA shall be called the exhibit record and shall contain besides the flyleaf and the table of contents :—

- (a) List of documents admitted in evidence for plaintiff.\*
- (b) Documents†† admitted in evidence for plaintiff.\*
- (c) List of documents admitted in evidence for defendant.†
- (d) Documents†† admitted in evidence for defendant.†

File B shall be called the process record and shall contain besides the flyleaf with table of contents—

- (a) Powers-of-attorney.
- (b) Summonses and other processes and affidavits relating thereto.‡
- (c) List of witnesses.
- (d) Petitions relating to adjournments, attendance of witnesses etc
- (e) Other papers not included in Trial Record
- (f) Letters, etc., calling for records, etc.

3. Every record under Class IV shall consist of two files, A and B. File A shall contain besides the flyleaf with table of contents—

- (a) Diary
- (b) Application for execution.
- (c) Papers received from Court which passed the decree. Order XXI, Rule 6
- (d) Plans of lands to be attached.
- (e) Petitions, proceedings, and orders in interlocutory matters.
- (f) Petitions objecting to the execution, other than claims under Order XXI, Rule 58.

\* Substitute "defendant" if defendant begins.

† Substitute "plaintiff" if plaintiff begins.

†† Documents not admitted in evidence must not be filed with the record, but should be returned to the party who produced them.

‡ Summonses on defendants and process-servers' reports and affidavits of process servers and identifiers with the orders of the Court thereon in *ex parte* cases should be on the A file

- (g) Warrants and prohibitory orders issued to effect execution by attachment or delivery of property, and returns thereto.
- (h) Warrant of sale.
- (i) Proclamation of sale.
- (j) Report of result of sale.
- (k) Order confirming sale.
- (l) Copy of certificate of sale.
- (m) Applications for payment of money in deposit and the orders thereon.
- (n) Receipts or acknowledgments of satisfaction.
- (o) Final order.
- (p) Copy of order in appeal or revision.

File B shall contain all other papers.

4. The A file of the trial record of an Appellate Court shall contain, besides the flyleaf with table of contents—

- (a) Diary.
- (b) Memorandum of appeal.
- (c) Copy of judgment and decree of lower Court.
- (d) Written statements, if any.
- (e) Petitions, proceedings, and orders in interlocutory matters.
- (f) Oral evidence, if any.
- (g) Judgment
- (h) Decree.
- (i) Copy of judgment and decree in second appeal or revision.

The B file shall contain all other papers.

5. The record of suits decided by Small Cause Courts, or tried under Small Cause Court procedure, shall consist only of one file.

## APPENDIX E.

### Form No. 5.

*In the heading of Form No. 5, for the words and figures "Order 21, rule 6," the word and figures "section 41" shall be substituted.*

### Form No. 15A.

*The following shall be inserted as Form 15A :—*

#### No. 15A.

*Form of Receipt for money deposited in connection with the attachment of property together with Notice to Decree-holder.*

IN THE  
EXECUTION CASE No.

COURT OF  
OF 19 .

*versus*

Received the sum of Rs. \_\_\_\_\_ on account of the following expenditure to be incurred in connection with attachment of property as per list appended.

Process Fees Rules—Rule  
 \*15 (i) (b) (ii) (2) —†17 (1)  
 (c) (ii) (2)

1. Custody fees . . . . .
2. Feeding charges . . . . .
3. Conveyance charges . . . . .
4. Other expenses (to be specified) .

Total

Rs.	A.	P.

N. B. The Decreeholder is hereby warned that the sum deposited by him for recurring charges will be exhausted on the day of 19 , and that unless a further deposit is made before that date the attachment will cease.

Dated this                      day of                      19 .

*List of Property to be attached.*

\*Strike out if used in Courts other than the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

†Strike out if used in the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.



# RULES MADE BY THE CHIEF COURT OF OUDH UNDER SECTION 122.

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(Approved by the Local Government on April 20, 1927. Published in the United Provinces Gazette on April 30, 1927, under Section 127 of the Code of Civil Procedure.)

## FIRST SCHEDULE TO THE CODE OF CIVIL PROCEDURE, 1908.

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### ORDER III.

#### Rule 5.

*For the words "on the pleader of any party" substitute the words "on a pleader who has been appointed to act for any party."*

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### ORDER IV.

#### Rule 1.

*To sub-rule (2) add the following words:—"and except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."*

---

### ORDER V.

#### Rule 1A.

*Add a new sub-rule (1A) after sub-rule (1) as follows:—*

*"(1A) A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting; provided that—*

- (a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English, and*
  - (b) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court."*
- 

#### Rule 2.

*Omit the words "or, if so permitted, by a concise statement."*

---

## Rule 15.

*For the words "where in any suit the defendant cannot be found" substitute the words "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."*

---

## Rule 20A.

*Between rules 20 and 21, insert the following:—*

20A. (1) Where the defendant resides in British India outside the province of Ouddh and within the limits of headquarters town of a district in that province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in Order VIII, rule 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice had been personally served.

---

## Rule 25.

*Substitute the word "may" in place of the word "shall."*

---

## Rule 26.

*In rule 26 (b), after the words "the summons may," insert the words "in addition to, or in substitution for, the method permitted by rule 25."*

---

## Rule 27.

*\* Insert the word "air" between the words "military" and "or".*

---

## Rule 28.

*\* Add the following as 28 (a) and re-number the present rule as (b) :—*

*"(a) Where the defendant is an officer in his Majesty's military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him."*

---

## ORDER VII.

## Rule 9.

*In rule 9 (1), for the words "and if the plaintiff is admitted shall present," substitute the words "and shall, at the same time, present." Also delete the words "unless the Court . . . . . present such statements," as well*

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\* The amendment was provided for by Act 10 of 1927.

as sub-rules (2) and (3), and renumber sub-rule (4) as sub-rule (2) deleting the words "or statements."

---

### Rule 14.

*Substitute the following for rule 14 (2) :—*

"14. (2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

*Explanation.*—A certified copy of a public document is a document 'in the power' of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be 'in the power' of the plaintiff."

---

### Rule 15.

*Delete rule 15.*

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### Rules 19 to 27.

*Add the following rules :—*

"19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the 'registered address,' and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which rule 23 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be

deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at his registered address :

Provided that, where a notice is served on a pleader under the above rule he shall be given sufficient time to communicate with his client and to receive instructions.

*Explanation*—Where 10 days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent them by registered post, as the Court thinks fit.

27. Nothing in rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reason, it thinks fit."

## ORDER VIII.

### Rule 1.

*Add the following as rule 1 (2) and read the existing rule 1 as rule 1 (1):—*

"1. (2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

*Explanation.*—A certified copy of a public document is a document 'in the power' of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be 'in the power' of the defendant."

## Rules 11 to 13.

*Add the following rules :—*

"11 Every defendant in suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the 'registered address') for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule, and rule 24 shall,

in the same manner, apply but as if the words at the beginning, 'In all cases to which rule 23 does not apply' were omitted. .

13. Nothing in rules 11 and 12 shall apply to the notice prescribed by Order XXI, rule 22."

---

## ORDER IX.

### Rule 13.

*In rule 13, between the words "was not duly served or that" and the words he was prevented by any sufficient cause," insert the words "notwithstanding due service of the summons," and at the end of the rule add the following proviso :—*

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

*Explanation.*—Where a summons has been served under Order V, rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be duly served within the meaning of this rule."

---

## ORDER XIII.

### Rule 1.

*For rule 1, substitute the following :—*

"1. (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order VII, rule 14, and Order VIII, rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the cause) they are accompanied by an accurate list thereof prepared in such form as the Chief Account may direct.

*Explanation.*—A certified copy of a public document is a document 'in the power' of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be 'in the power' of the plaintiff or defendant."

---

### Rule 4

*In rule 4 (1) (d) insert the words "in the Judge's own handwriting" between the words "statement" and "of its having been so admitted."*

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**ORDER XVI.**

*For rule 1, substitute the following :—*

"1. (1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

**Rule 8**

*Add the following provisos :—*

"Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court; but in his case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court.

Provided also that the special procedure for the service of summons upon defendant under Order V, rule 29A (1)—shall not apply to service of summons under this order."

**ORDER XVII.****Rule 2.**

*To rule 2 add the following as sub-rule (2), and read the existing rule 2 as 2 (1) :—*

"(2) Where before any such day, the evidence or a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day, the Court may, in its discretion proceed with the case as if such party were present and may dispose of it on the merits.

*Explanation.*—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader though engaged only for the purpose of making an application."

**Rule 3**

*For the existing rule 3, substitute the following :—*

"3. Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits."

## ORDER XXI.

## Rule 5.

*In rule 5, for the word "district" where it occurs after the words "sums and "different" read "provinces,"*

---

## Rule 6.

*To rule 6, add the following as sub-rule (2) and re-number 6 as 6 (1) :—*

*"(1) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."*

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## Rule 11.

*In rule 11, for clause (f) of sub-rule (2) substitute the following :—*

*"(f) the date of the last application, if any."*

---

## Rule 17.

*In rule 17, sub-rule (1), delete the last sentence beginning with the words "and, if they ...." and ending with the words "to be fixed by it," and substitute the following sentence in lieu thereof :—*

*"and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied; and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."*

---

## Rule 22.

*In rule 22, for the words "one year," wherever they occur in this rule, read the words "three years."*

*To sub-rule (2) of this rule add the following proviso :—*

*"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment-debtor has sustained substantial injury by reason of such omission."*

---

## Rule 24.

*In rule 24 (3) after the words at the end of the sub-rule,*

*"be executed" add the words "and a day shall be specified on or before which it shall be returned to Court,"*

---

## Rule 25.

*For the existing rule 25 (2) substitute the following :—*

*"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine, him personally or upon*

affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall accept the result."

---

#### Rule 26.

*In rule 26 (3) for the words "the Court may" read the words "the Court shall, unless good cause to the contrary is shown."*

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#### Rule 31

*In rule 31, sub-rules (2) and (3), for the words "six months" substitute the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."*

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#### Rule 32.

*In rule 32 (3) for the words "one year" substitute the words "three months," and at the end of the sub-rule add the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year."*

*In rule 32 (4) for the words "one year" substitute the words "three months or such further time as may have been fixed by the Court under the previous sub-rule."*

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#### Rule 39.

*In rule 39 (5) delete the words "in the civil prison"*

---

#### Rule 53.

*In rule 53, sub-rule (1) (b), in the third line and in sub-rule (4) in the eighth line, after the words "to such other Court" add the words "and to any other Court to which the decree has been transferred for execution."*

*In sub-rule (6) for the words "after receipt of notice thereof" read the words "after receipt of notice, or with the knowledge thereof"*

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#### Rule 54.

*To rule 54, add the following sub-rule (3):—*

*"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made"*

---

#### Rule 55

*For rule 55 substitute the following —*

*"55 (1) Where an application has been made to the Court under section 73, sub-section (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the*



execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where—

- (a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], with costs and all charges and expenses resulting from the attachment of any property not paid into Court, or
- (b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], is otherwise made through the Court or certified to the Court, or
- (c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

---

#### Rule 57.

*For rule 57, substitute the following :—*

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist."

---

#### Rule 58.

*In rule 58 add the following words to sub-rule (2) :—*

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

---

#### Rule 68.

*In rule 68 for the words "fifteen days" read the words "seven days."*

---

#### Rule 69.

*In rule 69 (2) for the word "seven" read the word "fourteen," and add the following proviso :—*

"Provided that where the principal judgment-debtor or one of the principal judgment-debtors, if there are more than one, appears and gives his consent, the Court may dispense with the consent of the other judgment-debtor or judgment-debtors who have failed to attend in answer to a notice issued under rule 66."

**Rule 72.**

*For rule 72 (1), substitute the following:—*

"72. (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just."

*In sub-rule (2) for the words "with such permission" read the words "the property sold."*

*Delete sub-rule (3).*

---

**Rule 7.**

*In rule 75 (2) after the words "being stored" insert the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state."*

---

**Rule 84.**

*To rule 84 (2) add the following:—*

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets."

---

**Rule 89.**

*In rule 89, sub-rule (1), for the words "any person . . . before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property,"*

---

**Rule 90.**

*To rule 90 add the following second proviso:—*

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

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**Rule 92.**

*In rule 92, sub-rule (1), after the words "the Court shall," insert the words "subject to the provisions of rule 58 (2)."*

---

**Rule 98**

*In rule 95, after the words "at his instigation," wherever they occur, insert the words "or on his behalf," and after the words "thirty days" at the end of the rule, add the words "and may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The*

order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

### Rule 99.

*In rule 99, for the words in brackets "(other than the judgment-debtor)" read the words in brackets, "other than the persons mentioned in rules 95 and 98 hereof."*

### Rules 104 to 113.

*Add the following rules:—*

"104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge on a negotiable instrument, or a debt recoverable only in a revenue court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

109. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order of the judgment may be set aside or reversed.

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

*Illustration.*—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or section 47."

## ORDER XXV.

### Rule 1.

To rule 1, add sub-rules (4) and (5) :—

"(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court, to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit."

## ORDER XXVI.

### Rule 18

In rule 18 (1), after the words "agents or pleaders" substitute a comma for the full stop, and add the following words :—

"and shall direct the party applying for the examination of the witness, or

in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

---

## ORDER XXXII.

### Rule 3.

*Add the following proviso to rule 3 (4):—*

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

---

### Rule 4.

*Substitute the following for rule 4:—*

"4. (1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by sub-rule (6) of this rule, be entitled to be re-imbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under section 35A or section 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under sub-rule (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

---

### Rule 4A.

*Add the following rule 4A:—*

"4A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

*Explanation.*--An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

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#### ORDER XXXIV.

##### Rule 4.

*In rule 4 (2)\* after the words "the Court may," insert the words "of its own motion," or.*

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##### Rule 15.

*Read the present rule 15 as rule 15 (1) and add as sub-rule (2) the following :—*

"(2) Where a decree orders payment of money and charges it on immoveable property on default of payment, the amount can be realized by sale of that property in execution of that very decree."

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#### ORDER XXXIX.

##### Rule 1.

*In rule 1 delete the words "or wrongfully sold in execution of a decree" in clause (a) and delete the word "sale" after the words "damaging, alienation," and add the following proviso to the rule :—*

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

---

#### ORDER XLI.

##### Rule 3.

*For the existing rule 3 (1) substitute the following :—*

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in rule 1, sub-rule (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

---

##### Rule 14

*To rule 14, add the following sub-rule (3) :—*

"(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subsequent to that decree, it shall only

be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative and, thereafter service may be effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing it to the wall or door of the *chaupal* of the village where the respondent last resided or any other method as the Court may direct."

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### Rule 38.

*Add the following as rule 38 :—*

"38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 26, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings."

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### ORDER XLIII.

*In rule 1 (ii) for the words "an order under rule 23 of Order XLI," read "any order."*

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### Rule 3.

*Add the following as rule 3 :—*

"3. In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid."

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### ORDER XLVI.

#### Rule 8.

*Add the following as rule 8 :—*

"8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."

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### ORDER XLVII.

#### Rule 10.

*Add the following as rule 10 :—*

"10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."

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## ORDER XLVIII.

## Rules 1

*In rule 1, before the words "Every process issued" prefix the words "Except as provided in Order IV, rule 1 (2)."*

## Rule 4

*Add the following as rule 4:—*

"4. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement.

## ORDER LII.

*After Order LI add the following as Order LII:—*

"Rule 33 of order XLI shall apply, so far as may be, to proceedings under section 115 of the Code."

## APPENDIX E.

The following form shall be used under the provisions of rule 104 of Order XXI:—

EXECUTION CASE No.                      of 19                      .

versus

*Decree-holder.*

*Judgment-debtor.*

To

Whereas it is alleged that a debt of Rs                      is due from you to the judgment-debtor:

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the                      day of                      19                      , to pay into this Court the said sum of Rs.                      to deliver, or account to the Nazir of this Court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this

day of

19                      .

*Munsif*

*Subordinate Judge.*

At



RULES MADE BY THE COURT OF THE JUDICIAL  
COMMISSIONER, CENTRAL PROVINCES  
UNDER SECTION 125 OF THE CODE  
OF CIVIL PROCEDURE, 1908.

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ORDER III.

Rule 5.

*In rule 5 substitute the words "on a pleader who has been appointed to act for any party" for the words "on the pleader of any party".*  
(Notifications Nos. 7390 and 7391, dated the 19th September, 1929.)

---

ORDER IV.

Rule 1.

*Substitute the following for rule 1 (1) :—*

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant, unless the Court, for good cause shown, allows time for filing such copies.

*(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).*

---

*Add the following as sub-rule (2) to rule 1 and renumber the present sub-rule (2) as sub-rule (3) :—*

"2. The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for."

*(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).*

---

ORDER V.

Rule 15.

*In rule 15 substitute the words "When the defendant is absent or cannot be personally served" for the words "Where in any suit the defendant cannot be found."*

*(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).*

---

Rule 17.

*In rule 17 the following proviso shall be inserted, namely :—*

"Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore."

*(Notifications Nos. 5487 and 5488, dated the 3rd August, 1932).*

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## New rule 21-A.

After rule 21 in Order V, the following shall be inserted as rule 21-A, namely:—

"21-A. The Court may, . . . . . cause the summons of its own court to be addressed to the defendant . . . . . on business and sent to him by registered post prepaid for acknowledgment provided that such place is a town or village in the Akola revenue taluq. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

(Notifications Nos. 6631 and 6635, dated the 23rd September, 1932).

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## Rule 25.

In rule 25 substitute "may" for "shall".

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).

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## New rule 25-A.

Add the following as rule 25-A:—

"25-A. Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).

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## Rule 26.

In rule 26 insert the words "in addition to or in substitution for the method permitted by rule 25" between the words "may" and "be sent."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).

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## ORDER VII.

## Rule 9.

Substitute the following for rule 9:—

"9. (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The Chief ministerial officer of the Court shall sign such lists and the copies of the plaint presented under rule 1 of Order IV, if, on examination, he finds them to be correct."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).

---

## New rules 19 to 23.

Add the following as rules 19 to 23:—

**19.** Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the Civil district in which the suit or petition is filed, or of the Civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

**20.** Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

**21.** (1) If the plaintiff or the petitioner fails to file a registered address as required by rule 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

**22.** Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

**23.** A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform.

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929).

## ORDER VIII.

## New rules 11 to 13.

Add the following as rules 11 to 13:—

**11.** Every defendant in a suit or opposite party in any proceedings, shall on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall be within the local limits of the Civil district in which the suit or petition is filed or of the Civil district in which the party ordinarily

resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

12. (1) If the defendant or the opposite party fails to file a registered address as required by rule 11 he shall be liable, at the discretion of the Court to have his defence struck out and to be placed in the same position as if he had made no defence.

Consequence of non-filing of registered address.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing, appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order, setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of Order VII shall apply so far as may be, to addresses for service filed under rule 11."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929)

## ORDER IX.

### Rule 13.

All the following as an additional proviso to rule 13:—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

*Explanation.*—Where a summons has been served under Order V, rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929.)

"In rule 13 for the words "he was prevented by any sufficient cause from appearing" the words "there was sufficient cause for his failure to appear" shall be substituted."

(Notifications Nos. 5487 and 5488, dated the 3rd August, 1932.)

- (a) Existing rule 13 shall be renumbered as sub-rule (1) and  
 (b) after sub-rule (1) so renumbered the following shall be inserted as sub-rule (2), namely:—

“(2) The provisions of section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1).”

(Notifications Nos. 8346 and 8347, dated the 17th December, 1932.)

### ORDER XIII.

#### Rule 9.

Insert the following as sub-rule (2) of rule 9 and renumber the present sub-rule (2) as sub-rule (3):—

“(2) Where the document has been produced by a person who is not a party to the suit, the Court may and, at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the cost of preparing the certified copy.”

(Notifications Nos. 6532 and 6533, dated the 21st August, 1929.)

### ORDER XVI.

#### Rules 2 (1).

Add the following as an exception to rule 2 (1):—

“Exception.—When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-rule (1).”

[Notification No. 163-143—D. V. dated the 9th May 1919. (For Central Provinces only)]

#### Rule 3.

For rule 3 substitute the following:—

“3. (1) The sum so paid into Court, shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant the sum so paid no Court shall be credited to Government.

Exception (1).—In cases in which Government servants have to give evidence at a Court situate not more than 5 miles from their headquarters, the actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them..

Exception (2).—A Government servant whose salary does not exceed Rs. 10 per mensem may receive his expenses from the Court.”

[Notification No. 163-143- D. V, dated the 9th May, 1919 (For Central Provinces only)].

#### Rule 4.

After the word “summoned” where it first occurs in 4 (1) insert—

“or, when such person is a Government servant, to be paid into Court.”

[Notification No 163-143-D-V, dated the 9th May 1919 (For Central Provinces only.)]

## ORDER XVIII.

## Rule 2.

Add the following as sub-rule (4) to rule 2 :—

“being contained in this rule the Court may order or the address to the Court may be in any

(Notifications Nos. 6532 and 6533, dated the 21st August, 1929.)

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## ORDER XX.

## Rule 11.

In sub-rule (2) of rule 11 in Order XX for the words “and with the consent of the decree-holder” the words “and after notice to the decree-holder” shall be substituted.

(Notifications Nos. 1033 and 1034, dated the 3rd February, 1931.)

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## ORDER XXI.

## Rule 1.

(a) In sub-rule (1) after the words “a decree” insert the words “or an order” ;

(b) for clause (a) of sub-rule (1) substitute the following clause :—

“(a) by deposit in, or by postal money-order to, the Court whose duty it is to execute the decree or order ; or” ;

(c) in clause (c) of sub-rule (1), after the “decree” insert the words “or order” ; and

(d) to sub-rule (2), add the following .—

“Provided that when the payment is made by money-order the notice may be given by registered post by the judgment-debtor direct to the decree-holder.”

(Notifications Nos. 7114 and 7115 dated the 9th September, 1930.)

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## Rule 11

After sub-clause (v) of clause (i) of sub-rule (2) of rule 11, insert the following proviso :—

“Provided that, when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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## Rule 16.

In rule 16, after the words, “which passed it” insert the words “or to any Court to which it has been sent for execution.”

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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## Rule 17.

*In sub-rule (1) of rule 17, for the words "and, if they have not been complied with..... within a time to be fixed by it," substitute the words "and, if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 22.

*In rule 22, for the words "one year," wherever they occur, substitute the words "three years."*

*To sub-rule (2) of rule 22 add the following proviso :—*

*"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."*

*(Notification Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 24.

*In sub-rule (3) of rule 24, for the word "executed" substitute the words "returned to the Court."*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 26.

*In sub-rule (3) of rule 25, for the word "may" substitute the words "shall unless good cause to the contrary is shown."*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 31.

*In sub-rules (2) and (3) of rule 31, for the words "six months", wherever they occur, substitute the words "three months or such further time as the Court may in any special case, for good cause shown, direct."*

*(Notification Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 32.

(a) in sub-rule (3)—

(i) for the words "one year" substitute the words "three months";

(ii) after the words "application" insert the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(b) In sub-rule (4) for the words "one year" substitute the words "three months, or such further time as may have been fixed by the Court under sub-rule (3)".

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

## Rule 39.

(a) To sub-rule (1) of rule 39 the following order shall be added namely:—  
 “and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house.”

(b) For sub-rules (4) and (5) of rule 39 the following sub-rules shall be substituted, namely.

“(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.”

(Notifications Nos. 9633 and 9634 dated the 19th December, 1930.)

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## Rule 53.

In clause (b) of sub-rule (1) and in sub-rule (4) of rule 53, after the words “to such other Court” insert the words “and to any other Court to which the decree has been transferred for execution.”

In sub-clause (ii) of clause (b) of sub-rule (1) of rule 53

(a) after the word “judgment-debtor” insert the words “with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court,” and (b) for the words “its own” substitute the words “the attached.”

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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## Rule 54.

After sub-rule (2) of rule 54, insert the following sub-rule:—

“The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made.”

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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## Rule 57.

For rule 57, substitute the following rule:—

57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue



or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist."

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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#### Rule 58.

*In sub-rule (2) of rule 58, after the word "objection" where it occurs for the second time, insert the following words :—*

*"or, where the property to be sold is immoveable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided".*

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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#### Rule 65.

*In rule 65 of Order XXI, the following sentence shall be added, namely :—*

*"Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or within the precincts of the Court-house, no such declaration shall be made without the leave of the Court."*

(Notifications Nos. 3733 and 3734, dated the 24th June, 1933.)

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#### Rule 66.

*In clause (e) of sub-rule (2) of rule 66, after the word "property" insert the words :—*

*"including the decree-holder's estimate of the approximate market price."*

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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#### Rule 69.

*In sub-rule (2) of rule 69, for the words "seven days" substitute the words "fifteen days."*

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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#### Rule 75.

*In sub-rule (2) of rule 75, after the words "being stored" insert the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state."*

(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)

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#### Rule 85.

*In rule 85 of Order XXI, the following explanation shall be added, namely :—*

*"Explanation.—When an amount is tendered on any day after 1 P. M. but paid into Court on the next working day between 11 A. M. and 1 P. M. the payment shall be deemed to have been made on the day on which the tender is made."*

(Notifications Nos. 2476 and 2477, dated the 21st April, 1933.)

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**Rule 89.**

*In sub-rule (i) of rule 89 for the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person,"*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

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**Rule 90.**

*After the proviso to sub-rule (1) of rule 90, insert the following further proviso :—*

*"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

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**Rule 92.**

*In sub-rule (1) of rule 92, after the word "make" insert the words "subject to the provisions of rule 58 (2)."*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

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**Rule 94.**

*In rule 94, add a comma after the word "sold" and insert the words "the amount of the purchase money" between the word "sold" and the word "and."*

*Notifications Nos. 6806 and 6907, dated the 30th August, 1929.)*

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**Rule 98.**

*In rule 98—(a) after the word "instigation in," both places where it occurs, insert the words "or on his behalf"; and (b) after the words "thirty days" insert the words :—*

*"and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

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**Rule 99.**

*In rule 99, for the word "judgment-debtor" where it occurs in brackets, substitute the words "persons mentioned in rule 95 or 98".*

*(Notifications Nos. 7114 and 7115, dated the 9th September, 1930.)*

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## ORDER XXV.

## Rule 1.

*In rule 1 (1) insert the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may."*

## New Rule 3.

*After rule 2, add the following new rule:—*

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit transferred or agreed to transfer the property in suit to a person who is not already a party to the suit, or to be made a plaintiff to the suit, or to be fixed on the application of any defendant, by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of rule 2 shall apply, mutatis mutandis, to such application."

*(Notifications Nos. 2563 and 2564, dated the 21st March, 1929.)*

## ORDER XXXII.

## Rules 3 and 4.

*For rules 3 and 4 substitute the following:—*

"3. Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. Who may act as next friend or guardian for the suit.

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity.

Procedure for appointment of guardian for the suit.

4A. (1) No person, except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or, where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-rule (3), the Court may, in the absence of any other person fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(6) In any case in which there is a minor defendant the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs.

(Notifications Nos. 4733 and 4736, dated the 20th June, 1928.)

### ORDER XXXIX.

#### Rule 1.

In Rule 1 (a) in clause (a) omit the words "or wrongfully sold in execution of a decree"; (b) omit the word "sale"; and (c) after the words "further orders" insert the following proviso:—

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

(Notifications Nos. 7111 and 7115, dated the 9th September, 1930)

### ORDER XLI.

#### Rule 14

To rule 14 the following sub-rule shall be added:—

"(3) The appellate Court may, in its discretion, dispense with notice to any respondent against whom the suit was heard *ex parte*."

(Notifications Nos. 8519 and 8520, dated the 15th December, 1927.)

## Rule 21.

*In rule 21 of Order XLI (a) Existing rule 21 shall be renumbered as sub-rule (1), and (b) after sub-rule (1) so renumbered the following shall be inserted as rule (2), namely:—*

*(2) The provisions of section 5 of the Indian Limitation Act, IX of 1908, shall apply to application under sub-rule (1)."*

*(Notifications Nos. 8346 and 8347, dated the 17th December, 1932).*

## ORDER XLV.

## Rule 3.

*For sub-rule (2) of rule 3 of Order XLV, the following sub-rules shall be substituted, namely:—*

*"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition.*

*(3) Unless the Court dismisses the petition under sub-rule (2), it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.*

*(Notifications Nos. 5457 and 5458, dated the 3rd August, 1932)*

## New Rule 7A.

*Insert the following as new rule 7A.—*

*"7A. No such security as is mentioned in rule 7 (f) clause (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.*

*(Notifications Nos. 2229 and 2230, dated the 4th March, 1930).*

## ORDER XLVIII.

## Rule 1.

*To sub-rule (2) of rule 1 of Order XLVIII prefix the words "Except as provided in Order IV, rule 1 (2)" and substitute the word "the" for "The."*

*(Notifications Nos. 7390 and 7391, dated the 19th September, 1929)*

## APPENDIX E.

## Form No 38.

*In form No. 38 insert the words "for Rs. ...." between the words "the purchaser" and "at the sale".*

*(Notifications Nos. 6806 and 6807, dated the 30th August, 1929)*

## APPENDIX H (MISCELLANEOUS).

## Form No. 11.

*For Form No. 11 substitute the following :—*

## NOTICE TO MINOR DEFENDANT AND GUARDIAN.

(Order 32, rule 4A.)

(Title).

To

Minor Defendant,

Legally appointed  
Actual Guardian.

Proposed Guardian.

Whereas an application has been presented on the part of the plaintiff  
on behalf of the minor defendant  
 for the appointment of you \_\_\_\_\_ as the guardian of the suit  
 of the minor defendant \_\_\_\_\_ (you the said minor\*)  
 you \_\_\_\_\_ his legally appointed  
actual guardian and you \_\_\_\_\_

the proposed guardian for the suit are hereby required to take notice that unless you, the proposed guardian, appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to your appointment, or unless an application is made to this Court for the appointment of some other person to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as a guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

Given under my hand and the seal of the Court this day of 19 .

Judge.

(Notifications Nos. 4734 and 4737, dated the 20th June, 1928).

\*The portion in brackets should be scored out if no notice is to issue to the minor-defendant.

RULES MADE BY THE COURT OF THE JUDICIAL  
COMMISSIONER OF SIND, KARACHI, UNDER  
SECTION 125 OF THE CODE OF CIVIL  
PROCEDURE, 1908.

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ORDER III

Rule 6.

*Add the following as sub-rule (3) to rule 6 of Order III:—*

"(3) The Court may at any stage of a suit, and whether upon application made to it, or of its own motion, direct any party to the suit not having a recognised agent residing within the jurisdiction of the Court, to appoint, within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub-rule the provisions of sub-rule (2) shall be applicable.

*(Notifications published at page 1975 of S. O. G. Pt. I for 1926)*

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ORDER V.

Rule 21A.

*Insert the following as rule 21A in Order V.—*

21-A. *Service of summons by prepaid post wherever the defendant may be residing, if plaintiff so desires:—*Where the plaintiff so desires, the Court may notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment, provided that such place is at a town or village in British India which is the head quarters of a district or a recognised sub-division of a district, such as a taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of the Judicial Commissioner of Sind, published in the *Sind Official Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

*(Notification published at pages 1240-41 of S. O. G. Pt. I for 1931).*

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Rule 31.

*Add the following as rule 31 in Order V:—*

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may while issuing a fresh summons for personal service or ordering substituted service of the summons also order that a copy of the summons be addressed to the defendant at the place where he is residing and be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

*(Notification published at page 1973 of S. O. G. Pt. I for 1926).*

## ORDER VII.

## Rule 9.

*Substitute the following for sub-rule (1) of rule 9 in Order VII:—*

"9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made, the Court may, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, presented along with the plaint."

*(Notification published at page 1975 of S. O. G. Pt. I for 1926.)*

## Rules 19 to 26.

*Add the following as rules 19 to 26 in Order VII:—*

"19. *Address to be filed with plaint or original petition.*—Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

"20. *Nature of address to be filed.*—An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides

"21. *Consequences of failure to file address.*—Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

"22. *Procedure when party not found at the place of address.*—Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post prepaid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

"23. *Service of notice on pleaders.*—Where a party engages a pleader, notice, or process on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

"24. *Change of address.*—A party who desires to change service given by him aforesaid shall file a fresh memorandum to that effect and the Court may direct the amendment of the Notice of such memorandum shall be given to such other as the Court may deem it necessary to inform, and may to the pleaders for such parties or to be sent to them by Court think fit.



25. *Rules not binding on Court.*—Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons, it thinks fit to do so.

26. *Applicability to notice under Order XXI, rule 22.*—Nothing in these rules shall apply to notice prescribed by Order XXI, rule 22."

(Notification published at pages 1240-41 of S. O. G. Pt. I to 1931.)

## ORDER VIII.

### Rules 11 and 12.

Add the following as rules 11 and 12 in Order VIII:—

"11. *Parties to file addresses.*—Every party whether original, added or substituted, who appears in any suit or other proceeding shall, on, or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just:

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

12. *Applicability of rules 20 and 22-26 of Order VII to addresses for service.*—Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply so far as may be, to addresses for service filed under the last preceding rule.

(Notification published at pages 1240-41 of S. O. G. Pt. I for 1931.)

## ORDER IX

### Rule 13.

Add the following further proviso to rule 13 in order IX:—

"Provided also that a decree passed *ex-parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

(Notification published at page 1973 of S. O. G. Pt. I for 1926.)

## ORDER XVI.

### Rule 1A.

Add the following as rule 1A after rule 1 in Order XVI:—

"1A. The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party."

(Notification published at page 1975 of S. O. G. Pt. I for 1926.)

**ORDER XXI.****Rule 24.**

*Add the following as proviso to sub-rule (2) of rule 24 of Order XXI :—*

"Provided that a First Class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

*(Notification published at page 1240-41 of S. O. G. Pt. 1 for 1931.)*

**ORDER XLI.****Rule 14.**

*Add the following as sub-rule (2) to rule 14 in Order XLI :—*

"(3). The Appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court.

*(Notification published at page 1352 of S. O. G. Pt. 1 for 1926.)*

**Rule 14A**

*Add the following as rule 14A in Order XLI :—*

14A. Subject to the leave of the Appellate Court nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court.

*(Notification published at page 1352 of S. O. G. Pt. 1 for 1926)*

**Rule 38**

*Add the following as rule 38 in Order XLI :—*

"38. Address for service filed to hold good during appellate proceedings.—  
(1) An address for service filed under Order VII, rule 19 or Order VIII, rule 11, subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings."

*(Notification published at pages 1940-41 of S. O. G. Pt. I for 1931)*

**ORDER XLVI****Rule 8.**

*Add the following as rule 8 in Order XLVI :—*

S. Applicability of rule 38 of Order XLI.—Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order.

*(Notification published at pages 1240-41 of S. O. G. Pt. I for 1931)*

**ORDER XLVII.****Rule 10.**

10. *Applicability of rule 38 of Order XLI. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order.*

*(Notification published at pages 1240-41 of S. O. G. Pt. I. for 1931)*

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**ORDER LII.**

*Add the following as Order LII :—*

1. *Applicability of rule 38 of Order XLI to proceedings under section 115.— Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.*

*(Notifications published at pages 1240-41 of S. O. G. Pt. I for 1931)*

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**APPENDIX B.**

*Insert the following note in red ink in Forms Nos. 1, 2, 3, 5 and 6 of Appendix B to Schedule I :—*

*“Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out.*

*(Notifications published at pages 1240-41 of S. O. G. Pt. I. for 1931)*

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# RULES MADE BY THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE UNDER SECTION 125 OF THE CODE OF CIVIL PROCEDURE

Amendments of the 1st schedule of Civil Procedure Code made by the Court of the Judicial Commissioner under section 125 Civil Procedure Code. (See Notification No. 379-J, dated 31 May, 1927).

Effective from 1 July, 1927.

Civil Procedure Code	Amendments
O. 3, R. 5 ...	Add "Provided that the pleader is acting and not merely pleading for the party."
O. 5, R. 15 ...	For the words "Where in any suit the defendant cannot be found" substitute "Where the defendant is absent from his usual place of residence."
O. 5, R. 17 ...	Add "The signature of a headman of the village shall be obtained on the summons and proclamation shall be made by beat of drum in the neighbourhood of the said house."
O. 7, R. 14 (2)	Add "And shall also produce such documents as are in his possession or power."
O. 7 ...	Add the following rules:— <p>"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceeding of this nature.</p> <p>20. An address for service filed under the preceding rule shall be within the local limits of the district court within which the suit or petition is filed or, of the district court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.</p> <p>21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the court <i>suo motu</i> or any party may apply for an order to that effect, and the court may make such order as it thinks just.</p>

Civil Procedure Code	Amendments
	<p>22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered posts as the court thinks fit."</p>
O. 8, R. 1 ...	<p><i>Add a sub-clause (2) "The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not), enter such documents in a list and produce those documents which are in his possession or power."</i></p>
O. 8 ...	<p><i>Add the following rules :—</i></p> <p>"11. Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the court may act <i>suo motu</i> or on the application of any party for an order to such effect, and the court may make such order as it thinks just.</p> <p>12. Rules 20 and 22 of Order VII shall apply, so far as may be, to addresses for service, filed under the preceding rule."</p>
O. 9, R. 13 ..	<p><i>Add "Provided further that no decree passed ex parte shall be set aside merely on the ground of an irregularity in the service of summons, if the court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."</i></p>
O. 13, R. 1 ...	<p><i>The following rule is substituted :—</i></p> <p>"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in orders 7 and 8; provided that after the settlement of issues the court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely."</p>
O. 16, R. 1 ...	<p><i>Substitute the following :—</i></p> <p>"(1) On such date as the court may appoint and not later than 30 days after the settlement of issues the parties</p>

Civil Procedure Code	Amendments
	<p>shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents.</p> <p>(2) They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the court and after showing good cause for the omission of the said witnesses from the list; the court granting such permission shall record reasons for so doing.</p> <p>(3) On application to the court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in court."</p>
O. 16, R. 8 ..	Add "Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service; provided further that he shall, for sufficient reason, be entitled to apply to the court to have the summonses served through its agency."
O. 41, R. 14 (1)	Add "Provided that with the permission of the court no notice need be served upon a respondent who was a <i>pro forma</i> defendant in a suit which was decided <i>ex parte</i> against him."
O. 41 ..	<p>Add the following rules—</p> <p>"38 (1) An address for service filed under O. 7, R. (19) or O. 8, R. 1, or subsequently altered under O. 7, R. 22, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.</p> <p>(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the court below, and notices and processes shall issue from the appellate court to such addresses.</p> <p>(3) Rules 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."</p>

Amendments of Order XXI of the 1st Schedule of Civil Procedure Code made by the Court of the Judicial Commissioner, under section 125, Civil Procedure Code. (See Notification No. 444-J, dated 26 August, 1931.)

Effective from 1 October, 1931.

## JUDICIAL DEPARTMENT

### NOTIFICATION

Peshawar, 26 August, 1931.

No. 444-J.—Under the provisions of section 125 of the Code of Civil Procedure (V of 1909), and with the approval of the Chief Commissioner, North-West Frontier Province, the following amendments of Order XXI contained in the First Schedule of the said Code have been made by the Court of the Judicial Commissioner.

The amendments will take effect from 1 October, 1931.

### DRAFT AMENDMENTS

Civil Procedure Code	Amendments
O 21, R. 6 ...	Read R. 6 as R. 6 (1) and add the following sub-rule 6 (2):—  “(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints in a sealed cover to be taken to the court to which they are to be sent.”
O. 21, R. 16 ...	For the first proviso to R. 16 substitute the following proviso:—  “Provided that where the decree or such interest as aforesaid has been transferred by assignment, notice of such application shall be given to the transferrer; and unless an affidavit by the transferrer admitting the transfer is presented with the application, the decree shall not be executed, until the court has heard his objections (if any) to its execution.”
O. 21, R. 22 ...	For the words “one year” wherever they occur in R. 22 read “two years.”
O. 21, R. 26 ...	In sub-rule (3) of R. 26 for the words “the court may” substitute the words “the court shall, unless good cause to the contrary is shown.”
O. 21, R. 31 ...	In sub-rules (2) and (3) of R. 31 for the words “six months” substitute the words “three months” and add the following as sub-rule (4):—  “(4) The court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit.”

Civil Procedure Code	Amendments
O. 21, R. 32 ...	<i>In sub-rule (3) of R. 32 for the words "for one year" substitute the words "for three months or such further period not exceeding one year in the whole as may be fixed by the court."</i>
O. 21, R. 39 ...	<i>For sub-rule (1) of R. 39 substitute the following:—</i> <p data-bbox="248 379 947 435">"(1) All payments shall be made to the officer in charge of the civil prison."</p> <p data-bbox="248 451 860 475"><i>In sub-rule (5) omit the words "in the civil prison."</i></p>
O. 21, R. 43 ...	<i>Add the following further proviso to R. 43:—</i> <p data-bbox="290 531 947 778">"Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the court, if such person enters into a written bond for its production.</p> <p data-bbox="248 802 947 930">Any person who has so undertaken to keep attached property may be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."</p>
O. 21, R. 53 ...	<i>In sub-rule (1) (b) of R. 53 in the 3rd line and in sub-rule (4) in the 8th line after the words "to such other court" add the words. "or to any other court to which the decree has been transferred for execution."</i> <p data-bbox="212 1058 947 1106"><i>In sub-rule (1) (b) ii) for the words "its own decree" substitute the words "the attached decree."</i></p> <p data-bbox="212 1121 947 1185"><i>In sub-rule (6) for the words "after receipt of notice thereof" read "after receipt of notice or with the knowledge thereof."</i></p>
O. 21, R. 54 ...	<i>Add the following sub-rule to R. 54:—</i> <p data-bbox="227 1249 947 1369">"54. (3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made"</p>
O. 21, R. 57	<i>Cancel the concluding sentence of R. 57 "upon the dismissal .....shall cease," and substitute the following:—"In dismissing such application the court shall direct whether the attachment shall continue or cease. In the absence of any such direction the attachment shall be deemed to cease."</i>



Civil Procedure Code	Amendments
O 21, R. 66	<p>Add the following words to clause (c) of sub-rule (2) of R. 66 :—</p> <p>"Provided that it shall not be necessary for the court itself to give its own estimate of the value of the property; but the proclamation shall include the estimate, if any, given by either or both of the parties."</p>
O 21, R. 68	<p>In R. 68 for the word "thirty" read "fifteen" and for the word "fifteen" read "seven."</p>
O 21, R. 69	<p>In sub-rule (2) of R. 69 for the word "even" substitute the word "thirty" and add the following proviso :—</p> <p>"Provided that the court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under R. 66"</p>
O 21, R. 72	<p>For sub-rule (1) of R. 72 substitute the following :—</p> <p>"72 (1) The holder of a decree in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the court, provided that the court may, on application of the judgment-debtor and for sufficient cause, debar him from so bidding or purchasing."</p>
	<p>In sub-rule (2) for the words "with such permission" substitute the words "the property."</p> <p>Cancel sub-rule (3).</p>
O 21, R. 75	<p>In sub-rule (2) of R. 75 after the words "being stored" add the words "or can be sold to greater advantage in an unripe state."</p>
O 21, R. 89	<p>In sub-rule (1) of R. 89 for the words "either owning... before such sale" substitute the following words :—</p> <p>"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."</p>
O 21, R. 90	<p>Add the following further proviso to sub-rule (1) of R. 90 :—</p> <p>"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."</p>
O 21, R. 98	<p>In R. 98 after the words "at his instigation" wherever they occur, add the words "or on his behalf," and after the words "in the civil prison" add the words "at the expense of the Crown"</p>
O 21, R. 99	<p>In R. 99 for the words "(other than the judgment-debtor)" substitute the words "(other than the persons mentioned in rules 95 and 98)"</p>

## GENERAL INDEX



# INDEX

PAGE

N. B.—'O' refers to Order, 's' to Section, 'r' to Rule, 'Sch' to Schedule, 'Ap' to Appendix of this Code.

## Abandonment *See also* Withdrawal

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